

041

SCSL-2003-12-PT  
(111-1120)

1111

**SPECIAL COURT FOR SIERRA LEONE  
TRIAL CHAMBER**

**Before:** Judge Pierre Boutet  
Designated Judge

**Registrar:** Robin Vincent

**Date:** 7 November 2003

**The Prosecutor Against:** Allieu Kondewa

(Case No. SCSL-2003-12-PT)

---

**PRELIMINARY MOTION BASED ON LACK OF JURISDICTION/ABUSE  
OF PROCESS: AMNESTY PROVIDED BY LOMÉ ACCORD**

---

**Office of the Prosecutor:**

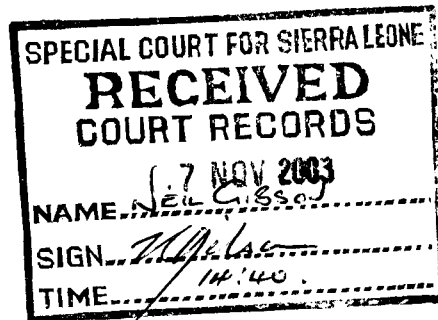
Luc Cote, Chief of Prosecution

**Defence Counsel:**

James MacGuill, MacGuill & Company

James Evans, MacGuill & Company

Charles Margai, Banta Chambers



1. Rule 72 of the Rules of Procedure and Evidence provides that preliminary motions by the accused include *inter alia* (i) objections based on lack of jurisdiction, and (ii) objections based on abuse of process.
2. The Accused presents this challenge to the jurisdiction of the Special Court without prejudice to his right to challenge legitimacy of the Statute of the Special Court either before this tribunal or otherwise.

### ***Factual Background***

3. The Accused has by Indictment dated 24 June 2003 been charged with Crimes Against Humanity, Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law in violation of Articles 2, 3 and 4 of the Statute of the Special Court for Sierra Leone. The Accused denies all charges presented in the Indictment.
4. All charges presented in the Indictment concern offences allegedly committed within the territory of Sierra Leone after 30 November 1996 and before 7 July 1999.
5. It is alleged that at all times relevant to the indictment, the Accused was the High Priest of the Civil Defence Forces (CDF).

### ***The Lomé Accord***

6. On 7 July 1999, President Alhaji Ahmad Tejan Kabbah signed the Lomé Accord on behalf of the Government of Sierra Leone.

7. Article IX of the *Lomé Accord* provided as follows:

(1) .....

(2) *After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute freedom, 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 time of 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. Further Article X provides:

*In order to ensure that the Constitution of Sierra Leone represents the needs and aspirations of the people of Sierra Leone and that no constitutional or any other legal provision prevents the implementation of the present Agreement, the Government of Sierra Leone shall take the necessary steps to establish a Constitutional Review Committee to review the provisions of the present Constitution, and where deemed appropriate, recommend revisions and amendments, in accordance with Part V, Section 108 of the Constitution of 1991.*

- 9. It is submitted that the Government of Sierra Leone is duty bound to honour the undertaking it made in agreeing to and signing the Lomé Accord. It is noted that at the time of signing the Lomé Accord, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in Article 9 of the Accord shall not apply to the international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. No such similar reservation was appended by President Kabbah on behalf of the Government of Sierra Leone. Thus, on the part of the Government of Sierra Leone the amnesty provision was accepted, valid and effective.
  
- 10. Additionally, no steps have been taken by the Government of Sierra Leone to remove the legal and/or constitutional provisions referred to in Part X of the Lomé Accord preventing implementation of the Lomé Accord. On the contrary, the Government of Sierra Leone has taken active steps to prevent the implementation of the Lomé Peace Accord; the Agreement for the Establishment of the Special Court of Sierra Leone and the Statute of the Special Court being but two examples.

***Special Court: Lack of Jurisdiction to Prosecute Crimes Pre-Dating Lomé Accord***

- 11. The Special Court for Sierra Leone is established pursuant to an Agreement between the United Nations and the Government of Sierra Leone (16 January 2002). The Special Court has been established, and could only have been established, with the agreement of the Government of Sierra Leone. The Government's participation and role in the establishment of the Special Court was vital and central.
  
