SCSL-2004-15-AR72(E)
(1236-1271)

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SPECIAL COURT FOR SIERRA LEONE
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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)) **BRIMA BAZZY KAMARA** (Case No. SCSL-2004-16-AR72(E))

DECISION ON CHALLENGE TO JURISDICTION: LOMÉ ACCORD AMNESTY

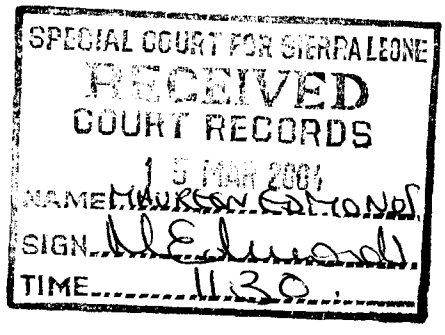
Office of the Prosecutor:
Desmond de Silva, QC
Luc Côté
Walter Marcus-Jones
Abdul Tejan-Cole

Amici Curiae:
Richard Hermer for *Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists*
Professor Diane Orentlicher

Defence Counsel for Morris Kallon:
James Oury
Stephen Powles

Defence Counsel for Brima Bazzy Kamara:
Ken Fleming, QC

Interveners:
Andreas O'Shea for *Augustine Gbao*
Michiel Pestman for *Moinina Fofana*



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

BEING SEIZED of (1) a 'Preliminary Motion based on lack of Jurisdiction/ Abuse of Process: Amnesty Provided by the Lomé Accord', filed on behalf of Morris Kallon on 16 June 2003 ("Kallon Preliminary Motion"); and (2) 'Application by Brima Bazzy Kamara in respect of Jurisdiction and Defects in Indictment', filed on behalf of Brima Bazzy Kamara on 22 September 2003, section 3 of which raises issues relating to the Lomé Accord amnesty ("Kamara Preliminary Motion");[1]

NOTING that the Prosecution Response to the Kallon Preliminary Motion was filed on 23 June 2003[2], and that the Prosecution Response to the Kamara Preliminary Motion was filed on 29 September 2003;[3]

NOTING that the Kallon Preliminary Motion was referred to the Appeals Chamber on 30 September 2003 pursuant to Rules 72(E) and (F) of the Rules of Procedure and Evidence for the Special Court for Sierra Leone ("the Rules"), and that the Kamara Preliminary Motion was referred to the Appeals Chamber under Rule 72(E) of the Rules on 9 October 2003; [4]

NOTING that oral submissions were heard on 3 and 4 November 2003;

NOTING that Written Defence Submissions in support of Oral Argument were filed on behalf of Kallon on 3 November 2003[5]; that Defence Post-Hearing Written Submissions were filed on behalf of Kallon on 28 November 2003[6]; and that the Prosecution filed its Response thereto on 3 December 2003;[7]

NOTING that submissions by the Redress Trust, the Lawyer's Committee for Human Rights and the International Commission of Jurists ("Redress") as *amicus curiae* were filed on 24 October 2003, that

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[1] These Preliminary Motions were filed under Case No. SCSL-2003-07 and Case No. SCSL-2003-10 respectively. Following the Decision and Order on Prosecution Motions for Joinder of 27 January 2004, and the subsequent Registry Decision for the Assignment of a new Case Number of 3 February 2004, they have been assigned the new case numbers referred to herein.

[2] Prosecution Response to the First Defence Preliminary Motion (Lomé Agreement), ("Kallon Response"), 23 June 2003.

[3] Prosecution Response to the Defence Application in Respect of Jurisdiction and Defects in Indictment, 29 September 2003.

[4] Order pursuant to Rule 72(E) and (F): Defence Preliminary Motion based on Lack of Jurisdiction/ Abuse of Process: Amnesty Provided by the Lomé Accord, Case No. SCSL-2003-07, 30 September 2003; Order pursuant to Rule 72(E): Application by Brima Bazzy Kamara in Respect of Jurisdiction and Defects in the Indictment, Case No. SCSL-2003-10 PT, 9 October 2003.

[5] Written Submissions in Support of Oral Argument: Preliminary Motion based on Lack of Jurisdiction/ Abuse of Process: Amnesty provided by the Lomé Accord, 3 November 2003.

[6] Further Written Submissions on behalf of Morris Kallon: Preliminary Motion based on Lack of Jurisdiction/ Abuse of Process: Amnesty Provided by Lomé Accord, ("Kallon Further Submissions"), 28 November 2003.

[7] Prosecution Response to the Further Written submissions on behalf of Morris Kallon (Lomé Accord), ("Prosecution Response to Kallon Further Submissions"), 3 December 2003.

the application by Redress to make written and oral submissions as *amicus curiae* was accepted by the Appeals Chamber on 1 November 2003[8] and that subsequent Post-Hearing Written Submissions were filed by Redress on 21 November 2003;[9]

NOTING FURTHER that at the invitation of the Appeals Chamber submissions were filed by *amicus curiae* Professor Diane Orentlicher on 27 October 2003 ("Orentlicher *amicus* brief"); and that with leave of the Court written submissions were filed on behalf of the accused Moinina Fofana[10] and Augustine Gbao[11] intervening, in support of oral arguments;

HAVING CONSIDERED THE ORAL AND WRITTEN SUBMISSIONS OF THE PARTIES, *AMICI CURIAE* AND INTERVENERS;

HEREBY DECIDES:

I. GROUNDS OF THE PRELIMINARY MOTION

A. Introduction

1. In summary, the grounds of the two applications, in so far as they are relevant to this Decision, are that the Government of Sierra Leone is bound to observe the amnesty granted under Article IX of the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone ("Lomé Agreement");[12] the Special Court should not assert jurisdiction over crimes committed prior to July 1999 when an amnesty was granted by virtue of the Lomé Agreement and it would be an abuse of process to allow the prosecution of any of the alleged crimes pre-dating the Lomé Agreement.

2. The Prosecution put its opposition to the Preliminary Motions in several ways. The Prosecution argues that the Special Court is bound by Article 10 of its Statute and that the Lomé Agreement,

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[8] *Prosecutor v Kallon*, Case No. SCSL-2003-07, Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to file Amicus Curiae Brief and to present oral submissions, 1 November 2003.

[9] Further Written Submissions on behalf of the Redress Trust and the Lawyers' Committee for Human Rights and the International Commission of Jurists, 21 November 2003.

[10] Reply to the Prosecution Response to the Motion on behalf of Moinina Fofana for leave to intervene as an interested party in the Preliminary Motion filed by Mr. Kallon based on a lack of Jurisdiction: Amnesty provided by the Lomé Accord and Substantive Submissions, 31 October 2003 ("Fofana Submissions").

[11] Arguments on behalf of Augustine Gbao 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, 30 October 2003 ("Gbao Submissions").

[12] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), Lomé, 7 July 1999 ("Lomé Agreement").

being an agreement between two national bodies, is limited in effect to domestic law and was, in any event, not intended to cover crimes mentioned in Articles 2 to 4 of the Statute of the Special Court ("Statute"). [13] Furthermore, it is contended that given the gravity of the crimes charged, discretion should not be exercised to grant a stay of proceedings on the basis that there has been an abuse of process of the Court.

B. Historical Background

3. It is commonly said, though no such factual finding is made and can be made at this stage, that on 23 March 1991 forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party rule of the All Peoples' Congress (APC). That was believed to be the beginning of the armed conflict in Sierra Leone which lasted until 7 July 1999 when the parties to the conflict signed the Lomé Agreement. There was an earlier peace agreement between the Government of Sierra Leone and RUF signed in Abidjan on 30 November 1996 ("Abidjan Peace Agreement")[14] but that collapsed soon after it was signed.

4. On 7 July 1999 the Lomé Agreement was signed between the Government of Sierra Leone and the RUF, the parties to the Agreement having met in Lomé, Togo from 25 May 1999 to 7 July 1999 under the auspices of the Chairman of ECOWAS at the time, President Gnassingbe Eyadema.

