THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson, President
Judge Emmanuel Ayoola
Judge George Gelaga King
Judge Renate Winter
Fifth Judge to be determined

Registrar: Mr. Robin Vincent

Date: 31 October 2003

THE PROSECUTOR

v.

MORRIS KALLON

CASE NO. SCSL-2003-07-PT

MOININA FOFANA intervening

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 LOME ACCORD

&

SUBSTANTIVE SUBMISSIONS

Office of the Prosecutor:
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Counsel for Mr. Kallon

Defence Office:
Mr. Sylvain Roy, Acting Chief

For Mr. Fofana, intervening:
Mr. Michiel Pestman
Mr. Victor Koppe
Mr. Arrow John Bockarie
Prof. André Nollkaemper
Dr. Liesbeth Zegveld

1. The Defence for Mr. Fofana is filing three separate documents to deal with each of the three preliminary motions in which it has requested to intervene. The current document contains the Defence reply to the "Prosecution Response to Motion on behalf of Moinina Fofana to Intervene as an Interested Party in the Preliminary Motions Filed by Mr Kallon Based on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by Lomé Accord", filed on 27 October 2003 (the "Prosecution Response"), as well as the Defence substantive submissions on the issue of the Amnesty provided by the Lomé Agreement as suggested on 23 October 2003 by the President of the Special Court in the "Special Practice Direction on Expedited Timetable for Filing Submissions before the Appeals Chamber of the Special Court for Sierra Leone".

Reply to the Prosecution Response

2. As a preliminary point the Defence notes that the Prosecution does not dispute that the Defence is indeed an interested party in the terms of Article 5 of the Practice Direction on Filing Documents under Rule 72 of the Rules of Procedure and Evidence before the Appeals Chamber of the Special Court for Sierra Leone ("Article 5" and "Practice Direction"). The dispute therefore revolves around whether the Appeals Chamber should exercise its discretion under Article 5 in favour of the accused as an interested party wishing to intervene. The Defence submits that when, as in this case, the interested party is another accused before the court, that discretion should be exercised in favour of the interested party unless good reasons exist for not doing so.

3. Much of the Prosecution Response is based on a misunderstanding of the original Defence request. Mr. Fofana is not asking for leave to intervene for the purpose of requesting a stay or adjournment of proceedings in Mr. Kallon's case. If Mr. Fofana's request is granted there will be no need, in the Defence's eyes, for a postponement of either the hearing of Mr. Kallon's preliminary motion or delivery of judgement on it. Mr. Fofana is asking to intervene at the scheduled hearing so that his arguments may be made available to the Court when it first comes to deliberate on this matter. The alternative courses of action are suggested as possible solutions to the problem perceived by the Defence in the event that the application to intervene is denied.

4. The Defence is fully aware of the principle of *stare decisis*. Indeed, it is the existence of this principle, and the fact that, we assume, the Special Court will be applying the principle in its work, that has triggered the current application. The Appeals Chamber's deliberations on these first challenges to this new Court's jurisdiction cannot be described, in the words of the Prosecution, as "the ordinary course of business". These important legal questions will be given the most serious and thorough examination the first time that they are raised; it is natural, and in accordance with principle of *stare decisis*, that these first judgements will thereafter be applied, *mutatis mutandis*, to subsequent jurisdictional challenges. The practice of the *ad hoc* criminal tribunals for Rwanda and the former Yugoslavia have shown this to be the case, and this is precisely why Mr. Fofana wishes to make his supplementary arguments available to the Court before they render their first judgement on these issues.

5. Indeed, the Defence imagines that it was exactly this point that caused the President of the Special Court to draw up Article 5 of the Practice Direction. It should be noted that the intervention procedure set out in Article 5 applies only to preliminary motions filed under Rule 72. The Defence submits that Article 5 recognises the interest of the Court in hearing from all interested parties before rendering a decision on challenges to its jurisdiction; and in particular those major challenges which will naturally arise at the beginning of the Court's active life.

