IN THE SPECIAL COURT FOR SIERRA LEONE

THE APPEAL CHAMBER

Before: Judge Robertson QC, President
Judge King, Vice-President
Judge Ayoola
Judge Winter
Fifth judge to be determined

Registrar: Mr Robin Vincent

Date filed: 30th October 2003

Case No. SCSL 2003 – 07 – PT

In the matter of:

THE PROSECUTOR
(Prosecution)

Against

MORRIS KALLON,
(Respondent)

AUGUSTINE BAO intervening
(Applicant)

ARGUMENTS ON BEHALF OF AUGUSTINE BAO IN SUPPORT OF MORRIS KALLON'S PRELIMINARY MOTION BASED ON LACK OF JURISDICTION/ABUSE OF PROCESS IN THE EVENT OF PERMISSION BEING GRANTED TO INTERVENE

Office of the Prosecutor

Mr Desmond de Silva, QC, Deputy Prosecutor
Mr Luc Cote, Chief of Prosecutions
Mr Walter Marcus-Jones
Mr Christopher Staker
Mr Abdul Tejan-Cole

Intervening for Mr Gbao

Mr Girish Thanki
Professor Andreas O'Shea
Mr Kenneth Carr

For Mr Kallon

Mr James Oury
Mr Edward Fitzgerald QC
Mr Steven Powles

The proper interpretation of Article 10 of the Statute of the Special Court for Sierra Leone

1. The prosecution submits in its Response to Kallon's Preliminary motion based on lack of jurisdiction/Abuse of process: Amnesty provided by the Lome Accord (hereinafter Kallon's Preliminary Motion on Amnesty) that the Court is bound by Article 10 of its Statute and that therefore Kallon's Preliminary Motion on Amnesty 'does not provide a claim in law capable of being recognised by the Special Court.' The effect of this submission is that the Court is not entitled to examine its own jurisdiction as a result of Article 10. It is respectfully submitted that this submission misreads the effect of Article 10 which reads:

> An amnesty granted to any person *falling within the jurisdiction of the Special Court* in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

2. Therefore, article 10 clearly states that amnesty will not be a bar to prosecution once jurisdiction is properly established. It assumes the existence of jurisdiction and rather relates to questions of admissibility once jurisdiction is established. It is not a provision intended either to define jurisdiction or to prevent the Court from examining its own jurisdiction;

3. The fact that the Court is permitted in terms of the Statute to examine its own jurisdiction is confirmed by the Rules of Procedure and Evidence, which are made on the basis of an interpretation of the Statute. Rule 72 of the Rules of Procedure and Evidence clearly envisage the power the Court to examine its own jurisdiction. Article 10 of the Statute must be interpreted in the light of the fact that the Statute further directs that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be adopted,

that Rule 72 already existed in those Rules of Procedure and Evidence and that therefore it must have been the intention of the parties to the Special Court Agreement to preserve the Court's power to examine its own jurisdiction;

4. Further and or in the alternative, it is a general principal of law applicable to all courts and tribunals that they have the competence to determine their own competence;[1]

5. Once it is admitted that a Court has the power to examine its own jurisdiction then it follows that it can do this comprehensively. A court cannot be said to have examined its own jurisdiction if in law it does not have jurisdiction, but ignores that fact simply because of a provision of its founding document, to exclusion of all other applicable law;

6. It is submitted that Article 10 must be interpreted consistently with the provisions of international law and Sierra Leone law in so far as possible. This is implied from the direction in the Statute to apply the provisions of international law and the law Sierra Leone.[2] It is respectfully submitted that it would be absurd to interpret a provision of the Statute ignoring international law and the law of Sierra Leone, when these are the applicable laws to the crimes covered by the jurisdiction of the Court. Further, Article 10 should be interpreted on the assumption that the creators of the Court intended it to be established consistently with international law. This is a principle of interpretation often adopted in relation to domestic laws and should apply a fortiori to the constitutive document of an international organisation designed to implement international legal principles;[3]

7. Therefore, if the laws of the international community and/or the laws of Sierra Leone indicate that the court does not have or should not exercise jurisdiction

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[1] See *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995

[2] The crimes over which the Court has jurisdiction are either crimes under international law or crimes under Sierra Leone law

[3] Interpretation- The South African Constitution provides a constructive example here. Section 133 provides that a reasonable interpretation of the Constitution consistent with international law should be preferred to one inconsistent with international law

then it is submitted that this finding can be reached by the Court, notwithstanding Article 10. The mere possibility of this is confirmation enough that the proper meaning of Article 10 excludes the possibility of amnesty being a bar only after establishing jurisdiction.