5. Among other things, the parties to the Lomé Agreement stated that they were moved "by the imperative need to meet the desire of the people of Sierra Leone for a definitive settlement of the fratricidal war in their country and for genuine national unity and reconciliation".[15]

6. Article 34 of the Lomé Agreement shows that the Government of the Togolese Republic, the United Nations, the OAU, ECOWAS and the Commonwealth of Nations stood as moral guarantors of the implementation of the Lomé Agreement with integrity and in good faith by both parties.

C. Article 9 of the Lomé Agreement

7. At the centre of these proceedings is Article 9 of the Lomé Agreement which provides as follows:

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[13] Statute of the Special Court for Sierra Leone, 16 January 2002.
[14] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Abidjan, 30 November 1996, UN Doc. S/1996/1034.
[15] Lomé Agreement, Preamble.

ARTICLE IX

PARDON AND AMNESTY

1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.

2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.

3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations since March 1991, up to the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.

8. By a letter dated 12 June 2000 written to the President of the Security Council by the President of Sierra Leone on behalf of the Government and people of Sierra Leone,[16] the President of Sierra Leone requested the President of the Security Council to initiate a process whereby the United Nations would resolve on the setting up of a Special Court for Sierra Leone.

9. That letter reads as follows:

12 June 2000

> On behalf of the Government and people of the Republic of Sierra Leone, I write to request you to initiate a process whereby the United Nations would resolve on the setting up of a special court for Sierra Leone. The purpose of such a court is to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages. This necessitates the establishment

[16] Annex to Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, S/2000/786, 10 August 2000.

of a strong court in order to bring and maintain peace and security in Sierra Leone and the West African subregion. For this purpose, I request assistance from the United Nations Security Council in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace. To achieve this, a quick response from the Secretary-General and the Security Council is necessary.

As you are aware, the atrocities committed by the RUF in this country for nearly 10 years in its campaign of terror have been described generally as the worst in the history of civil conflicts. In July 1999, my Government and the leadership of the RUF signed the Lomé Peace Agreement. The aim of this Agreement was to bring peace and a permanent cessation to those atrocities and the conflict. As a prize for such peace, my Government even conceded to the granting of total amnesty to the RUF leadership and its members in respect of all the acts of terrorism committed by them up to the date of the signing of that Peace Agreement.

But the RUF leadership have since reneged on that Agreement, and have resumed their atrocities, which have always had as their targets mainly civilians, including women and children. They still murder and amputate them and use the women and girls as sex slaves. Lately, they have abducted over 500 United Nations peacekeepers and seized their arms, weapons and uniforms, and even killed some of the peacekeepers. This is in spite of a provision in the Lomé Peace Agreement itself requiring both my Government and the RUF to ensure the safety of these peacekeepers. In the process, the RUF have committed crimes against Sierra Leonean and international law and it is my Government's view that the issue of individual accountability of the leadership of the RUF for such crimes should be addressed immediately and that it is only by bringing the RUF leadership and their collaborators to justice in the way now requested that peace and national reconciliation and the strengthening of democracy will be assured in Sierra Leone.

I am aware of similar efforts made by the United Nations to respond to similar crimes against humanity in Rwanda and the former Yugoslavia. I ask that similar considerations be given to this request.

I believe that crimes of the magnitude committed by the RUF in this country are of concern to all persons in the world, as they greatly diminish respect for

international law and for the most basic human rights. It is my hope that the United Nations and the international community can assist the people of Sierra Leone in bringing to justice those responsible for those grave crimes.

Because of the sensitivity aroused in Sierra Leone and around the world by the activities of the RUF and their collaborators and the need to dispose of the matters to be tried at the proposed tribunal without delay, I am inviting you or the Security Council to send to Sierra Leone immediately a rapid response team of inquiry to assess the needs and concerns regarding my Government's ability to provide effective, secure, fair and credible justice.

With regard to the magnitude and extent of the crimes committed, Sierra Leone does not have the resources or expertise to conduct trials for such crimes. This is one of the consequences of the civil conflict, which has destroyed the infrastructure, including the legal and judicial infrastructure, of this country. Also, there are gaps in Sierra Leonean criminal law as it does not encompass such heinous crimes as those against humanity and some of the gross human rights abuses committed by the RUF. It is my view, therefore, that, unless a court such as that now requested is established here to administer international justice and humanitarian law, it will not be possible to do justice to the people of Sierra Leone or to the United Nations peacekeepers who fell victim to hostage-taking.

I attach hereto a suggested framework for the type of court intended (see enclosure). As you can see, the framework is meant to produce a court that will meet international standards for the trial of criminal cases while at the same time having a mandate to administer a blend of international and domestic Sierra Leonean law on Sierra Leonean soil.

(*Signed*) Alhaji Ahmad Tejan **Kabbah**
President of the Republic of Sierra Leone

10. After reiterating that "the situation in Sierra Leone continues to constitute a threat to international peace and security in the region"[17] and expressing "concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and

[17] SC Res 1315 (2000), 14 August 2000, Preamble.

United Nations and associated personnel and at the prevailing situation of impunity"[18] the Security Council adopted Resolution 1315 (2000), on its own independent assessment of the situation, whereby the Secretary-General was mandated to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with the resolution.

11. In a clause in the Preamble to Resolution 1315, the Security Council reaffirmed the importance of compliance with international humanitarian law; that persons who commit or authorise serious violations of international humanitarian law are individually responsible and accountable for those violations; and that *the international community* will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law.[19] The establishment of the Special Court was thus an implementation of the determination of the Security Council to bring those responsible for serious violations of international humanitarian law to justice.

D. The Special Court for Sierra Leone

12. On 16 January 2002, after a successful negotiation between the Secretary-General and the Government of Sierra Leone, an agreement was entered into by the United Nations and the Government of Sierra Leone whereby the Special Court for Sierra Leone was established ("Agreement").[20]

13. The Special Court was established for the sole purpose of prosecuting 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 November 1996. The competence of the Special Court was extended in its Statute by the addition in Article 1 of the words "including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."

14. The Special Court, though established by an agreement between the United Nations and the Government of Sierra Leone, is an autonomous and independent institution vested with juridical capacity by Article 11 of the Agreement. The involvement of the Government of Sierra Leone in

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[18] *Ibid.*

[19] *Ibid.* emphasis added.

[20] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 ("Agreement").

the Special Court after its establishment is defined by the Agreement. It is limited to participation in the appointment of judges, prosecutor and deputy prosecutor, as provided, respectively, in Articles 2 and 3 of the Agreement, and participation in the Management Committee as provided for in Article 7 of the Agreement. The Sierra Leone Government undertook certain responsibilities of a non-managerial nature in regard to the Special Court, such as an obligation to assist in the provision of premises for the Court, and such utilities, facilities and other services as may be necessary for its operation;[21] to grant immunity and inviolability to counsel of a suspect or an accused as provided for in Article 14; and to co-operate with the Special Court as provided for in Article 17.

15. The Statute of the Special Court defined the jurisdiction of the Court as follows:

> Article 1: Competence of the Special Court
>
> 1. The Special Court shall, except as provided in subparagraph (2), have the power 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 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.
>
> 2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.
>
> 3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.
>
> Article 2: Crimes against humanity
>
> The Special Court shall have the power to prosecute persons who committed the

[21] Article 5 of the Agreement.

following crimes as part of a widespread or systematic attack against any civilian population:

a. Murder;
b. Extermination;
c. Enslavement;
d. Deportation;
e. Imprisonment;
f. Torture;
g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
h. Persecution on political, racial, ethnic or religious grounds;
i. Other inhumane acts.

Article 3: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:

a. Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
b. Collective punishments;
c. Taking of hostages;
d. Acts of terrorism;
e. Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
f. Pillage;
g. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
h. Threats to commit any of the foregoing acts.