6. Failure to appreciate the exceptional nature of these first hearings on jurisdiction leads the Prosecution to warn of "disastrous consequences for the work of the Court" if the application to intervene is granted; an opening of "the floodgates for parties to bring requests throughout the life of the Special Court", and the setting of "a dangerous precedent whereby all accused persons could file amicus briefs or request to make oral submissions in other cases before the Special Court whenever an issue arises in one case that may have an affect [*sic*] on them".[1] It has already been recalled that Article 5 applies only to preliminary motions, and that requests to intervene are therefore limited to a particular stage of proceedings, and cannot be made "whenever an issue arises in one case that may have an [e]ffect on" another accused. It should further be noted that the arguments which weigh in favour of the current application will not apply in all future cases. Mr. Fofana wishes to intervene precisely because this will be the first time that these questions are deliberated. This

[1] Prosecution Response, p. 3.

will not be the case in a putative application concerning two new accused a year from now, and it is not therefore correct to speak of Mr. Fofana's intervention in the current matter setting a precedent for all accused persons.

7. To briefly address the judicial economy argument further, allowing Mr. Fofana (and other interested accused) to intervene in this motion concentrates the argument before the Court and reduces the number of hearings. This gain in efficiency is presumably another reason for the inclusion of Article 5 in the Practice Direction.

8. Mr. Fofana would very much have liked to file his own motion on the topic of the amnesty provided by the Lomé Accord in time for it to have been considered along with Mr. Kallon's motion. The Defence imagines that the two motions might indeed have been heard together. However, the Defence received the supporting material only on Monday, 27 October 2003; disclosure having been delayed by the Trial Chamber decision on protective measures which was delivered three and a half months after the original application. The Defence respectfully submits that it should not be penalised for the no doubt unavoidable delay in the rendering of that decision.

9. The Defence urges the Appeals Chamber to exercise its discretion to allow it to intervene in Mr. Kallon's motion under Article 5 of the Practice Direction.

Substantive submissions

10. In addition to the arguments raised in Mr. Kallon's motion, two critical arguments support the position that the amnesties given under the Lomé Agreement are valid, that they cannot be affected by the subsequent agreement between the United Nations and Sierra Leone that established the Special Court (hereafter: the "Special Court Agreement") and that therefore the Special Court has no jurisdiction over events governed by the amnesties. First, the Lomé Agreement is an agreement under international law. It was signed by six States and a number of international organisations, as well as by the RUF. As such, the rights and obligations under the Agreement cannot be altered by later treaties without the consent of the parties. Second, international law does not prohibit the granting of amnesties for international crimes.

The Lomé Agreement is an agreement under international law

11. The Lomé Agreement is an agreement under international law. It is signed by two entities relevant to the current proceedings which have international legal personality: the Republic of Sierra Leone and the RUF[2]. In so far as armed opposition groups, such as the RUF, have international obligations they are subjects of international law. Their legal personality derives from their obligations as parties to an armed conflict, as the conflict in Sierra Leone.

12. Armed opposition groups, such as the RUF, are bound by common article 3 of the 1949 Geneva Conventions, Protocol II additional to the Geneva Conventions, and other rules of international humanitarian and general international law. Special agreements concluded by armed opposition groups are another source of humanitarian obligations of these groups.

13. Common Article 3 specifically recognizes the legal capacity of armed opposition groups to conclude agreements, stipulating:

> "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"[3].

The capacity to conclude treaties under international law is thus not limited to states. It also extends to *de facto* authorities. International law recognises that such *de facto* authorities posses limited international personality and that agreements concluded by them can be regarded as agreements under international law.