The scope and applicability of the doctrine of abuse of process to the jurisdiction of the Court

8. It is submitted that the Special Court for Sierra Leone is no ordinary court of law. It is not merely a mechanism for criminal justice, but also a mechanism for peace and reconciliation. It is respectfully submitted that this is manifest from its method of creation and its character;

9. The Special Court for Sierra Leone is created by a treaty. Its instrument of creation is no ordinary law but a commitment between subjects of international law aimed at enhancing the interests of those subjects of international law in the international arena. It is therefore to be understood and interpreted in this light, not only according to its ordinary meaning but also in its context and in the light of its object and purpose.[4] This treaty was concluded between a government and the United Nations following a civil war. It was concluded as a measure for the maintenance of peace. The authority for the United Nations to conclude the treaty is derived from a Security Council resolution. The mandate of the Security Council is put in no uncertain terms as maintenance of international peace and security.[5] So, the Special Court for Sierra Leone is a mechanism for the maintenance of international peace and security as well as national reconciliation. This is confirmed by Security Counsel Resolution 1315 (2000), which authorises the establishment of the Court, in:

> Recognizing that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious

[4] See Article 31 of the Vienna Convention on the Law of Treaties
[5] See Article 24(1) of the United Nations Charter

> crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace

And

> Commending the efforts of the Government of Sierra Leone and the Economic Community of West African States (ECOWAS) to bring lasting peace to Sierra Leone

It is respectfully submitted that the Special Court therefore not only has inherent jurisdiction to decline the exercise of jurisdiction where there has been an abuse of the process of the court, but also where there has been an abuse of the international legal system;

10. Further or in the alternative where there has been an abuse of the international legal system, this also amounts to an abuse of the process of the court since the Court is a creation and instrument of international process designed to contribute to the maintenance of peace and reconciliation in Sierra Leone, a major objective of the international community of states. While there may not be specific authority or precedent to support this proposition, it is submitted that these circumstances, that is an international tribunal set up between a state and an international organisation where the state acts in breach of its former promise to combatants, have not arisen before as a question of jurisdiction. Further, it is respectfully submitted that the proposition is supported by the nature and function of abuse of process as a doctrine to protect the integrity of legal process, as reflected in the principles set out in *Prosecutor v Barayagwiza*[6] and general principles of law as derived from national jurisprudence and therefore falls properly within the inherent or implied jurisdiction of an international criminal tribunal such as this one. The Appeal Chamber in *Barayagwiza*, cited with approval the parameters of the abuse of process doctrine as described by the House of Lords:

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[6] *Jean-Bosco Barayagwiza v The Prosecutor*, Decision of 3 November 1999

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> [A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) *because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.*

The House of Lords described the basis of the doctrine as permitting a court to decline to exercise jurisdiction:

> Not only where a fair trial is impossible, but also where it would be *contrary to the public interest in the integrity of the criminal justice system that a trial should continue.*[7]

When one is concerned with an international criminal justice system, one is dealing with a system that forms an integral part of the international legal system as a whole and therefore its integrity may be adversely affected by the abuse of that international legal system.

11. In other words, where a prosecution is made possible by the dishonourable, reprehensible or unfair conduct of a state, it is respectfully submitted that the Court can and should decline to exercise jurisdiction on the basis of an abuse of process of the Court and/or the international legal system on the basis that it effects the integrity and credibility of the judicial process;[8]

12. It is further submitted that conduct that gives rise to an abuse of process may include the conduct of a third party such as a state. Thus, it has been noted by the Appeal Chamber of the International Criminal Tribunal for Rwanda that:

> ... under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights[9]

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[7] See ibid, at par 74

[8] See *R v Horseferry Road Magistrates*, ex parte *Bennett* [1994] 1 AC 42; *S v Ebrahim* 1991 (2) SA 553; *R v Hartley* [1978] 2 NZLR 199; contra see *US v Alverez-Machain* (1992) 119 L.Ed 2d 441, but see dissenting opinion; *Jean-Bosco Barayagwisa v The Prosecutor*, Decision of 3 November 1999

[9] *Jean-Bosco Barayagwisa v The Prosecutor*, Decision of 3 November 1999, at par 73

In this case, the Special Court for Sierra Leone in any event represents the third party in a joint exercise of jurisdiction with the United Nations through the mechanism of an international agreement.

13. It is submitted that the kind of conduct giving rise to the Court's discretion to denounce jurisdiction on the basis of abuse of process would include a breach of an international obligation, a breach of promise giving rise to a legitimate expectation in international relations and the creation of a threat to international peace and security.