Article 4: Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
b. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
c. Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Article 5: Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

a. Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):
   (i) Abusing a girl under 13 years of age, contrary to section 6;
   (ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;
   (iii) Abduction of a girl for immoral purposes, contrary to section 12.
b. Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:
   (i) Setting fire to dwelling - houses, any person being therein, contrary to section 2;
   (ii) Setting fire to public buildings, contrary to sections 5 and 6;
   (iii) Setting fire to other buildings, contrary to section 6.

E. The Three Phases of the Sierra Leone Situation

16. It is evident from the brief historical background that the events starting from the launching of the rebellion in March 1991 and ending with the establishment of the Special Court, described here as 'the Sierra Leone situation', have three discernible phases, namely: (1) the phase of armed

conflict; (2) the Peace Agreement phase and (3) the Justice phase. There are legal perspectives which have some bearing on the issues raised by the Preliminary Motions to each of these phases of the Sierra Leone situation.

17. It must be assumed, since the facts of the case have not been gone into, that the *phase of armed conflict* was of such a degree as to be recognised as an insurgency, passing beyond the threshold of a rebellion that could be dealt with internally as a matter of domestic security and to be regulated by domestic law, to a level of conflict that had to be regulated by Common Article 3 of the Geneva Conventions. The parties, whether from the Government side or the insurgents, were thereby subjected to the obligations imposed by international law in a situation of internal armed conflict. The competence of the Special Court to prosecute persons who committed violations of Common Article 3 is the basis of that assumption.

18. *The Peace Agreement Phase* signifies the end of the armed conflict by means of a peaceful settlement. One legal consequence of that phase is that international humanitarian law would normally cease to be applicable to any act of violence in the peace period unless, notwithstanding what would have been regarded as a peaceful resolution, one party or both parties, in breach thereof, continued the armed conflict. Presumably, it is in further protection of the peace process that the competence of the Special Court includes in Article 1(1) of the Statute the prosecution of "those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone." Thereby, impunity is denied to any such person, notwithstanding that there had been a peace agreement which constituted some sort of peaceful resolution of the conflict.

19. The *Justice Phase* is that phase in which participants in the armed conflict have to answer for crimes committed in the course of the armed conflict. The justice phase itself involves separating what is in the exclusive domain of the municipal authority to be resolved under municipal law from what is in the concurrent jurisdiction of that authority and of the international community to be resolved by application purely of international law.

F. Prosecutorial Choice of Sierra Leone

20. Whether to prosecute the perpetrators of rebellion for their act of rebellion and challenge to the constituted authority of the State as a matter of internal law is for the state authority to decide.

There is no rule against rebellion in international law.[22] The State concerned may decide to prosecute the rebels. It may decide to pardon them, generally or partially, conditionally or unconditionally. It is where, and in this case because, the conduct of the participants in the armed conflict is alleged to amount to international crime that the question arises whether in such a situation a State has the same choice to dispense with the prosecution of the alleged offenders. Furthermore, if it claims to have such choice and exercises it to grant amnesty to alleged offenders, does this conclusively bar prosecution for the alleged commission of grave crimes against humanity in an international tribunal or, for that matter, by another state claiming universal jurisdiction to prosecute?

21. The Preliminary Motions with which this ruling is concerned arose because the Government of Sierra Leone included in the Lomé Agreement Article IX which contained 'Pardon and Amnesty' provisions in terms already stated above, whereby, among other things, it undertook to "grant absolute and free pardon and reprieve to all combatants and collaborators" and undertook also to "ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organizations".[23] The Motions argue, in effect, that the amnesty granted by the Lomé Agreement in Article IX amounts to an unconditional pardon and that, as such, it was a choice validly made by the Sierra Leone Government that conclusively precluded the prosecution of the accused Kallon and Kamara for any crime whatsoever allegedly committed before the date of the Lomé Agreement by this Court.

II. ARGUMENTS OF THE PARTIES

22. Counsel for the accused Kallon made submissions on the following main lines:[24]

a) The Lomé Accord was binding on the Government of Sierra Leone;

b) The abuse of process doctrine applies to proceedings before the Special Court and crimes of a serious nature;

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[22] See M. N. Shaw, *International Law* (5th ed., 2003) p. 1040.
[23] See para. 7 above.
[24] See Kallon Preliminary Motion.

c) Article 10 of the Special Court Statute is not a bar to the application of the abuse of process doctrine;

d) Not all amnesties, including the Lomé Accord, are unlawful under international law;

e) Morris Kallon acted in good faith pursuant to the Lomé Accord.

23. It is not necessary to approach the issues raised by the Preliminary Motions strictly on those lines. It suffices to consider the issues raised and to advert to submissions made by counsel for the parties and by the *amici curiae* in the discussion of those issues.

24. The submissions by counsel for Kallon on the Lomé Agreement proceeded on the following lines: as part of the Agreement the Government of Sierra Leone stated that it would, in order to "consolidate the peace and promote the cause of national reconciliation," ensure that "no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of signing the present agreement".[25]

25. Defence counsel for Kallon pointed out that the Lomé Accord was ratified by the Parliament of Sierra Leone on 15 July 1999 with the passage of the Lomé Peace Agreement (Ratification) Act, 1999 ("Lomé Act").[26] According to the Defence, since the Preamble to the Lomé Act states that as the Lomé Agreement contained provisions which "alter the law of Sierra Leone and impose a charge on the Consolidated Fund and other funds of Sierra Leone" it was necessary for Parliament to ratify it pursuant to Section 40(4) of the Constitution of Sierra Leone, 1991 ("The Constitution"). Such ratification is only required by Section 40(4) of the Constitution where the President has entered a "Treaty, Agreement, or Convention" in the name of Sierra Leone. Thus, according to the Defence, the Lomé Accord is governed by the 1969 Vienna Convention on the Law of Treaties.[27]

26. Defence Counsel for Kallon argued that the Special Representative of the Secretary-General ("SRSG") purportedly appended a disclaimer to the Lomé Agreement to the effect that the UN did not recognise the validity of the amnesty in respect of war crimes, crimes against humanity or genocide. The Defence argued that the Secretary-General's Report only states

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[25] Article IX(3) Lomé Agreement.
[26] Lomé Peace Agreement (Ratification) Act, 15 July 1999.
[27] Adopted 23 May 1969, entered into force 27 January 1980, UNTS vol. 1155, 331.

that an instruction was given to the SRSG - not that it was carried out.[28] The Defence observed that it is not clear when and how such a disclaimer was made - whether orally or in writing at the time of signature or indeed sometime after 7 July 1999. Although the Orentlicher *Amicus* Brief stated that the instructions given to the SRSG to append a disclaimer were issued pursuant to policy guidelines issued by the UN Secretary-General to assist envoys and representatives involved in peace negotiations,[29] that cannot be right according to Kallon's defence. The *Amicus* Brief implied that the policy was issued pursuant to a Statement of Secretary-General Kofi Annan on 10 December 1999. Thus, the Defence argued, it would appear that the guidelines were formulated after the adoption of the Lomé Agreement, perhaps in order to avoid any repeat of the confusion or misunderstanding as to the UN's position resulting from Lomé. The SRSG's disclaimer is and was limited to any action to be taken by the UN, and the Government of Sierra Leone itself was expected to abide by and honour the amnesty provision.

