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SCSL-2003-07-PT.
(3070-3079)

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SPECIAL COURT FOR SIERRA LEONE

APPEALS CHAMBER

Before: Judge Robertson, President
Judge King, Vice President
Judge Ayoola,
Judge Winter.

Registrar: Robin Vincent

Date: 26 November 2003

The Prosecutor Against: **Morris Kallon**

(Case No. SCSL-2003-07-PT)

**FURTHER WRITTEN SUBMISSIONS ON BEHALF OF MORRIS KALLON
PRELIMINARY MOTION BASED ON LACK OF JURISDICTION/ABUSE
OF PROCESS: AMNESTY PROVIDED BY LOME ACCORD**

Office of the Prosecutor:

David Crane
Desmond de Silva QC
Luc Cote
Walter Marcus-Jones
Christopher Staker
Abdul Tejan-Cole

Counsel for Mr Kallon:

James Oury
Steven Powles
Melron Nicol-Wilson

SPECIAL COURT FOR SIERRA LEONE	
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NAME	MORRIS KALLON
SIGN.	M. Edwards
TIME	15.40

Introduction

1. Regrettably amnesties can and do sometimes lead to impunity. However, they can also lead to the cessation of hostilities and spare many thousand's of people from endless suffering. It is for this reason that States have, from time to time, turned to amnesties as a useful tool in bringing to an end many years of war.

2. The Amicus (Redress & Others) seek the development of international law by the Appeals Chamber so as to seize the "historic opportunity to provide a clear and categorical statement of the principles of international law, namely that amnesties cannot apply for those who have committed serious violations of international human rights and humanitarian law that constitute crimes under international law".¹ It is questioned, however, whether a declaration that all amnesties are illegal under international law will actually achieve this aim. Perhaps the surest way to put an end to widespread human rights abuses would be for the international community to take decisive action (within the international legal framework) as and when such abuses occur. It is both sad and shameful that the international community has not yet matured to a point where it routinely takes such action.

3. In the absence of such maturity, and as long as negotiators are sent to resolve armed conflict, amnesties must remain a necessary option to States to put an end to fighting and bloodshed. In short, amnesties are pursued and implemented by States because they work. It is therefore respectfully submitted that it would be both wrong in law and premature for the Appeals Chamber to declare all amnesties illegal under international law.

The Role of Amnesties in International Affairs

4. Amnesties have been important at bringing hostilities to an end and restoring peace to a country. President Lincoln offered an amnesty to encourage the

¹ Amicus Brief para. 101.

Confederates to defect during the US civil war. He declared that it would be a 'cruel and astounding breach of faith' to go back on the amnesty granted. Thus, in *US v Klein*² the US Supreme Court ordered the return of property seized from 'amnestied' ex-Confederates.

5. Similarly, in *Murphy v Ford*³ the pardon granted by President Ford to ex-President Nixon was upheld on the basis that it would, in the words of Alexander Hamilton in *The Federalist*, 'restore the tranquillity of the commonwealth'. The US Supreme Court held that the granting of a pardon was within the letter and spirit of the Presidential Pardoning Power and "was a prudent public policy judgment".⁴ Hamilton had stated:

"In seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the Commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall."⁵

6. To avert conflict or restore tranquillity amnesties and pardons are still employed in the modern world. In an attempt to avoid war in Iraq in January 2003, immunity from prosecution was offered to Saddam Hussein. The Foreign Secretary of the UK, Jack Straw, supported moves to avert war with the timely offer of an amnesty. In an interview with the BBC on 10 January 2003,⁶ he stated:

Interviewer: Does he support what Donald Rumsfeld called a fair trade to avoid war, exile for Saddam?

Jack Straw: Well we think it is a sensible suggestion And I think that most members of the British public, faced with that choice

² (1871) 80 US 13 Wall 128.

³ (1975) 390 F Supp 1372.

⁴ *Ibid* page 1374.

⁵ *The Federalist* no 74 (1788) (Bourne edition, 1947) p. 79.

⁶ Transcript of interview on UK Mission to the UN web site.

between removal of Saddam by peaceful means, albeit with some kind of offer of impunity, would swallow hard if it meant that we could resolve the crisis as a result by peaceful means.

Interviewer: So it could be immunity from prosecution of war crimes if that indeed was the price to pay for peace?

Jack Straw: Well if it were the price. ...

Interviewer: So that might include immunity from prosecution, yes?

Jack Straw: Well it might do, and I say, I mean it, the world is imperfect but I think that given that kind of choice as I have just said, people would swallow hard and think well is it better to provide some degree of immunity if it meant we can resolve this peacefully? The Iraqi people could then put in a far better regime which in due course could turn in to a representative government.