Breach of international law

14. It is respectfully submitted that in concluding the Lome Agreement the State of Sierra Leone created an internationally binding obligation not to prosecute the beneficiaries of the amnesty under that accord;

15. The Prosecution submits in its response to Kallon's preliminary motion on amnesty that the Lome agreement was nothing more than a purely domestic arrangement between two domestic bodies and that it could not be a treaty because it was not concluded between states, relying principally on the provisions of the Vienna Convention on the Law of Treaties, which it claims forms part of customary international law;

16. The government of Sierra Leone is not a purely domestic body, by the representative arm of the state, an international legal person with full juridical capacity under international law. An agreement stated to be between a government and another subject, whether a state or not, is necessarily an agreement between the state and that other subject. Therefore, it cannot be pretended that neither party to the Lome Accord was a subject of international law subject to rights and obligations under international law. If the nomenclature government were to have that effect then states could avoid their international obligations to their citizens and to other states merely by hiding behind government as one organ of the state;

17. Neither, it is submitted, was the RUF a purely domestic body capable of having no rights or obligations under international law. It is respectfully submitted however that as an insurgent movement and liberation movement it was capable of having both rights and obligations under international law.[10] In terms of common Article 3 to the four Geneva Conventions of 1949 and the 1977 Protocol II Additional to the Geneva Conventions of 1949, it would be classified as a party to the conflict and its members are classified as combatants if these treaties have application to the conflict;

18. Further or in the alternative, even where an entity does not normally have rights and obligations under international law, a state, as a subject of international law can voluntarily recognise an entity's capacity to make and receive international undertakings by entering into an agreement with such entity, which is clearly designed to bind both the state and itself in international instead of or as well as domestic relations.[11] It is submitted that a peace treaty between a state and a liberation movement is such an agreement, especially where it is witnessed or otherwise participated in by other subjects of international law including states and international organisations.

19. States are not the only subjects of international law. Other entities may become subjects of international law with full or limited capacity to have rights and duties under international law where so recognised by states. As noted by Sir Hersch Lauterpacht:

> The range of subjects of international law is not rigidly and immutably circumscribed by any definition of the nature of international law but is capable of modification and development in accordance with the requirements of international discourse.[12]

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[10] See H.M. Blix, 'Contemporary aspects of Recognition', *Recueil des cours* (1970) II, especially at 596 and 616-617.
[11] See Christian Nwachukwu Okeke, *The expansion of new subjects of contemporary international law through their treaty-making capacity: An insight into the legal place of the proliferating controversial international legal persons*, 1973, especially at 18 and 109-127.
[12] Hersch Lauterpacht, *International Law, Collected Papers*, Vol. 1, 1970, at 137.

It is submitted that whether or not the agreement between the RUF and Sierra Leone is to be classified as a treaty, it was nevertheless an agreement creating internationally enforceable obligations as between the parties, and that the status of the RUF to make and rely on such obligations was recognised by Sierra Leone by entering into the Lome Accord;

20. In any event, the Vienna Convention's definition of a treaty is only intended to define a treaty for the purposes of the application of the provisions of that Convention. So, either, other legally binging agreements may exist under international law, or in the alternative, the Vienna Convention was only intended to apply to agreements between states. This is evident from the fact that there are two treaties on treaties, one relating to agreements between states and another relating to agreements between states and international organisations.[13]

21. The assertion that the Agreement for the establishment of the Special Court renders the Lome Accord invalid has no foundation. Neither the RUF nor the ECOWAS states were party to the Special Court Agreement, and in accordance with the principle of *pacta sunt servanda*, it is not binding upon them. In any event, nothing in the Special Court Agreement expressly or impliedly invalidates the Lome Accord or any part thereof. The provision on amnesty is consistent with the Lome Accord since, on its proper interpretation it relates to admissibility and not jurisdiction. In so far as it could be argued that it was intended to invalidate the Lome Accord, this is not authorised by the Security Counsel resolution enabling the conclusion of the agreement. Indeed, Security Counsel Resolution 1315 (2000) authorising the establishment of the Court expressly recognises the Lome Accord the importance of national reconciliation in:

> Noting also the steps taken by the Government of Sierra Leone in creating a national truth and reconciliation process, as required by

[13] Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations of 1986

> Article XXVI of the Lomé Peace Agreement (S/1999/777) to contribute to the promotion of the rule of law

And:

> Recognizing that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace

Furthermore, in issuing practice directions that permit the possibility of proceedings before the Truth and Reconciliation Process of Sierra Leone, the Special Court has recognised the validity of that body created in terms of the Lome Accord.