27. The Defence argued that at the time of signing the Lomé Agreement it was widely accepted that the price of peace was an amnesty for the warring factions, as the various members of the Security Council explained when adopting Resolution 1260.[30]

28. The Defence refers to the State Opening of Parliament (16 June 2000) where President Kabbah said: "My Government for its part remains committed to the Lomé Peace Accord, but the RUF must now demonstrate its own commitment and sincerity, in very practical ways, to convince the people of this country that they will implement the letter and spirit of the Accord and ensure lasting peace and prosperity in Sierra Leone".[31]

29. Furthermore, there was the statement to the Truth and Reconciliation Commission on 5 August 2003 as follows:

> We had resisted the persuasion of the international community for the exclusion of war crimes, crimes against humanity and against international humanitarian law from the applicability of the amnesty provision in the Lomé Agreement. We did this deliberately.... Thus, we put beyond the ability and outside the

[28] The report referred to is the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN DOC S/2000/915, 4 October 2000.
[29] Orentlicher *amicus* brief, p. 3.
[30] SC Res 1260(1999), 20 August 1999.
[31] His Excellency the President's Address on the Occasion of the State Opening of the Fourth Session of the First Parliament of the Second Republic of Sierra Leone, 16 June 2000, http://www.sierra-leone.org/kabbah061600.html.

> jurisdiction of our domestic courts power over the prosecution of crimes committed before the signing of the Lomé Agreement since the amnesty granted amount [sic] to a constitutional bar to any form of prosecution in our domestic courts in respect of the offences amnestied.[32]

30. For their part counsel for Fofana argued first, that the Lomé Agreement is an agreement under international law because it was signed by six states and a number of international organisations as well as by the RUF which, it was argued, was an entity subject to rights and obligations which as *de facto* authority possessed limited international personality; second, that obligations arising from the Lomé Agreement, regarded as a treaty, cannot be altered by later treaties without the consent of the parties and, third, that international law does not prohibit the granting of amnesties.[33]

31. Counsel for Gbao submitted in line with the submissions made by the other Defence counsel that the Lomé Agreement created an internationally binding obligation not to prosecute the beneficiaries of the amnesty under the Agreement.[34]

32. The Prosecution's response was that the Lomé Agreement is not a treaty but an agreement signed between two national bodies. It was submitted that others who signed the agreement did not do so as parties but as moral guarantors who were facilitating and supporting the conclusion of the Agreement; the Lomé Agreement has no force under international law but was an agreement which had no legal basis until it was ratified by the enactment of the Lomé Act which itself had force only as a domestic law; the Lomé Agreement is no longer effective in domestic law since the Lomé Ratification Act had been impliedly repealed by the enactment of the Special Court (Ratification) Act 2002 ("the Implementing Legislation"); the disclaimer by the SRSG at the time of the signature of the Lomé Agreement that Article IX shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law was a correct interpretation by the UN of Article IX, and, on that correct interpretation, the Lomé Agreement does not apply to the prosecution of persons pursuant to the Statute of the Special Court.

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[32] A Statement by His Excellency the President Alhaji Dr. Ahmad Tejan Kabbah made before the Truth and Reconciliation Commission on Tuesday 5 August 2003, para. 35, Sierra Leone Web, http://www.sierra-leone.org/documents-kabbah.html.
[33] See Fofana Submissions, paras 11-28.
[34] Gbao Submissions, para. 14.

33. In the arguments presented by the Redress Trust ("Redress") as *amicus curiae*, it was submitted that the Special Court would in effect be questioning a measure taken by the Security Council under Chapter VII of the UN Charter if it took it upon itself to review the validity of the exception of the applicability of the Lomé amnesty for serious international crimes that was specifically requested in Resolution 1315. The amnesty granted by the Government of Sierra Leone cannot be interpreted as covering violations of international humanitarian law. The Lomé amnesty was a domestic amnesty. Premised on an obligation to prosecute or extradite persons accused of crimes under international law, it was submitted that application of an amnesty would be an unlawful interference with that duty. Appended to the written submissions of Redress are numerous useful materials in support of the submissions.

34. Professor Diane Orentlicher who was invited as *amicus curiae* made useful and extensive submissions which can be summarised as follows. As Article IX of the Lomé Agreement addressed and could have legal force in respect of the national legal system of Sierra Leone only, the amnesty does not legally circumscribe the jurisdiction of the Special Court which has been established outside the national court system and operates independently of the Sierra Leonean national system. Any amnesty that encompasses crimes against humanity, serious war crimes, genocide or torture would be of doubtful validity under international law. However, Article IX of the Lomé Agreement was addressed to the question of prosecutions before national courts of Sierra Leone. States cannot use domestic legislation to bar international criminal liability.

35. Professor Orentlicher argued that there can be no amnesty where a treaty requires prosecution, or has been interpreted or would be likely to be interpreted by their supervisory bodies as requiring state parties to investigate and, if warranted, prosecute serious violations.

III. DISCUSSION

A. The Status of the Lomé Agreement

36. In view of the submissions made and in order to put the issues in proper perspective, the starting point is to determine the character of the Lomé Agreement. The Defence argues that it is an international agreement having the character of a treaty. The Prosecution, the *amici curiae* agreeing, argue that it is an agreement within municipal law between two bodies within the state.

37. In regard to the nature of a negotiated settlement of an internal armed conflict it is easy to assume and to argue with some degree of plausibility, as Defence counsel for the defendants seem to have done, that the mere fact that in addition to the parties to the conflict, the document formalising the settlement is signed by foreign heads of state or their representatives and representatives of international organisations, means the agreement of the parties is internationalised so as to create obligations in international law.

38. Indeed, such argument finds support in the opinion of Professor Kooijmans.[35] He used as an example the peace accord of 1994 embodied in the Lusaka Protocol concluded to end the armed conflict in Angola. The Lusaka Protocol was signed by the Presidents of the Republic of Angola and of UNITA and by the SRSG of the UN as mediator in the presence of the representatives of the observer states, the United States, Russia and Portugal. Admittedly, the Lusaka Protocol was not an inter-state agreement. However, upon UNITA failing to comply with the agreement, the Security Council by Resolution 1127 (1997) ordered mandatory travel sanctions to be imposed on senior UNITA officials; and if UNITA continued its obstruction the Council would take further measures such as trade and financial restrictions. The Council emphasised the "urgent need for the Government of Angola and in particular UNITA to complete without further delay the implementation of their obligations under the...Lusaka Protocol...and the relevant Security Council resolutions"[36] and deplored the failure by UNITA to comply with its obligations under the relevant peace accords (of which the Lusaka Protocol was one) and the Security Council resolutions. It then demanded that UNITA implement its obligations under the Lusaka Protocol. The Council determined that the resulting situation in Angola constituted a threat to international peace and security in the region, and in consequence acted under Chapter VII of the UN Charter in the measures it took. Upon these facts, Kooijmans was of the opinion as follows in regard to the Lusaka Protocol and the obligation it created:

> The fact that it is concluded between a government and an insurrectionist party does not in itself detract from its international character. The United Nations as an organization of states has been deeply involved in the conflict, peace keeping forces have been deployed, the Secretary-General through his Special Representative has continuously mediated. If a settlement is reached which is co-signed by the Secretary-

[35] P.H. Kooijmans, "The Security Council and Non-State Entities as Parties to Conflicts", in K. Wellens (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (Kluwer Law International, 1998), pp. 333-346.
[36] SC Res 1127(1997), 28 August 1997.

> General's Representative, the non-state entity must be assumed not only to have committed itself to its counterpart, the Government but also to the United Nations.[37]

39. It is manifest that the learned commentator assumed that the Lusaka Protocol, though not in the form of a 'genuine international instrument' drew its 'internationalised character' from the factors he stated in the passage above. It is difficult to agree with this conclusion. The role of the UN as a mediator of peace, the presence of a peace-keeping force which generally is by consent of the State and the mediation efforts of the Secretary-General cannot add up to a source of obligation to the international community to perform an agreement to which the UN is not a party. As will be seen, action taken by the Security Council upon failure of a party to implement the peace agreement derives from Chapter VII of the UN Charter and not from the peace agreement.

40. Almost every conflict resolution will involve the parties to the conflict and the mediator or facilitator of the settlement, or persons or bodies under whose auspices the settlement took place but who are not at all parties to the conflict, are not contracting parties and who do not claim any obligation from the contracting parties or incur any obligation from the settlement.