14. This conclusion is not affected by the rules laid down in common Article 3 stipulating that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict". This phrase emphasizes that armed opposition groups have no rights and duties *other* than those contained in common Article 3. However, this leaves their obligations and responsibilities under common Article 3, and other international rules for

[2] The other signatories to the Lomé Agreement are Burkina Faso, Liberia, Nigeria, Ghana, Cote d'Ivoire, ECOWAS, OAU, the UN and the Commonwealth.
[3] Article 3 (2) common to the Geneva Conventions of 1949, 3rd sentence.

that matter, unaffected[4]. The legal personality of armed groups under these rules is objective in that it emanates from the Geneva Conventions and other international instruments.

15. Common Article 3 does not state with whom armed opposition groups should conclude agreements. An obvious option, as was the case with the Lomé Agreement, is the territorial state, with the cooperation of international organizations. The Lomé Agreement was signed by the Republic of Sierra Leone and the RUF. It was co-signed by, among other parties, the United Nations.

16. The international legal personality of armed groups, such as the RUF, recognises the reality of the internal conflict and the politically weakened position of the established authorities. Armed groups are bound as *de facto* authorities in a particular territory[5]. At the time of the signature of the Lomé Agreement, the RUF was a *de facto* authority, exercising effective control over significant parts of the country. The RUF existed as an independent entity side-by-side with the Government of Sierra Leone. It would be unrealistic to deny such personality. As Judge Kooijmans rightly pointed out,

> "[m]odern international law should be a *'ius inter potestates'* and therefore should encompass every political organization that acts as an effective factor in international relations"[6].

17. Special agreements concluded by armed opposition groups are binding upon them. This is supported by common Article 3 and practice of international bodies. The ICTY, for example, affirmed that agreements constitute evidence of legal obligations of the parties to an armed conflict. In the Tadic case (Appeal on Jurisdiction), in the section entitled "May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?", the Tribunal considered that it is authorised to apply, in addition to customary international law, any treaty which: "(i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogated from peremptory norms

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[4] T. Meron, *Human Rights in Internal Strife: their International Protections*, Cambridge: Grotius Publications Ltd., 1987, pp. 33-37.

[5] R. Baxter, 'Jus in Bello Interno: The Present and Future Law', in: J. Moore, (ed.) *Law and Civil War in the Modern World,* Baltimore: Johns Hopkins University Press, 1974, pp. 518-536 at pp. 522-528.

[6] P.H. Kooijmans, 'The Security Counsil and Non-State Entities as Parties to Conflicts' in: K. Wellens (ed.) *International Law: Theory and Practice,* The Hague: Kluwer Law International, 1998, pp. 333-346 at p. 339; *see also* R. Higgins, *Problems and Process: International Law and How We Use It,* Oxford: Clarendon Press, 1994, Introduction pp. 49-50.

of international law"[7]. At the time the Appeals Chamber made this statement, it had not decided whether the conflict in the former Yugoslavia was international or internal in nature. It may therefore be inferred that the ICTY referred to agreements concluded by both states and armed opposition groups.

The rights and obligations under the Lomé Agreement cannot be altered by later treaties without the consent of the parties

18. The obligations of the RUF under international humanitarian law and general international law imply the right to demand that the adversary comply with the same rules[8]. The Lomé Agreement is thus also binding upon the Government of Sierra Leone. As an international treaty, the Lomé Agreement has legal status and force equal to the Special Court Agreement.

19. Article 34 of the Vienna Convention on the Law of Treaties provides that a treaty cannot create rights or obligations for third parties. This principle applies equally to agreements to which other entities than states are a party. The Special Court Agreement is therefore not valid insofar as it impacts on the rights of the RUF, and subsidiary armed groups, as recognised in the Lomé Agreement. The rights and obligations of parties under the Lomé Agreement, as an international instrument equal in force to the Special Court Agreement, cannot be affected or altered by the Special Court Agreement.