7. Similarly, at the House of Commons on 19 March 2003, in response to a question on the offer of amnesty for Saddam Hussein and the message it sent the world, Prime Minister Tony Blair stated:

“First, the reason why we were prepared to offer such a possibility [immunity from prosecution if he leaves Iraq] was to avoid war, which is, after all, what I thought my hon. Friend wanted. ... We wanted to try to avoid conflict by having him voluntarily disarm.⁷

8. The most recent example of amnesty is contained in the *Peace Agreement Between the Government of Liberia, LURD, MODEL, and Political Parties*, 18 August 2003. Article 34 provides:

⁷ Hansard: House of Commons Debates for 19 March 2003 Column 936.

“The National Transitional Government of Liberia shall give consideration to a recommendation for general amnesty to all persons and parties engaged or involved in military activities during the Liberian civil conflict that is the subject of this Agreement.”

It appears that this amnesty may have been endorsed by the United Nations, at least for offences committed before 8 October 2003.⁸

The Lome Accord and Abuse of Process

9. It is accepted that the ICTY case of *Furundzija*⁹ is sound authority for the proposition that amnesties granted by a State for torture are not binding on (i) international tribunals, (ii) foreign states, and even (iii) subsequent regimes in the state that granted the amnesty. The Trial Chamber stated:

“What is even more important is that perpetrators of torture acting upon or benefiting from those national measures [amnesties] may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State *under a subsequent regime.*”
[Emphasis added]¹⁰

10. It seems therefore that the Trial Chamber were of the view that where there has been no change of regime, it would be difficult for that same regime which had granted the amnesty not to respect it and thereafter prosecute someone for torture in violation of the amnesty.
11. It is submitted that it could clearly amount to an abuse of process for a State or Government to go back on a promise made and seek to prosecute someone after granting an amnesty.

⁸ ‘UN Says No Amnesty for War Crimes After 8 October 2003’ UN Integrated Regional Information Networks, 12 November 2003.

⁹ *Furundzija* ICTY Trial Chamber Judgment 10 December 1998.

¹⁰ *Furundzija* para 155.

12. In Article 9 of the Lome Accord the Government of Sierra Leone guaranteed that “no official or judicial action” would be taken against *inter alia* any member of the RUF/SL. It is submitted that in entering into negotiations with the UN to establish the Special Court, entering into the agreement with the UN to establish the Special Court, and then ratifying that agreement with an Act of Parliament, clearly amounts to “official action” and is contrary to the guarantee made in the Lome Accord. Such “official action” and reneging on the Lome Accord is capable of amounting to an abuse of process.
13. The abuse of process doctrine has been recognised by the Appeals Chamber of the ICTR. As stated already on behalf of the Mr Kallon, in *Barayagwiza*¹¹ the Appeals Chamber held that delay in Barayagwiza’s case amounted to an abuse of process and accordingly stayed the proceedings against him and ordered his release.¹²
14. This Decision was reviewed pursuant to Article 25 of the ICTR Statute on the basis that a “new fact” had been discovered which was not known at the time of the proceedings before the Trial and Appeals Chambers which could have been a decisive factor in reaching the decision. Thus, a slightly differently constituted Appeals Chamber reviewed the case on the basis of new facts not presented at the time of the first *Barayagwiza* Decision. The new facts presented in *Barayagwiza* demonstrated that the period of delay had not been as serious as thought at the time of the first decision as some of it was not attributable to the Prosecutor and indeed some of it had been acceded to by the Defence.¹³
15. The Appeals Chamber held that Barayagwiza’s rights had still been violated and that all violations demand a remedy. However, in light of the new facts presented the Appeals Chamber held that the violations suffered by the Barayagwiza and the omissions of the Prosecutor were not as serious as those

¹¹ *Barayagwiza* ICTR Appeals Chamber 3 November 1999.

¹² *Kallon* Written Submissions In Support of Oral Argument 3 November 2003.

¹³ *Barayagwiza* ‘Decision – Prosecutor’s Request for Review or Reconsideration’ 31 March 2000, paras. 55, 58 and 62.

on which the first Decision was founded.¹⁴ Therefore the remedy ordered, ie dismissal of the Indictment and release of Barayagwiza was altered. As the violation had not been as serious, it was ordered that he should receive a reduction of sentence if convicted or financial compensation if acquitted.¹⁵

16. Thus, if the violations had remained as serious as first perceived, the appropriate remedy would still have been the dismissal of the indictment and release of the accused.
17. Morris Kallon could not have been put under the jurisdiction of the Special Court unless the Government of Sierra Leone undertook “official action” in establishing the Court. Although it is accepted that a *foreign state* could have prosecuted humanitarian law violations, notwithstanding the amnesty, if an accused were to travel to that country, it is submitted that the Lome Accord would have prevented the extradition of an accused from Sierra Leone into the jurisdiction of the foreign state as this would require official or judicial acts pursuant to the Sierra Leone *Extradition Act 1974*.¹⁶
18. In establishing the Special Court with jurisdiction to prosecute crimes in Sierra Leone, the Government has effectively transferred the accused from the jurisdiction of Sierra Leone to the jurisdiction of the Special Court. This could only be done by taking “official action”. Thus, the Government of Sierra Leone’s actions in establishing the Special Court could amount to an abuse of process as a result of going back on its undertaking to take no official action.
19. In *US v Klein*,¹⁷ the US Supreme Court struck down all congressional laws that discriminated against the amnestied ex-Confederates. It is therefore possible for a court to hold that laws passed by a government that violate an amnesty provision are thereby abusive.