41. In this case, the parties to the conflict are the lawful authority of the State and the RUF which has no status of statehood and is to all intents and purposes a faction within the state. The non-contracting signatories of the Lomé Agreement were moral guarantors of the principle that, in the terms of Article XXXIV of the Agreement, "this peace agreement is implemented with integrity and in good faith by both parties". The moral guarantors assumed no legal obligation. It is recalled that the UN by its representative appended, presumably for avoidance of doubt, an understanding of the extent of the agreement to be implemented as not including certain international crimes.

42. An international agreement in the nature of a treaty must create rights and obligations regulated by international law so that a breach of its terms will be a breach determined under international law which will also provide principle means of enforcement. The Lomé Agreement created neither rights nor obligations capable of being regulated by international law. An agreement such as the Lomé Agreement which brings to an end an internal armed conflict no doubt creates a factual situation of restoration of peace that the international community acting through the Security Council may take note of. That, however, will not

[37] Kooijmans (n. 33 above), p. 338.

convert it to an international agreement which creates an obligation enforceable in international, as distinguished from municipal, law. A breach of the terms of such a peace agreement resulting in resumption of internal armed conflict or creating a threat to peace in the determination of the Security Council may indicate a reversal of the factual situation of peace to be visited with possible legal consequences arising from the new situation of conflict created. Such consequences such as action by the Security Council pursuant to Chapter VII arise from the situation and not from the agreement, nor from the obligation imposed by it. Such action cannot be regarded as a remedy for the breach. A peace agreement which settles an internal armed conflict cannot be ascribed the same status as one which settles an international armed conflict which, essentially, must be between two or more warring States. The Lomé Agreement cannot be characterised as an international instrument. That it does not have that character does not, however, answer the further question whether, as far as grave crimes such as are stated in Articles 2 to 4 of the Statute of the Court are concerned, it offers any promise that is permissible or enforceable in international law.

43. It was argued by Defence counsel that since the Lomé Agreement was ratified by the Parliament of Sierra Leone pursuant to the proviso to sub-section 4 of section 40 of the Constitution, it is a treaty or an agreement in the nature of a treaty. Subsection 4 of section 40 of the Constitution provided that:

> ... any Treaty, Agreement or Convention executed by or under the authority of the President which relates to any matter within the legislative competence of Parliament, or which in any way alters the law of Sierra Leone or imposes any charge on, or authorises any expenditure out of, the Consolidated Fund or any other fund of Sierra Leone, and any declaration of war made by the President shall be subject to ratification by Parliament.

44. The application of that sub-section to the Lomé Agreement does not make the agreement a treaty or an international agreement. There is nothing obnoxious in construing the word "Agreement" in section 40 in its primary and natural sense which may not necessarily imply an international agreement. Besides, what is a treaty or an international agreement is not determined by the classification of a transaction by a State, but by whether the agreement is regarded as such under international law and regulated by international law.

B. Do insurgents have treaty-making capacity?

45. Notwithstanding the absence of unanimity among international lawyers as to the basis of the obligation of insurgents to observe the provisions of Common Article 3 to the Geneva Conventions,[38] there is now no doubt that this article is binding on States and insurgents alike and that insurgents are subject to international humanitarian law. That fact, however, does not by itself invest the RUF with international personality under international law.

46. Common Article 3 of the Geneva Conventions recognises the existence of "Parties to the conflict". The penultimate sentence of Common Article 3 provides that: "The parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention". But the final clause of Common Article 3 also provides that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict." It has been explained that the penultimate sentence "underlines the fact that parties to an internal conflict are bound only to observe Article 3, remaining free to disregard the entirety of the remaining provisions in each of the Convention"[39] and that the final clause indicates that the insurgents may still be made subject to the State's municipal criminal jurisdiction. In an authoritative book on international law the view was expressed that:

> a range of factors needs to be carefully examined before it can be determined whether an entity has international personality and, if so, what right, duties and competences apply in the particular case. Personality is a relative phenomenon varying with the circumstances.[40]

47. It suffices to say, for the purpose of the present case, that no one has suggested that insurgents are bound because they have been vested with personality in international law of such a nature as to make it possible for them to be a party to the Geneva Conventions. Rather, a convincing theory is that they are bound as a matter of international customary law to observe the obligations declared by Common Article 3 which is aimed at the protection of humanity. No doubt, the Sierra Leone Government regarded the RUF as an entity with which it could enter

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[38] *See e.g.* Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 UNTS 135.

[39] L. Moir, *The Law of Internal Armed Conflict*, (Cambridge 2002), pp. 63-64. The author at p. 65 was of the view that the application of Article 3 does not constitute a recognition by the government that the insurgents have any authority, and certainly does not amount to a recognition of belligerency. He noted that "scholars have since argued that, despite the obvious intention of the framers of the Conventions, Article 3 must confer a measure of international legal personality upon the insurgents, at least they become the holders of rights and obligations under the Article."

[40] Shaw, *International Law*, p.176 (note 22 above).

into an agreement. However, there is nothing to show that any other State had granted the RUF recognition as an entity with which it could enter into legal relations or that the Government of Sierra Leone regarded it as an entity other than a faction within Sierra Leone.

48. Although a degree of organisation of the insurgents may be a factor in determining whether the factual situation of internal armed conflict existed, the distinction must be borne in mind between the factual question whether the insurgents are sufficiently organised and the question of law, with which the issue in these proceedings is concerned, whether as between them and the legitimate government international law regarded them as having treaty-making capacity. International law does not seem to have vested them with such capacity. The RUF had no treaty-making capacity so as to make the Lomé Agreement an international agreement.

49. The conclusion seems to follow clearly that the Lomé Agreement is neither a treaty nor an agreement in the nature of a treaty. However, it does not need to have that character for it to be capable of creating binding obligations and rights between the parties to the agreement in municipal law. The consequence of its not being a treaty or an agreement in the nature of a treaty is that it does not create an obligation in international law.

50. The validity of Article IX of the Lomé Agreement in the municipal law of Sierra Leone is not of prime importance in these proceedings since the challenge to its validity had not been based on municipal law. It is expedient for this Court to confine itself to the limited questions that arise in regard to Article IX of the Lomé Agreement. These are, ultimately, whether in international law it bars this Court from exercising jurisdiction over the defendants in regard to crimes against humanity allegedly committed by them before the date of the Lomé Agreement, and whether it provides materials that are grounds for this Court to exercise a discretion to stay the proceedings as being an abuse of process.

C. Legal Consequence of Article 10 of the Statute

51. In these proceedings the validity of the constitutive instruments of the Special Court is not in issue. They are the documents that define the competence and jurisdiction of the Court and the provisions with which this Court is bound to comply. The purpose for which the Special Court is established, the nature of the Court as an autonomous, independent institution, and the jurisdiction of the Court have been discussed in paragraphs 12-15 above.

52. The constitutive document of the Special Court (the Agreement) with the Statute of the Court annexed to and forming part of it, is a treaty.