20. With the Lomé Agreement the government of Sierra Leone entered into the obligation to ensure that no official or judicial action was taken against any member of not only the RUF, but also the CDF[9]. The government of Sierra Leone cannot unilaterally rescind this obligation, and indeed it has taken no formal steps to do so: it has so far not tried to denounce the Lomé Agreement. Only with the consent of all parties to the Lomé Agreement can the Court therefore exercise jurisdiction over individuals belonging to any other party

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[7] Appeals Chamber of the ICTY "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", *Prosecutor vs. Dusko Tadić*, Case No. IT-94-1-T, 2 October 1995, *Tadic Interlocutory Appeal,* para. 143; *compare* Kooijmans, *supra* note 6, p. 338, stating: "insurrectionist movements who are parties to an internationalized peace-agreement or who have committed themselves in such an agreement have legal obligations under international law."

[8] Kooijmans, *supra* note 6, p. 338.

[9] Article IX (3) of the Lomé Agreement reads: "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".

than the government of Sierra Leone itself. The Special Court thus is prevented from exercising jurisdiction over crimes committed in the period governed by the amnesty under the Lomé Agreement.

International law does not prohibit the granting of amnesties for international crimes

21. In its response to Mr. Kallon preliminary motion the Prosecutor submits an international norm is crystallising prohibiting the granting of amnesty for serious violations of crimes under international law[10]. International law, however, does not prohibit the granting of amnesties for international crimes. On the contrary, an amnesty is an accepted legal instrument and an important means for achieving peace and reconciliation at the end of an armed conflict. The denial of amnesty in the Statute of the Special Court thus cannot be justified by any alleged invalidity of the amnesty under the Lomé Agreement.

22. Modern history has shown many examples where states have sought to secure peace through the granting of amnesties. In many cases, parties to a conflict have deemed it desirable or necessary to insert amnesty clauses in peace agreements:

> "Amnesty clauses are frequently found in peace treaties and signify the will of the parties to apply the principle of *tabula rasa* to past offences, generally political delicts such as treason, sedition and rebellion, but also to war crimes. As a sovereign act of oblivion, amnesty may be granted to all persons guilty of such offences or only to certain categories of offenders."[11]

23. The Constitutional Court of South Africa stated, after reviewing world wide practice:

> "South Africa is not alone in being confronted with a historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an overtaking democratic order. Chile, Argentina and El Salvador are among the countries which have in modern times been confronted with a similar need. Although the mechanisms adopted to facilitate that process have

[10] Prosecution Response to the First Defence Preliminary Motion (Lomé Agreement), 23 June 2003, para. 13.
[11] R. Bernhardt (ed), *Encyclopedia of Public International Law*, Amsterdam: North-Holland, 1992, Volume I, p. 148 and R. Bernhardt (ed), *Encyclopedia of Public International Law,* Amsterdam: North-Holland, 1997, Volume 3, pp. 938-939.

differed from country to country and from time to time, the principle that amnesty should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries and truth commissions were also established in such countries.

What emerges from the experience of these and other countries that have ended periods of authoritarian and abusive rule, is that there is no single or uniform international practice in relation to amnesty. Decisions of states in transition, taken with a view to assisting such transition, are quite different from acts of a state covering up its own crimes by granting itself immunity. In the former case, it is not a question of the governmental agents responsible for the violations indemnifying themselves, but rather, one of a constitutional compact being entered into by all sides, with former victims being well-represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the abuses."[12].

The Constitutional Court concluded that the amnesty granted by South Africa is not contrary to international law[13].

24. Lord Lloyd of Berwick stated in the judgment of the House of Lords in the Pinochet Case:

"Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about 1 million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government.

[12] Constitutional Court of South Africa, *Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and others,* Case no. CCT17/96, 25 July 1996, paras. 22, 24.
[13] *Idem*, para. 32.

> In some cases the validity of these amnesties has been questioned. For example, the Committee against Torture (the body established to implement the Torture Convention under article 17) reported on the Argentine amnesty in 1990. In 1996 the Inter-American Commission investigated and reported on the Chilean amnesty. It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators."[14].

25. In considering whether present international law prohibits the granting of amnesties, Professor Dugard notes that

> "state practice hardly supports such a rule as modern history is replete with examples of cases in which successor regimes have granted amnesty to officials of the previous regime guilty of torture and crimes against humanity, rather than prosecute them."[15].

and concludes that international law does not prohibit the granting of amnesty[16].

