128) SCSL-2004-14-AR72(E)
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**SPECIAL COURT FOR SIERRA LEONE**

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IN THE APPEALS CHAMBER

| | |
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| Before: | Justice Renate Winter, Presiding<br>Justice George Gelaga King<br>Justice Emmanuel Ayoola<br>Justice Geoffrey Robertson<br>Justice Raja Fernando |
| Registrar: | Robin Vincent |
| Date: | 25 May 2004 |

PROSECUTOR Against ALLIEU KONDEWA
(Case No. SCSL-2004-14-AR72(E))

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# DECISION ON LACK OF JURISDICTION / ABUSE OF PROCESS: AMNESTY PROVIDED BY THE LOMÉ ACCORD

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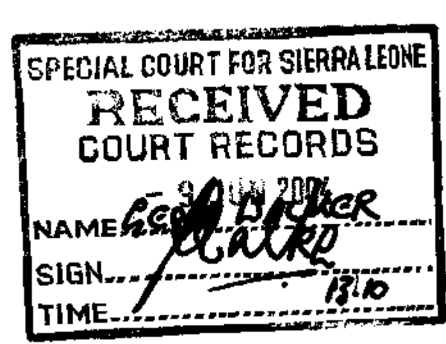
| Office of the Prosecutor: | Defence Counsel: |
|---|---|
| Desmond de Silva QC<br>Luc Côté<br>Walter Marcus-Jones<br>Abdul Tejan-Cole | James MacGuill<br>James Evans<br>Charles Margai |





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

**SEIZED** of the Preliminary Motion based on Lack of Jurisdiction / Abuse of Process: Amnesty Provided by the Lomé Accord filed on behalf of Allieu Kondewa ("Preliminary Motion") on 7 November 2003;

**NOTING** that the Prosecution Response was filed on 14 November 2003;

**NOTING** that the Preliminary Motion was referred to the Appeals Chamber under Rule 72(E) of the Rules of Procedure and Evidence ("Rules") on 8 December 2003;

**NOTING** the Decision of the Appeals Chamber (composed of Justice Winter, Justice King and Justice Ayoola) on Decision on Challenge to Jurisdiction: Lomé Accord Amnesty of 13 March 2004 in the Kallon and Kamara cases ("Lomé Amnesty Decision");

**HAVING CONSIDERED THE SUBMISSIONS OF THE PARTIES;**

**HEREBY DECIDES:**

## I. DISCUSSION

1. The Applicant, Allieu Kondewa, was indicted on 24 June 2003, some months after Kallon and Norman and others who were already in the process of making preliminary motions challenging the lawfulness of the court's establishment and requesting that it give overriding force to an amnesty provision in the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of 7 July 1999 ("Lomé Agreement"). These preliminary motions were in due course referred to the Appeals Chamber under Rule 72, and extensive oral argument was heard on 3 and 4 November 2003, both by parties to the motions and interveners. This Applicant did not seek, prior to that hearing, to intervene under Rule 74, and filed this Preliminary Motion on 14 November 2003 after judgment had been reserved on the other preliminary motions.

2. On an examination of the Preliminary Motion and the Prosecution response thereto, we find nothing that adds to the various arguments that were dealt with in the Lomé Amnesty Decision.



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## II. DISPOSITION

3. It follows from the Lomé Amnesty Decision and its reasoning that we dismiss this Preliminary Motion.

Done at Freetown this twenty-fifth day of May 2004

Justice Winter Presiding | Justice King | Justice Ayoola | Justice Fernando

[Seal of the Special Court for Sierra Leone]

**Justice Robertson appends a separate opinion to this Decision.**



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## SEPARATE OPINION OF JUSTICE ROBERTSON

1. This Applicant, alleged by the Prosecution to have been responsible for crimes against humanity through a leadership position in the CDF, claims the benefit of an amnesty proffered by the Government of Sierra Leone in a peace agreement at Lomé in Togo on 7 July 1999.[1] For this Court to acknowledge the validity of that amnesty, or else to allow it to affect the trial, would appear to be foreclosed by the stark terms of Article 10 of the Statute of the Special Court which provides:

> 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.