The alleged crystallising international norm that a government cannot grant amnesty for serious crimes under international law

22. The Prosecution avers the existence of a crystallising international norm that a government cannot grant amnesty for serious crimes under international law. It is correct not to assert that any such general norm has in fact crystallised under customary international law and the Prosecution does not offer the evidence of state practice and *opinio juris* to support such a proposition. However, neither does it produce adequate evidence of its claim that such a general norm is crystallising;

23. It is respectfully submitted that under the current state of customary international law an international obligation to prosecute international crimes that would further exclude any possibility of amnesty is only supported by state practice and *opinio juris* or by treaty obligations binding on Sierra Leone in very limited circumstances. Thus, such an obligation may be said to exist with respect to the crime of genocide and for grave breaches of the Geneva Conventions of 1949, but no general obligation exists for other international crimes. With respect to the crime of torture there is a division of opinion on

whether there exists sufficient state practice and *opinio juris* to establish an obligation to prosecute under customary international law.[14] Those who deny the existence of such an obligation in the case of torture refer to the numerous instances of practising torture around the world.[15] Further, one must carefully distinguish between the prohibition of torture, even if *jus cogens*, and the obligation on states to prosecute torturers and not to grant amnesty;

24. In the case of war crimes committed in the context of a non-international armed conflict, with which the accused are charged, it is respectfully submitted that while there may be an emerging or emergent right to exercise jurisdiction in respect of such crimes in the absence of an undertaking not to do so or other bars to jurisdiction, there is little or no evidence of state practice or *opinio juris* of an obligation to do so. In fact, Protocol II additional to the Geneva Conventions of 1949, unlike the Geneva Conventions themselves and Protocol I dealing with international armed conflicts, omits to provide for the principle of *aut dedere aut judicare*;

25. Further, Article 6(5) to Protocol II provides that:

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained

While it may be contentious as to whether this provision was intended to have any impact on the grave breaches regime, it is clearly intended to encourage amnesty where there is no specific obligation to prosecute and therefore, it is submitted endorses the fact that amnesty is an accepted practice by the international community as a measure for the maintenance of peace, save

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[14] In favour of the position that state practise has sufficiently developed see *Prosecutor v Furundzija* (1999) 38 ILM 317, at 349; Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' 100 Yale LJ 2537. Against this proposition see Michael Sharf, 'The Letter of the Law: The Scope of the International Duty to Prosecute Human Rights Crimes' (1996) 59 *Law and Contemporary Problems* 41; John Dugard, 'Dealing with Crimes of A Past Regime. Is Amnesty Still an Option?' (2000) 12 *Leiden Journal of International Law* 1000; Lyal S Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*, 1992

[15] Idem

perhaps where the international community has accepted a specific or general obligation not to afford amnesty;

26. Further, it is submitted that there is a strong basis for asserting that there is such an established practice of amnesty in peace treaties so as to either bring into question the nature and scope of general state practice regarding an emerging duty to prosecute or to create a surviving customary right to grant amnesty in peace treaties.[16]

Breach of national law

27. It is submitted that the Special Court Act does not impliedly repeal the Lome Agreement Act because if this were the intention, it would have expressly done so. Further, the passing of the Truth and Reconciliation Act of Sierra Leone and its subsequent implementation evidences the fact that Parliament intended to leave the Lome Agreement Act and the Lome Agreement itself intact. This is evidenced by the fact that the Truth and Reconciliation Commission Act specifically makes reference to the Lome Agreement as the foundation for the establishment of the Truth and Reconciliation Commission and purports to be enforcing the relevant provision of that agreement. No attempt has been made by the executive or the legislature to interfere with that Act or its implementation.

Otherwise unconscionable, reprehensible or unfair conduct undermining the credibility and integrity of the proceedings before the Special Court for Sierra Leone

28. Further and or in the alternative, it is respectfully submitted that the conduct of the government of Sierra Leone is otherwise reprehensible in providing a

[16] See the extensive examples cited by counsel in O'Shea, *Amnesty for Crime in International Law and Practice*, 2002, at 7-20, and the sources cited therein.

promise of amnesty to the RUF and reneging on that promise.[17] This is conduct which, if endorsed and enforced by the Special Court for Sierra Leone threatens the future of international peace and security by creating a perception of complete insecurity in the enforceability of the provisions of peace treaties and other peace agreements designed to bring an end to conflicts.

Girish Thakker

[17] The Court may here be guided by the English decisions on abuse of process following a breach of promise, and in particular in *R v Bloomfield* [1997] 1 Cr. App. R. 135 (CA) and *R v Croydon JJ., ex p. Dean*, 98 Cr. App. R. 76, DC.