53. Article 1(1) of the Statute of the Special Court spells out the temporal jurisdiction of the Court while Article 10 expressly provides:

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

54. Counsel for Kallon submitted that notwithstanding Article 10, this Court should exercise a discretion to stay the proceedings as being an abuse of process of the Court. The amnesty is thus not pleaded only as a legal bar to prosecution.[41]

55. Counsel for Kallon put his submissions, summarised, thus: The claim by the Prosecution and Redress that Article 10 closes the door on any consideration of the applicability of the Lomé Accord to proceedings before the Special Court should not be accepted. The Special Court of Sierra Leone is a 'hybrid' court, established pursuant to an agreement between the UN and the Government of Sierra Leone. Thus, it could not have been established without the consent and agreement of the Government of Sierra Leone. If the Special Court were a truly international tribunal, established by Security Council Resolution (as in the case of the International Criminal Tribunals for Rwanda and the Former Yugoslavia), it is accepted that the actions of the Government of Sierra Leone and the amnesty would be of no relevance. This was confirmed by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Furundzija*[42] in which it was held that a domestic amnesty law would not prevent prosecution for torture before the ICTY or indeed in any other foreign jurisdiction. *Furundzija* did not consider, and is silent on, the circumstances in which it could be an abuse of process to prosecute torture in a domestic court after an undertaking that no criminal prosecution would ensue. In *Furundzija* the Trial Chamber set out the jurisdictions in which an individual could be prosecuted for torture following an amnesty: (i) international tribunal, (ii) foreign State, or (iii) in their own State under a subsequent regime.[43]

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[41] Kallon Preliminary Motion, paras 15-26.
[42] *Prosecutor v Anto Furundzija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, ("*Furundzija* Trial Judgement"), para. 155.
[43] *Ibid.*

56. Counsel for Kallon went on to argue that in the Lomé Accord, the Government of Sierra Leone clearly undertook to "ensure that no official or judicial action is taken against any member of the RUF/SL".[44] The Defence submitted that this would include acceding to an extradition request which would require 'judicial action' and, moreover, that there can be no doubt that the establishment of a Special Court to prosecute alleged crimes committed in Sierra Leone since 30 November 1996 amounts to both 'official' and 'judicial' action. Thus, according to the Defence, in engaging in negotiations with the UN and then ultimately concluding an agreement with them for the establishment of the Special Court, the Government of Sierra Leone clearly reneged on its undertaking in the Lomé Accord.

57. The Defence argued that Article 10 of the Special Court Statute is not a bar to the Court considering whether the Government's actions in establishing the Special Court could render prosecution of those granted an amnesty an abuse of process. In *Prosecutor v. Dusko Tadic,*[45] the ICTY Appeals Chamber rejected the Prosecution's claim that the ICTY lacked authority to review its establishment by the Security Council. The Special Court must be able to do the same. The Defence submitted that as the Court is able to review the lawfulness of its own establishment it may similarly review the applicability of any one provision within its Statute. It may certainly hold that a provision of its Statute should not act as a bar to finding an abuse of process of the court.

58. It was further argued that there was an inconsistent approach to amnesty in that the temporal jurisdiction of the Special Court, pursuant to Article 1(1) of the Statute commenced on 30 November 1996, selected to coincide with the conclusion of the Abidjan Peace Agreement, whereas Article 14 of the Abidjan Agreement granted an amnesty to all members of the RUF from any official or judicial action being taken against them. It was, therefore, contended that it was both arbitrary and illogical of both the UN and the Government of Sierra Leone to appear to honour the terms of one agreement and respect the amnesty granted, but not another.[46]

59. Moreover, the Defence speculated that the Office of the Prosecutor may have offered *de facto* amnesty to certain individuals known by the Prosecution to have committed offences similar to those alleged against Kallon. It was speculated whether such individuals had been offered

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[44] Article IX(3).

[45] *Prosecutor v Dusko Tadić*, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction, 10 August 1995. ("*Tadic* Decision on Jurisdiction").

[46] Kallon Preliminary Motion, paras 11-13.

immunity as a result of cooperation with the Prosecution and after agreement to act as Prosecution witnesses.

60. For his part, counsel for Gbao (intervening) submitted that the Special Court has the jurisdiction to examine its own jurisdiction and, therefore, the power to determine whether it is bound by Article 10 of the Statute. Counsel argued that Article 10 relates to admissibility once jurisdiction is established. He submitted that if the laws of the international community and the law of Sierra Leone indicate that the Court does not have or should not exercise jurisdiction, the Court can make a finding either way, notwithstanding Article 10. The Special Court as a mechanism for maintaining international peace and security as well as national reconciliation, not only has inherent jurisdiction to decline to exercise jurisdiction where there has been an abuse of process of the court, "but also where there has been an abuse of the international legal system".[47] In his submission, the Lomé Agreement created an internationally binding obligation.

IV. THE QUESTION CONSIDERED

61. That this court will normally not claim jurisdiction to exercise a power of review of a treaty or treaty provisions on the ground that it is *unlawful* seems evident, except, perhaps in cases where it can be said that the provisions of Article 53 or Article 64 of the Vienna Convention on the Law of Treaties apply. Article 53 reads:

> A treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64 reads:

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

[47] Gbao Submissions, para 9.

62. This court cannot question the validity of Article 10 of its Statute on the ground that it is unlawful unless it can be shown that, in the terms of Article 53 or Article 64 of the Vienna Convention or of customary international law it is void. That has not been shown in this case. It may be pointed out at this stage that the decision in *Tadic* upon which Kallon's counsel relied as authority for the submission that this Court can pronounce on the lawfulness of its own establishment is not apt. The ICTY is not a treaty-based Tribunal, nor did the *Tadic* case involve the validity of the provisions of a treaty but rather the extent of the powers of the Security Council, an authority established by the UN Charter. Besides, the question may need to be revisited when the occasion arises as to the legal basis of the power of a body purportedly established as a court to make a *binding* declaration that it is not a court, when only a court legally established has jurisdiction to make such declaration that would have a binding force! The position would be different were a court duly established to be called upon to declare the limits of its powers.

63. It was argued by counsel for Kallon that by agreeing to Article 10 of the Statute, the Government of Sierra Leone had reneged on the undertaking in Article IX(2) of the Lomé Agreement.[48] In interpreting the Lomé Agreement it must be presumed, on the basis of effectiveness, that the Government of Sierra Leone undertook only that which was within its power to perform. In this sense "official and judicial action" mentioned in Article IX(2) of the Lomé Agreement must relate to official and judicial action of Sierra Leone and not, as in this case, of the international community. No reasonable tribunal will hold that the Government of Sierra Leone has reneged on its undertaking by agreeing to Article 10 of the Statute which is consistent with the developing norm of international law and with the declaration of the representative of the Secretary-General on the execution of the Lomé Agreement. Besides, even if it can be said that the Government of Sierra Leone had reneged on its undertaking, it would not be valid ground for declaring the invalidity of Article 10. The grounds on which a party to a treaty can challenge its validity, apart from the ground that it is unlawful, are a manifest violation of a rule of internal law of fundamental importance, error, fraud, and corruption and coercion. These grounds operate as vitiating the consent of the party impugning the validity of the treaty and must be raised by the party who claims that its consent had been vitiated. No such grounds have been raised in this case in which the consent of Sierra Leone to the treaty was itself the grievance of the accused.

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[48] Oral submissions.

64. It is evident that no ground on which the validity of Article 10 of the Statute can be impugned has been established. In the result, the line of reasoning pursued by counsel for the defendants and the intervening defendant, pursued to its logical conclusion, would lead to an absurd conclusion that although Article 10 is valid, since no ground on which its validity can be impugned has been established, this court, nevertheless, is not bound to comply with its provisions, but should, regardless of and contrary to its provisions, hold that by reason of the undertaking of the Government of Sierra Leone to grant an amnesty to the defendants, it has no jurisdiction to try the defendants for crimes committed before the date of the Agreement, or that it could exercise a discretion to stay proceedings on the ground that they amount to an abuse of process of the Court.

65. What rightly falls for consideration is not whether the undertaking in the Lomé Agreement made by the Government of Sierra Leone to grant an amnesty is binding on the Government of Sierra Leone, but whether such undertaking could be effective in depriving this Court of the jurisdiction conferred on it by the treaty establishing it, and, if it could not be so effective, whether its existence is a ground for staying the proceedings by reason of the doctrine of abuse of process.