2. The Applicant contends that the Court should disapply this provision, because the Government of Sierra Leone, one party to the bilateral treaty which created the Court, had no power to make an agreement which retrospectively invalidated the Lomé Amnesty. Alternatively, he argues that Article 10 operates merely to permit the prosecution to commence, notwithstanding the amnesty, and does not prevent the Court, in the interests of fairness, from stopping the trial as an abuse of process.

3. The Prosecution says that the Court is bound by its Statute. As an international court, it exercises a jurisdiction over international criminal offences that cannot be affected by a domestic agreement like Lomé which in any event was a) not intended to pardon international crimes; b) soon dishonoured and fundamentally breached; c) impliedly repealed by the parliament when it passed the Special Court Ratification Act. More broadly, the Prosecution contends that the Lomé Accord amnesty is of no effect in an international law which now refuses to recognise amnesties for certain grave offences which the international community acknowledges must be prosecuted.

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



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4. These submissions parallel those made on behalf of other defendants and rejected by this Court in the Lomé Amnesty Decision of 13 March 2004. With that Court's conclusion I agree, and further agree with the Court today that it forecloses any new decision in favour of this Applicant, and I set out my own reasons.

**Background**

5. It is unnecessary to make any findings as to the facts of the internecine conflict which raged in Sierra Leone between 1991 and 2001, alleged to involve a number of armed factions which fought in various combinations against the government and its supportive militias. After democratic elections in March 1996 the government was led by President Ahmed Kabbah. That government sought a negotiated settlement with the Revolutionary United Front (RUF), which took the form of a peace agreement made at Abidjan in November 1996.[2] This is a significant date, since it is from this point that the temporal jurisdiction of the Special Court arises to try persons accused of bearing the greatest responsibility for ensuing war crimes and crimes against humanity. By the Abidjan agreement the RUF undertook to cease hostilities and to demobilise, in return for the government ending its reliance upon foreign mercenaries and bestowing upon them a blanket amnesty. Although the government apparently proclaimed and gazetted this amnesty, the fighting soon broke out anew and it has not been suggested that the Abidjan Amnesty has any continuing force or relevance. As will appear, a proposed beneficiary of any form of pardon or amnesty for serious offences pursuant to a peace agreement must keep, virtually to the letter, the terms and conditions of that agreement. Thus, the Abidjan amnesty would have been nullified by the recommencement of hostilities.

6. Those hostilities culminated in an attack on Freetown which engaged the concern of the international community. Intervention followed, in support of the Kabbah government, from regional forces (ECOMOG/S) and UN peacekeepers, some of whom were reportedly kidnapped and held hostage by factions. After intense diplomatic activity, President Kabbah and Corporal Sankoh (as RUF leader) signed a ceasefire agreement in March of 1999 and commenced the negotiations which produced the Lomé Accord. This peace settlement went much further than the Abidjan Agreement in that it gave the opposing factions a share in political power and

[2] Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, Abidjan, 30 November 1996, UN Doc. S/1996/1034.



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provided financial inducements to disarm and demobilize, monitored by ECOMOG forces. The Accord was signed by President Kabbah on behalf of the Sierra Leone government and by Corporal Sankoh on behalf of the RUF. There were others such as heads of regional states, who appended signatures to the agreement under the description of its "moral guarantors", and these include a representative of the Secretary-General of the United Nations. Article IX of the Lomé Accord provided as follows:

> **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-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 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.

7. It is plain from the wording of Article IX, and even plainer from the subsequent statements of President Kabbah, that the intention of the parties was that this amnesty would cover all crimes committed by the combatants on either side of the conflict. There was to be an "absolute and free pardon" for all "combatants and collaborators" who were to suffer "no official or judicial action" for <u>anything</u> they had done in the pursuit of their objectives. The understanding of both parties, and of their armies and supporters, must sensibly have been that they were being pardoned for all crimes; so long as they complied with the conditions of the agreement, they would not and could not be prosecuted, even if their past actions might be characterized as crimes against humanity or serious violations of international law.