- 12. It is submitted that the Government is bound to observe the amnesty it has granted and the jurisdiction of the Special Court, as a Government creation, should not include acts for which the Government has already granted an amnesty.

13. The reservation to the Amnesty in Lomé by the Special Representative of the Secretary General should not absolve the Government of Sierra Leone of honouring its obligation to uphold and honour the amnesty it has granted. The United Nations is only one party to the establishment of the Special Court, the other being the Government of Sierra Leone. That Government being the very same Government that signed Lomé and guaranteed an amnesty. When granting the amnesty, the Government was well aware of its duties and responsibilities in relation to it and should not now be permitted to renege on its position because the United Nations entered a reservation to Lomé and is also a party to the establishment of the Court.
  
14. In the Report of the Secretary General on the Establishment of a Special Court for Sierra Leone (UN Doc. S2000/915, 4 October 2000) the Secretary General stated:

*“In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:*

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

*With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed”.*

The position is not as simple as the Secretary-General of the United Nations contends and there is no justifiable reason for the amnesty provision not to be respected and applied by the Government of Sierra Leone in this case.

15. Having agreed on an amnesty for all combatants, collaborators and members of the RUF, the Government is bound to honour that obligation and is not free to now concur with the position of the United Nations because it is more expedient to do so.
16. It is recognised that there may be pressure on the Trial Chamber, as a constituent element of the Special Court, in part established by the United Nations, to follow the opinion of the Secretary-General of the United Nations as expressed in his report and find that the amnesty granted at Lomé has no application before the Special Court. It is submitted that such a course would be wrong in law and that the Trial Chamber must conduct an impartial and fair assessment of the law and facts presented and determine the extent of application of the Lomé Accord and the amnesty contained therein in its own right and independently of the opinion already expressed by the Secretary-General and the United Nations.
17. It is submitted that as a creation of both the Government of Sierra Leone and the United Nations, the Special Court of Sierra Leone should, notwithstanding Article 10 of the Special Court Statute, not assert its jurisdiction over alleged crimes committed prior to 7 July 1999. Thus all allegations pre-dating 7 July 1999 should be formally withdrawn from the indictment against the accused.
18. It is submitted that the burden is on the Prosecution and/or Government of Sierra Leone to demonstrate why the amnesty granted in the Lomé Accord should not be respected by the Special Court as a creation of the very same Government of Sierra Leone that freely and of its own will entered into the Lomé Accord and granted an amnesty for all conduct pre-dating the Lomé Accord.

***Abuse of Process of Special Court to Prosecute Crimes Pre-Dating Lomé Accord***

19. Additionally, and in the alternative, it is submitted that it would be an abuse of process of the Special Court to permit the prosecution of Allieu Kondewa for alleged crimes pre-dating 7 July 1999.
20. It is settled law that any court has an inherent power to stay criminal proceedings as an abuse of process of the Court: see *Connelly v DPP* (1964) 48 Cr.App.R 183 per Lord Ried at page 201:

*“... there must always be a residual discretion to prevent anything which savour or the abuse of process”*

Each case must be considered on its own facts.

21. The power to stay proceedings for abuse of process has been said to include a power to safeguard an accused person from oppression or prejudice: *Connelly v DPP*, and has been described as a formidable safeguard, developed by the common law, to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so: See *Attorney General of Trinidad and Tobago v Phillip* [1995] 1 AC 396 PC.
22. An abuse of process was defined in *Hui Chi-Ming v R* [1992] 1 AC 34 PC as:
- “... something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding”*.
23. In *Re Barrings plc and Others (No. 2); Secretary of State for Trade and Industry v Baker and Others* [1999] 1 All ER 311 CA, it was said that a court may stay proceedings where to allow them to continue would bring the administration of justice into disrepute among right thinking people and that

this would be the case if the court was allowing its process to be used as an instrument of oppression, injustice and unfairness.