V. THE LIMITS OF AMNESTY

66. *Black's Law Dictionary* defines 'amnesty' in the following terms:

> A sovereign act of oblivion for past acts, granted by a government to all persons (or to certain persons) who have been guilty of crime or delict, generally political offences, - treason, sedition, rebellion, - and often conditioned upon their return to obedience and duty within a prescribed time.[49]

It is also stated that:

> Amnesty is the abolition and forgetfulness of the offence; pardon is forgiveness. (*Knote v. U.S.* 95 U.S. 149, 152.) The first is usually addressed to crimes against the sovereignty of the nation, to political offences, the second condones infractions of the peace of the nation. (*Burdick v. United States*, 236 U.S. 79, 35 S. Ct. 267, 271, 59 L.Ed).[50]

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[49] *Black's Law Dictionary* (5th Ed., 1983), p. 76.
[50] *Ibid.*

67. The grant of amnesty or pardon is undoubtedly an exercise of sovereign power which, essentially, is closely linked, as far as crime is concerned, to the criminal jurisdiction of the State exercising such sovereign power. Where jurisdiction is universal,[51] a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.

68. A crime against international law has been defined as "an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act would probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state."[52] In *re List and Others*, the US Military Tribunal at Nuremberg defined an international crime as: "such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances."[53] However, not every activity that is seen as an international crime is susceptible to universal jurisdiction.[54]

69. The question is whether the crimes within the competence of the Court are crimes susceptible to universal jurisdiction. The crimes mentioned in Articles 2-4 of the Statute are international crimes and crimes against humanity. Indeed, no suggestion to the contrary has been made by counsel. One of the most recent decisions confirming the character of such crimes is the *Tadić* Jurisdiction Decision.[55] The crimes under Sierra Leonean law mentioned in Article 5 do not fall into the category of such crimes and are not mentioned in Article 10.

70. One consequence of the nature of grave international crimes against humanity is that States can, under international law, exercise universal jurisdiction over such crimes. In *Attorney General of the Government of Israel v. Eichmann* the Supreme Court of Israel declared:

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[51] Under the universality principle, each and every state has jurisdiction to try particular offences. See Shaw, *International Law*, p. 592 (note 22 above).
[52] International Law in the Twentieth Century: Essay by Quincy Wright, p. 623, 641.
[53] See Kittichaisare, *International Criminal Law*, (Oxford, 2001), p.3.
[54] "The fact that a particular activity may be seen as an international crime does not itself establish universal jurisdiction and state practice does not appear to have moved beyond war crime, crimes against peace and crimes against humanity in terms of permitting the exercise of such jurisdiction." See Shaw, *International Law*, p.597 (note 22 above).
[55] See *supra* note 45.

> The abhorrent crimes defined in this Law are not crimes under Israeli law alone. These crimes which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.[56]

Also, in *Congo v Belgium*[57] it was held by the International Court of Justice that certain international tribunals have jurisdiction over crimes under international law. This viewpoint was similarly held by the ICTY in *Furundzija*.[58]

71. After reviewing international practice in regard to the effectiveness or otherwise of amnesty granted by a State and the inconsistencies in state practice as regards the prohibition of amnesty for crimes against humanity, Cassese conceptualised the status of international practice thus:

> There is not yet any general obligation for States to refrain from amnesty laws on these crimes. Consequently, if a State passes any such law, it does not breach a customary rule. Nonetheless if a court of another State having in custody persons accused of international crimes decide to prosecute them although in their national State they would benefit from an amnesty law, such court would not thereby act contrary to general international law, in particular to the principle of respect for the sovereignty of other States.[59]

The opinion stated above is gratefully adopted. It is, therefore, not difficult to agree with the submission made on behalf of Redress that the amnesty granted by Sierra Leone cannot cover crimes under international law that are the subject of universal jurisdiction. In the first place, it stands to reason that a state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*.[60]

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[56] *Attorney-General of the Government of Israel v. Eichman*, (1961) 36 ILR 5, 12.
[57] *Case concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002, para. 61.
[58] *Furundzija* Trial Judgement, para 14.
[59] A. Cassese, *International Criminal Law* (Oxford, 2003), 315.
[60] See *Barcelona Traction, Light and Power Co Case (Belgium v Spain)* [1970] ICJ Reports 3; See also Moir, *The Law of Internal Armed Conflict*, 57, "It has been suggested that three groups of [peremptory] norms exist: those protecting the foundations

72. In view of the conclusions that have been arrived at in paragraph 69, it is clear that the question whether amnesty is unlawful under international law becomes relevant only in considering the question whether Article IX of the Lomé Agreement can constitute a legal bar to prosecution of the defendants by another State or by an international tribunal. There being no such bar, the remaining question is whether the undertaking contained in Article IX is good ground for holding that the prosecution of the defendants is an abuse of process of the Court.

73. It is not difficult to agree with the submissions made by the *amici curiae*, Professor Orentlicher and Redress that, given the existence of a treaty obligation to prosecute or extradite an offender, the grant of amnesty in respect of such crimes as are specified in Articles 2 to 4 of the Statute of the Court is not only incompatible with, but is in breach of an obligation of a State towards the international community as a whole.[61] Nothing in the submissions made by the Defence and the interveners detracts from that conclusion. The case of *Azapo v. President of the Republic of South Africa*[62] is purely one dealt with under the domestic laws of South Africa. It was not a case in which the jurisdiction of another State or of an international court to prosecute the offenders is denied. The decisive issues which have arisen in the case before us did not arise in that case.

74. It may well be noted that the President of Sierra Leone did acknowledge that "there are gaps in Sierra Leonean law as it does not encompass such heinous crimes as those against humanity and some of the gross human rights abuses committed"[63] and also that the intention of the amnesty granted was to put prosecution of such offences outside the jurisdiction of national courts.

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of law, peace and humanity; those rules of co-operation protecting fundamental common interests; and those protecting humanity to the extent of human dignity, personal and racial equality, life and personal freedom." See also I. Brownlie, *Principles of International Law*, (6th Ed., 2003) where prohibition of crimes against humanity is included as an example of a *ius cogens* norm, p. 489.

[61] Indeed in 1999, the UN Commission on Human Rights made what can be regarded as a statement of universal jurisdiction in the following terms: "[I]n any armed conflict, including an armed conflict not of an international character, the taking of hostages, wilful killing and torture or inhuman treatment of persons taking no active part in hostilities constitutes a grave breach of international humanitarian law, and that all countries are under obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches and bring such persons regardless of their nationality, before their own courts." See *Situation of Human Rights in Sierra Leone*, U.N. Commission on Human Rights, 54th Session, U.N. Doc. E/CN. 4/RES/1999/1 (1999). See also, Babafemi Akinrinade, 'International Humanitarian Law and the Conflict in Sierra Leone', 15 *Notre Dame Journal of Law, Ethics and Public Policy*, 391-454 (Fall 2001) at pp. 442-443.

[62] *Azapo v. President of the Republic of South Africa* (4) SA 653 (1996).

[63] See Letter dated 9 August 2000, (note 16 above).

VI. ABUSE OF PROCESS

75. The question of abuse of process arose because it was submitted on behalf of Kallon that it would be an abuse of process of the Special Court to permit the prosecution of Kallon for alleged crimes pre-dating the Lomé Agreement. This was an alternative position taken by the defendants should the Court hold that the amnesty granted by the Lomé Agreement did not bar prosecution of the defendants and the interveners. It was argued that notwithstanding the fact that there may be jurisdiction to prosecute the defendants and the interveners, the Court should exercise discretion to stay proceedings on the ground that the prosecution itself was in abuse of process of the court.

76. The discretion to stay proceedings brought in abuse of the process of the Court in appropriate cases is undoubted. It is a jurisdiction that derives from what was described in the *Tadic* Jurisdiction Decision as "the 'incidental' or 'inherent' jurisdiction which derives automatically from the exercise of the judicial function."[64] The question in this case is not whether the Court has such discretionary power but whether it is exercisable in this case.