26. The most exhaustive study so far on the legality of amnesties concludes that an unmitigated duty to prosecute only exists for torture and genocide. For all other crimes, the duty to prosecute can be avoided, and non-prosecution thus can be legalised, by negotiation of peace treaties[17].

27. It follows from these authorities that states consider amnesties often indispensable for states to make a transitions from armed conflict to peace. State practice does not allow a conclusion that these amnesties are illegal. The amnesty under the Lomé Agreement thus is valid under international law.

28. It is recognised that certain conditions need to be satisfied before an amnesty is accepted under international law. There may be support for the proposition that blanket pardons and impunity are in violation with international law, at least *lege lata*. In this interpretation, international law would require either prosecution or amnesties accompanied

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[14] R. v. Bow Street Metropolitan Stipendiary Magistrate. *Ex Parte* Pinochet, House of Lords, 25 November 1998, speech of Lord Lloyd of Berwick, available at:
http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino07.htm

[15] J. Dugard, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?," *Leiden Journal of International Law,* (12) 1999, pp. 1001-1015 at p. 1003.

[16] *Idem,* p. 1004.

[17] A. O'Shea, *Amnesty for Crime in International Law and Practice,* The Hague: Kluwer 2002, p. 265.

by truth commissions[18]. However, the Lomé Agreement does not provide for a blanket amnesty and does provide, *inter alia* by establishing the Truth and Reconciliation Commission for adequate responses to human rights violations and violations of international humanitarian law[19]. The amnesty provided by the Lomé Agreement thus satisfies the requirements of international law.

Conclusion

29. The Defence therefore submits that the Special Court has no jurisdiction over events governed by the Lomé Agreement amnesty. Since all the acts charged against Mr. Fofana are covered by the amnesty, the indictment should be dismissed.

COUNSEL FOR THE ACCUSED

PP:

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Prof. André Nollkaemper
Dr. Liesbeth Zegveld

[18] Dugard, *supra* note 15, p. 1005.
[19] Article XXVI (1) of the Lomé Agreement reads: "A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation."

Defence Index of Authorities

1. T. Meron, *Human Rights in Internal Strife: their International Protections*, Cambridge: Grotius Publications Ltd., 1987, pp. 29-43.

2. R. Baxter, 'Jus in Bello Interno: The Present and Future Law', in: J. Moore, (ed.) *Law and Civil War in the Modern World,* Baltimore: Johns Hopkins University Press, 1974, pp. 518-536.

3. P.H. Kooijmans, 'The Security Council and Non-State Entities as Parties to Conflicts' in: K. Wellens (ed.) *International Law: Theory and Practice,* The Hague: Kluwer Law International, 1998, pp. 333-346.

4. R. Higgins, *Problems and Process: International Law and How We Use It,* Oxford: Clarendon Press, 1994, pp. 48-51.

5. R. Bernhardt (ed), *Encyclopedia of Public International Law*, Amsterdam: North-Holland, 1992, Volume I, p. 148 and R. Bernhardt (ed), *Encyclopedia of Public International Law,* Amsterdam: North-Holland, 1997, Volume 3, pp. 938-939.

6. Constitutional Court of South Africa, Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and others, Case no. CCT17/96, 25 July 1996, paras. 22, 24, 32 and summary. Full text in pdf-format available at: http://www.concourt.gov.za/files/azapo/azapo.pdf.

7. R. v. Bow Street Metropolitan Stipendiary Magistrate. *Ex Parte* Pinochet, House of Lords, 25 November 1998, speech of Lord Lloyd of Berwick, available at: http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino07.htm

8. J. Dugard, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?," *Leiden Journal of International Law,* (12) 1999, pp. 1001-1015.

9. A. O'Shea, *Amnesty for Crime in International Law and Practice,* The Hague: Kluwer 2002, p. 265.