



Amnesty Not a Bar to Prosecution

Sierra Leone Special Court

Special Court for Sierra Leone - Freetown

08 June 2004

FREETOWN - My discussion with people at the gas station in my "man-on-the-street" survey about what people think about the Special Court (see article of June 5, 2004) led me to wonder what exactly the Special Court decided about the Lome Agreement and why it isn't applicable here? While waiting for the Court to resume trial, I decided to investigate. The Lome Agreement (formally entitled "The Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone") signed on July 7, 1999, is the document by which the parties to the armed conflict in Sierra Leone formally agreed to end the war. Article IX of the Agreement requires that Sierra Leone not take any steps to prosecute the parties for acts committed during the war. More specifically, Article IX (3) says "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 organizations since March, 1991, up to the date of the agreement." The Government is to "grant absolute and free pardon and reprieve to all combatants and collaborators." (Art. IX (2)) Yet, here we are in 2004 with a hybrid court, created at the request of the Sierra Leonean government, trying cases against these very parties. How is it possible?

The answer is found in the Appeals Chamber's 13 March 2004, *The Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Case No. SCSL-2004-15-AR72 (E), Decision on Challenge to Jurisdiction: Lome Accord Amnesty. In a motion filed last year, defendants argued that the Lome Agreement is binding on Sierra Leone. By working with the UN to establish the Special Court, the Defense claims that the Government of Sierra Leone reneged on its obligations under the Lome Agreement. They further argued that because the Lome Agreement granted amnesty for crimes committed prior to July 1999, the Court should exercise its discretion to stay the proceedings for charges for crimes committed before that date as being "an abuse of process." The Defense also contended that the hybrid nature of the Court meant that it is not truly an international tribunal, and the actions of the Government of Sierra Leone and the grant of amnesty is relevant. Counsel for Fofana intervened and argued that the Lome Agreement is an agreement under international law because it was signed by six states and a number of international organizations, and that as a treaty it cannot be altered by later treaties without consent of the parties. Lastly, the defense argued that international law does not prohibit the granting of amnesties.

The Appeals Chamber held that the Lome Agreement created neither rights nor obligations capable of being regulated by international law (para 42) and therefore can not be characterized as an international agreement. It further held that the RUF, though bound to adhere to the requirements of Common



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Judges:

Justice Emmanuel Ayoola
Justice George Gelata King
Justice Renate Winter

Prosecutors:

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

Defence Counsel:

Andreas O'Shea
James Oury
Ken Fleming, Q.C.
Michiel Pestman
Stephen Powles

Indictees Mentioned:

Fofana, Moinina
Gbao, Augustine
Kallon, Morris
Kamara, Brima Bazzy

Amicus:

International Commission of Jurists
Lawyers' Committee for Human Rights
Professor Diane F. Orentlicher
Redress Trust

Article 3 to the Geneva Conventions, did not have treaty-making capacity. The Appeals Chamber pointed out that Article 10 of the Statute of the Special Court, which explicitly provides that “Any 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 valid. Even if Sierra Leone had reneged on the Lome Agreement by agreeing to Article 10 (which the Appeals Chamber said it did not), that would not be a proper ground for declaring Article 10's invalidity. The grounds on which a party to a treaty can challenge its validity, apart from the ground that it is unlawful, include manifest violation of a rule of internal law of fundamental importance, error, fraud, corruption and coercion. None of these grounds were raised in this case. (para 63)

The Appeals Chamber found that the grant of amnesty or pardon applies only to a national criminal jurisdiction and cannot cover international crimes, such as crimes against humanity and war crimes covered in Articles 2-4 of the Statute, because those are crimes over which states may exercise universal jurisdiction. It is therefore “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.”(para 67) According to this ruling, the Lome Agreement therefore cannot deprive an international court, such as the Special Court, jurisdiction over these crimes.

Furthermore, the existence of a treaty obligation to prosecute or extradite an offender means that an agreement to grant amnesty in respect to international crimes is in breach of a State's obligation toward the international community as a whole. The Appeals Chamber recognized this, stating that there is a “crystallizing international norm that a government cannot grant amnesty for serious violations of crime under international law” (para. 82) and used “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.” (para.. 84)

The opinion also addressed a statement that the UN Special Representative had appended to his signature on the Lome Agreement. The statement said 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.” The Court found this note to be in accordance with international law and a sufficient indication of the limits of the amnesty granted by the agreement.

Finally, the Court held that although it is defined as “hybrid”, it is not part of two or more legal systems. Sierra Leone has no control over the Prosecutor of the Special Court who exercises independent judgment in making decisions to prosecute, nor is the Prosecutor bound by independent actions (real or imagine) taken by the government of Sierra Leone. The Court therefore found it would not be unduly unjust and an abuse of process to try people who believed they had amnesty under the Lome Agreement.

With this decision it seems war criminals can no longer be assured they will be safe from international prosecution -- even with an amnesty agreement.

Submitted by Sara Darehshori on 08 June, 2004 - Updated: 10 June 2004 14:37

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