24. In *R v Beckford* (1996) 1 Cr. App.R. 94, it was held that the Court had power to impose a stay of proceedings, either:
- (1) where the defendant could not receive a fair trial, and/or
  - (2) where it would be unfair for the defendant to be tried.
25. In *R v Mullen* [1999] 2 CrAppR 143 CA, it was held that the speeches in *R v Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42 HL, conclusively established that proceedings may be stayed in the exercise of the court's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.
26. It is submitted that after granting an amnesty or undertaking not to prosecute *inter alia* members of the CDF at Lomé on 7 July 1999, it would be an abuse of process of the Special Court to permit the prosecution of such persons for conduct pre-dating the agreement. The members of the CDF are particularly prejudiced by virtue of the fact that the Government of Sierra Leone represented the interests of the CDF at all times during the negotiation of the Lomé Accord. Unlike, the members of the RUF/SL, the members of the CDF were in a position of having a 'special relationship' of trust with the Government of Sierra Leone.
27. The prosecution of a person who, in exchange for his co-operation, has received an undertaking, promise or representation from the authorities that he would not be charged or prosecuted for an offence, is capable of amounting to an abuse of process. It is not necessary for the accused to show that the authorities had the power to make the decision not to prosecute; nor is it necessary for him to show that the case was one of bad faith: *R v Croydon JJ, ex parte Dean* 98 CrAppR 76 DC.



28. It is accepted that a breach of promise not to prosecute does not necessarily and *ipso facto* give rise to abuse, however, the longer that a person is left to believe that he will not be prosecuted the more unjust it becomes for the authorities to renege on its promise and any manifest prejudice to the accused resulting from his co-operation will make it inherently unfair to proceed: *R v Townsend and others* [1997] 2 CrAppR 540 CA.
29. In *Attorney General v Phillip*, the Privy Council held that it could amount to an abuse of process to seek to prosecute those who have relied on an offer or promise of a pardon even though the pardon was invalid.
30. The Trial Chamber is urged not to permit the prosecution of any alleged crimes pre-dating the Lomé Accord as an abuse of process of the Court resulting from the breaching of an undertaking to ensure that no official or judicial action is taken against any member of the RUF and to grant an absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives up until 7 July 1999.

***Application to reserve right to join arguments advanced by other accused.***

31. Rule 72 provides that preliminary motions are to be brought within 21 days following disclosure by the Prosecution to the Defence of all Rule 66(A)(i) material. A decision on the issue of disclosure is pending before the Special Court and is expected shortly. Defence Counsel disputes that adequate disclosure has been made in this case.
32. Counsel for the Accused intends to liaise with Counsel for the other accused before the Special Court as to how to proceed with any common preliminary motions to be pursued before the Special Court. Such co-operation between defence counsel is envisaged to be in the interests of the Special Court itself with a view to avoiding duplication of work and effort, and thereby crucially avoiding unnecessary expenditure by the Special Court. It is understood that

co-operation between the various accused, where possible, is a principle very much supported by the Registrar of the Court.

33. It is submitted that the application of the Amnesty provided for in the Lomé Accord is no doubt a point that will be pursued by a number of other accused before the Special Court. Counsel for Mr. Kondewa are aware that other accused will be advancing arguments on this point. Accordingly, Counsel for Mr. Kondewa reserve the right to join and adopt such further arguments on this point that are ultimately advanced by other accused.

***Application for Oral Argument***

34. It is submitted that this is a question of crucial and fundamental importance to the work of the Special Court and such that it would, in all the circumstances, be appropriate for the Trial Chamber and/or Appeal Chamber to have the benefit of oral argument from Counsel on this point. Accordingly, an oral hearing before the full Trial and/or Appeal Chamber is respectfully requested. Again, it is submitted that it would be in the interests of justice to allow all accused to seek to advance a similar argument to be present at any such oral argument.

***Orders Sought***

35. A ruling that all allegations against Allieu Kondewa in the Indictment pre-dating 7 July 1999 be withdrawn from the Indictment on account of falling outside of the jurisdiction of the Special Court; and/or
36. A ruling that all allegations against Allieu Kondewa in the Indictment pre-dating 7 July 1999 be withdrawn from the Indictment on account of amounting to an abuse of process of the Special Court for which a stay of proceedings should be granted and the Accused immediately released.
37. An oral hearing on this matter.

PP: 