¹⁴ *Ibid* para. 74.

¹⁵ *Ibid* para. 75.

¹⁶ In particular sections 4, 5, 7, 8, 9 and 10.

¹⁷ Cited above.

20. In the case of Sierra Leone and the Lome amnesty, the official acts undertaken by the Government of Sierra Leone are not limited to the passing of the Special Court Act, but also entail the negotiations with the UN and the entry into the Agreement with the UN establishing the Special Court.
21. It is clearly open to the Appeals Chamber to consider the actions of the Government of Sierra Leone in ignoring the amnesty and establishing the Special Court. The Special Court is not created by domestic Statute and is not dependant upon domestic Statute for its existence. It can therefore consider the actions of the Government in establishing the Special Court and decide that such action amounts to “official action” contrary to the promise made in the Lome Accord.

The Limits of Article 10

22. Article 10 of the Special Court Statute stipulates that “an amnesty granted to any person ... shall not be a bar to *prosecution*.” [Emphasis added].
23. Firstly, it is submitted that to the extent that Article 10 is valid it only stipulates that an amnesty shall bar prosecution. It is accordingly open for a defendant to raise the amnesty granted as either an abuse of process or a defence.
24. Secondly, and alternatively, it is submitted that the Appeals Chamber is entitled to consider the lawfulness of Article 10 in its own right. It is noted that Article 4 of the Special Court Statute provides that the Special Court “*shall* have the power to prosecute persons who committed ... conscripting or enlisting children under the age of 15 years into armed forces or groups”. This does not mean that the Special Court must allow prosecution of individuals for conscripting child soldiers. The Court is clearly able to consider whether conscripting child soldiers amounts to an offence and if not, not permit the prosecution of such offences. In the same way that the Court is entitled to consider the legal status of the conscription of child soldiers under Article 4 it is submitted that the Court can consider Article 10.

25. In *Tadic*¹⁸ the ICTY Appeals Chamber reviewed the lawfulness of its own establishment and the ICTY Statute in its entirety. It is submitted that if the Appeals Chamber can consider the lawfulness of the entire Statute it must also be able to consider one isolated provision. In *Tadic* the Appeals Chamber held that in considering the lawfulness of the establishment of the ICTY the Appeals Chamber had to consider the scope of the Security Council's discretion and powers and whether its actions fell within the scope of its powers.¹⁹

Judicial Scrutiny of Prosecutorial Discretion

26. It is accepted that the benefits of the amnesty are not totally lost as the prosecution may exercise its discretion in not indicting or prosecuting someone who they feel should not be prosecuted. It is submitted, however, that it would be inappropriate to leave such discretion entirely in the hands of the Prosecution. There must and should be some judicial scrutiny of the exercise of that discretion.

27. It is clear from the *Report of the Security Council mission to Sierra Leone* (October 2000)²⁰ that, post Lome, the RUF was "divided into several groups". Some wanted to disarm while others did not. It is submitted that those who wanted to disarm, and indeed took the disarmament process forward, are entitled to the benefit of the amnesty. It is submitted that the judges of the Special Court must be entitled to play a supervisory role and make an assessment of those who abided by Lome and accordingly should have the benefit of the amnesty granted.


¹⁸ *Tadic* 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction' ICTY Appeals Chamber, 2 October 1995.


¹⁹ *Ibid.* paras. 20, 21 and 39.


²⁰ *Report of the Security Council mission to Sierra Leone S/2000/992* dated 16 October 2000 at paras. 22 and 25.

Conclusion

28. In conclusion, it is submitted that those who respected and abided by the Lome Accord should be permitted to raise the protections and guarantees contained therein before the Special Court. At this stage the Appeals Chamber is respectfully requested to rule on the basis upon which such arguments can be made and moreover the legal parameters of any such arguments. Clearly, before any accused can rely on the amnesty granted in the Lome Accord there would need to be evidential inquiry into the extent to which that individual did indeed comply with Lome. It is submitted that the Trial Chamber is best placed to conduct any such evidentiary enquiry.


for **JAMES OURY**


for **STEVEN POWLES**


for **MELRON NICOL-WILSON**