77. Counsel on behalf of Kallon argues that it is, and he puts his argument in this manner: It is settled law that any Court has an inherent power to stay criminal proceedings. In *Barayagwiza* the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) expressly acknowledged that "the abuse of process doctrine may be relied upon in two distinct situations: (1) where delay has made a fair trial of the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct."[65] In deciding to stay the proceedings against Barayagwiza, who was charged with inter alia genocide and crimes against humanity, the Appeals Chamber held:

> The Tribunal - an institution whose primary purpose is to ensure that justice is done - must not place its imprimatur on such violations. To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals - including those charged with unthinkable crimes - would be among

[64] *Tadić* Jurisdiction Decision, para 18.
[65] *Jean-Bosco Barayagwiza v The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999, para 77.

> the most serious of consequences of allowing the Appellant to stand trial in the face of such violations of his rights.[66]

Thus, according to the Defence, the abuse of process doctrine is applicable to international crimes and is applied to serious crimes in domestic courts. The Defence argues that domestic courts have jurisdiction to try crimes akin to those alleged in this case and if an abuse of process occurred during domestic proceedings for such crimes it would be unthinkable for a court to apply different principles to the case simply on account of the seriousness of the allegations. According to the Defence, the abuse of process doctrine clearly applies to so called 'international crimes' for which there is a duty to 'extradite or prosecute' in domestic courts.

78. The Prosecution's response is that prosecution by the Court would not be an abuse of the process of the Court because it could not be an abuse of process to comply with the express provisions of Article 10 of the Statute, particularly, in the circumstances that "(a) Article IX is of no effect in international law; (b) has been repealed as a matter of *national* law to the extent that it could apply to crimes under Articles 2 - 4 of the Special Court's Statute and (c) on its correct interpretation does not even apply to crimes under Articles 2 - 4 of the Special Court's Statute."[67]

79. At the root of the doctrine of abuse of process is fairness. The fairness that is involved is not fairness in the process of adjudication itself but fairness in the use of the machinery of justice. The consideration is not only about unfairness to the party complaining but also whether to permit such use of the machinery of justice will bring the administration of justice into disrepute. In A. G. *of Trinidad and Tobago v Phillip*[68] the Privy Council said, rightly:

> The common law has now developed a formidable safeguard to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so. It could well be an abuse of process to seek to prosecute those who have relied on an offer of promise of a pardon and complied with the conditions subject to which that offer or promise was made. If there were not circumstances justifying the state in not fulfilling the terms of its offer or promise, then the courts could well intervene to prevent injustices: see *Reg. v. Mines and Green* [1983] 33 S.A.S.R. 211.

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[66] *Ibid*, para 112.
[67] Prosecution Response to the Kallon Preliminary Motion, para. 15, emphasis in the original.
[68] G. *of Trinidad and Tobago v Phillip* 1 A.C.396 at 417 (1995).

80. Where there is an express provision of a statute that a tribunal shall not take into consideration a fact or an event as ground for declining to exercise its jurisdiction (other than a fact or event that affects the fairness of the trial itself as to constitute a violation of the right to fair hearing), such tribunal will be acting unlawfully if it circumvents the express provision of the statute under the guise of an inherent discretionary power. Article 10 of the Statute which provides that 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 is an express limitation on an exercise of the discretion of the Court to bar proceedings solely on the strength of such amnesty.

81. It must be stated, though no one has so suggested, that there was no bad faith in the inclusion of Article 10 in the Statute. There was the clear statement in the preamble to Resolution 1315 (2000) of the Security Council that "[t]he Special representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law". There was also the statement earlier referred to by the President of Sierra Leone that the amnesty was intended to be effective only in regard to the national courts.

82. The submission by the Prosecution that there is a "crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law" is amply supported by materials placed before this Court. The opinion of both *amici curiae* that it has crystallised may not be entirely correct, but that is no reason why this court in forming its own opinion should ignore the strength of their argument and the weight of materials they place before the Court. It is accepted that such a norm is developing under international law. Counsel for Kallon submitted that there is, as yet, no universal acceptance that amnesties are unlawful under international law, but, as amply pointed out by Professor Orentlicher, there are several treaties requiring prosecution for such crimes. These include the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[69] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[70] and the four Geneva

[69] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UN General Assembly on 9 December 1948, 78 UNTS 277.
[70] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 4 February 1985, (1984) ILM 1027.

conventions.[71] There are also quite a number of resolutions of the UN General Assembly and the Security Council reaffirming a state obligation to prosecute or bring to justice. Redress has appended to its written submissions materials which include relevant conclusions of the Committee against torture, findings of the Human Rights Commission, and relevant judgments of the Inter-American Court.

83. Professor Orentlicher cautiously concluded that "to the extent that the amnesty encompasses crimes against humanity, serious war crimes, torture and other gross violations of human rights its validity is highly doubtful".[72] She was, however, emphatic in her opinion that the amnesty contravenes the United Nation's commitment to combating impunity for atrocious international crimes.

84. Even if the opinion is held that Sierra Leone may not have breached customary law in granting an amnesty, this court is entitled in the exercise of its discretionary power, to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity.

85. Upon its establishment the Special Court assumed an independent existence and is not an agency of either of the parties which executed the Agreement establishing the Court. It is described as 'hybrid' or of 'mixed jurisdiction' because of the nature of the laws it is empowered to apply. Its description as hybrid should not be understood as denoting that it is part of two or more legal systems. Prosecutions are not made in the name of Sierra Leone which plays no part in initiating or terminating prosecution and has no control whatsoever over the Prosecutor who exercises an independent judgement in his prosecutorial decision. The understanding of the United Nations in signing the Lomé Agreement is that the amnesty granted therein will not extend to such crimes covered by Articles 2 to 4 of the Statute of the Court. The understanding of Sierra Leone from the statement made on the inauguration of the Truth Commission was that the amnesty affected only prosecutions before national courts. All these are consistent with the provisions of Article 10 of the Statute and the universal jurisdiction of other states by virtue of the nature of the crime to

[71] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention Relative to the Treatment of Prisoners of War; Convention Relative to the Protection of Civilians in Time of War. Geneva, 12 August 1949.
[72] Orentlicher *amicus* brief, p. 24.

prosecute the offenders. All these are factors which make the prayer that proceedings be stayed by reason of abuse of process untenable.

VII. SUMMARY OF CONCLUSIONS

86. The Lomé Agreement is not a treaty or an agreement in the nature of a treaty. The rights and obligations it created are to be regulated by the domestic laws of Sierra Leone. In the result, whether it is binding on the Government of Sierra Leone or not does not affect the liability of the accused to be prosecuted in an international tribunal for international crimes such as those contained in Articles 2 to 4 of the Statute of the Court.

87. The validity of Article 10 of the Statute has not been successfully impugned. That Article is an express statutory limitation on the discretion of the Court to decline jurisdiction on the sole ground that an amnesty has been granted to a defendant.

88. Whatever effect the amnesty granted in the Lomé Agreement may have on a prosecution for such crimes as are contained in Articles 2 to 4 in the national courts of Sierra Leone, it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction.

89. The interpretative declaration appended by the Secretary-General's representative at the signing of the Lomé Agreement is in accordance with international law and is sufficient indication of the limits of the amnesty granted by the Agreement.

90. The prosecution of the accused by an independent autonomous court, initiated by an independent prosecutor and not brought in the name of Sierra Leone, is not tainted by whatever undertaking any accused claiming the benefit of the amnesty may have believed he had from the Government of Sierra Leone. Such undertaking could not affect the independent judgment of the Prosecutor who is not responsible to the Sierra Leonean Government.

VIII. DISPOSITION

91. On the whole the Preliminary Motion lacks merit and is dismissed.

Done at Freetown this 13th Day of March 2004

Justice Winter
Presiding

Justice King

Justice Ayoola

[Seal of the Special Court for Sierra Leone]