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Focus

Prosecutor v. Kallon and Kamara, Case No. SCSL-2004-15AR72(E) and SCSL-2004-16 AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004.

Prosecutor v. Kondewa, Case No. SCSL-2004-14-AR72(E), Decision on Lack of Jurisdiction (Abuse of Process: Amnesty Provided by the Lomé Accord, 25 May 2004.

Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 155.

Article IX Lomé Accord

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 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, [...].**
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, [...].**

Article 10 of the SCSL Statute

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.

The Lomé Amnesty Decision of the Special Court for Sierra Leone

On 13 March 2004 the Appeals Chamber of the Special Court for Sierra Leone (SCSL) decided that amnesties granted in the so-called *Lomé Agreement* have no validity before it. This decision is the first ruling of a war crimes tribunal that unequivocally states that amnesties are not a bar to prosecution for all international crimes before a international criminal court. The *Lomé Peace Agreement* - signed on 7 July 1999 by the Revolutionary United Front (RUF) and the Government of Sierra Leone - provided for a blanket amnesty to all participants in the conflict. The UN Special Representative of the Secretary General for Sierra Leone appended a disclaimer to his signature, stating that the amnesty provision would not apply to international crimes. Consequently, Art. 10 of the SCSL Statute provides that any granted amnesty shall not be a bar to prosecutions before the SCSL. The accused *Kallon* and *Kamara* have nevertheless referred to the granted amnesty in a preliminary motion. They argued, *inter alia*, that not all amnesties were unlawful in international law and that the Government of Sierra Leone breached its obligations by signing the agreement with the UN to establish a war crimes tribunal, as such action could be considered as "*official or judicial action*" prohibited by the *Lomé Agreement*. Their motion was directly decided by the Appeals Chamber according to Rule 72 (E) of the Rules of Procedure and Evidence.

After declaring that the *Lomé Agreement* did not constitute an international treaty as it only had a binding effect on the Government of Sierra Leone and the RUF, the Appeals Chamber took a notable approach by stating that it was not vested with powers to declare statutory provisions of its own constitution unlawful. Only in circumstances applicable under Article 53 or Article 64 of the Vienna Convention on the Law of Treaties the Appeals Chamber could declare provisions unlawful. The SCSL hereby departs from the *Tadic* jurisdiction decision of the ICTY Appeals Chamber that clearly provided for such an authority. The competency to examine its own legality and the legality of the provisions of the Statute was acknowledged by most academic authors as it emphasised the right of the defendant to force a tribunal to confirm the validity of the provisions of its statute and even of its own creation. The SCSL Appeals Chamber explicitly declared that the *Tadic* jurisdiction decision could not be considered as authority, as the legal bases of the two tribunals where not alike. This statement cannot be denied, but the conclusion of the Special Court appears to be contrary to Art. 14 of the SCSL Statute which states that the ICTR Rules of Procedure and Evidence should be applied *mutatis mutandis* by the SCSL. In fact, the ICTR Rules provide in Rule 72 that every accused may raise issues concerning the jurisdiction of the court in a preliminary motion. In the case law of the ICTY and ICTR "*jurisdiction*" always meant the ability to question the legality of the creation and the validity of statutory provisions. The argument of the different legal nature between the SCSL and the Security Council tribunals is therefore not truly convincing as the authors of the Statute implemented the possibility to examine the legality of the court and the legality of statutory provisions through Art. 14 of the SCSL Statute.

Even though the Appeals Chamber could have refrained from any further comment on the general validity of amnesties after such a conclusion, it nevertheless examined the limits of amnesties in international law and based its arguments on the principles of universal jurisdiction. As a State could not deprive another State of its jurisdiction to prosecute international crimes by granting amnesties, an amnesty could not be a bar to the prosecution of such crimes before another State or an international court such as the SCSL. This conclusion – solely based on the principle of universal jurisdiction – is rather weak and does not truly highlight the significance of the SCSL jurisdiction, which derives from the cession of judicial powers and not primarily from universal jurisdiction. Further, the Appeals Chamber misinterprets the meaning of "*official and judicial*" action mentioned in Art. IX (2) *Lomé Agreement*, as it only relates such action to the ratification of the SCSL Agreement and Statute. If the SCSL primarily relies on the concept of universal jurisdiction to establish that the *Lomé* amnesties are not a bar to prosecution, they ignore that the SCSL is dependant on judicial cooperation of the authorities of Sierra Leone. In all cases the capture of indictees were undertaken by Sierra Leone authorities. As the SCSL does not clearly declare Art. IX of the *Lomé Agreement* to be illegal in the domestic system of Sierra Leone such measures of the national authorities consequently would be still in contradiction to the *Lomé Agreement*. It is confusing that the Appeals Chamber first states – relying on *Cassese* – that a State does not breach a customary rule by passing amnesty laws, and later – then relying on *Orentlicher* – declares that amnesties are generally in breach of an obligation of a State towards the international community as a whole. It is therefore not absolutely clear if the *Lomé Agreement* as such is a violation of the international obligations of Sierra Leone. Further, the Appeals Chamber does not discuss Sierra Leone's obligations to prosecute international crimes under international conventions, notably under the Geneva Conventions or the Torture Convention. The *Lomé* decision was confirmed by another ruling on 25 May 2004. *Judge Robertson* who was disqualified from all RUF trials, and therefore was not part of the bench in the first decision, rendered a more differentiated dissenting opinion in the CDF trial basing his arguments on the general violation of international law by granting blanket amnesties for international crimes.

The SCSL missed a clear opportunity to generally declare blanket amnesties unlawful under international law as argued in scholarly writings. It is unfortunate that the SCSL did not unequivocally declare that the *Lomé Amnesty* has also no effect for prosecutions in domestic trials of Sierra Leone as the grant of blanket amnesties violated international obligations of Sierra Leone to prosecute serious crimes.

Responsibility

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