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8. The Special Representative of the UN was Ambassador Francis G Okelo. He signed the agreement in the capacity of a "moral guarantor" and made no "reservation" or "disclaimer" on the agreement as officially transmitted. However, either orally or by handwriting on one copy of the agreement, he made a statement to the effect that:

> The United Nations interprets that the amnesty and pardon in Article 9 of this agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international law.

9. Much has been made of this statement in books and articles which refer to the Lomé Accord. The Prosecution relies upon it as an authoritative interpretation of Article IX because they claim that the other parties voiced no objection to it at the time, and because it put all combatants on notice that they could not rely upon the Lomé Accord if they were ever charged with international crimes. As a result of Ambassador Okelo's 'understanding', says the Prosecution, anti-government commanders (although most were still in the bush) and commanders of government militias, could have no legitimate expectation that the amnesty would be honoured, or that the state would have a moral obligation to honour it, if widespread and systematic acts of murder and grievous bodily harm were ever to be characterised as war crimes or crimes against humanity.[3]

10. I cannot accept the Prosecution position. Whatever the 'understanding' of the Secretary-General or his representative, it is impossible sensibly to interpret Article IX of the Lomé Accord as anything other than a blanket amnesty for all crimes, however heinous and however individually or collectively characterised, if they were committed to further military objectives during the war. That is what these words mean and that is what these words were intended to mean, certainly by President Kabbah. He told the Truth and Reconciliation Commission on 5 August 2003:

> 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. We realized that limiting the operation of the amnesty provisions would give a justification to the AFRC/RUF for refusing to sign that Agreement and for the resumption of

[3] See Prosecution Response, para. 13, citing the Preamble to Resolution 1315 and para. 23 of the Secretary-General's report for this gist of what it calls a "disclaimer". It is curious that no authentic text of what I prefer to describe as an "understanding" is available.



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> hostilities in the country. Thus, we put beyond the ability and outside the jurisdiction of our domestic courts power over the prosecution of crimes committed before the signing of the Lomé Agreement since the amnesty granted amount[ed] to a constitutional bar to any form of prosecution in our domestic courts in respect of the offences amnestied.[4]

11. There is no authoritative account of the proceedings leading up to the signing of the Lomé Accord. The UN plainly had an interest in securing the peace since it had peacekeepers on the ground and more projected to follow. But the UN was not a party to the Lomé Accord, which for all the international activity behind the scenes, took the final form of no more than a domestic agreement between a government and faction at war with it. The UN signed as "moral guarantor". Whatever that phrase means, it does not connote a legal obligation, quite the contrary. Since the UN was not a party to the agreement, its Ambassador's statement is not properly described as a "reservation" (as if to a treaty) or a disclaimer. It is mentioned by the Security Council in the preamble to Resolution 1315 as "an understanding". It may have been the "understanding" of the Secretary-General's representative, but there is no evidence put before us by the Prosecutor to prove it was the shared understanding of the parties. Indeed, the obvious intention of the parties, in so far as it emerges from the agreement, was to produce impunity for leaders of all factions accused of war crimes, who were by its terms not only immunised from prosecution or civil action but were elevated to some of the highest positions in the country as ministers, ambassadors, top civil servants and directors of national companies. Any crimes they may have committed were to be forgiven, but not entirely forgotten: a Truth and Reconciliation Commission would be established as an alternative to any prosecution. I cannot interpret the Lomé Accord Amnesty in any other way or to regard its meaning as any way changed by the statement of Ambassador Okelo. His was a statement reflecting the position of the UN, to the effect that international crimes should not be amnestied. Whether or not that reflects international law, it cannot alter the obvious meaning and intent of Article IX.

12. But the Lomé Amnesty was not a freestanding, unconditional pardon. It was a term in an agreement, conditional upon the performance of the other terms by or on behalf of its beneficiaries, the most important of which required a cease-fire, followed by disarmament and re-integration of warring factions into civil society.

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[4] 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.



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13. At first the Accord appeared to hold, but then, according to reports to the UN by the Secretary-General, there were episodes of violence and the taking of hostages, including UN peacekeepers. After an incident on 8 May 2000, when twenty one citizens were killed, the government asked the UN to set up a mechanism with power to punish the main perpetrators of war crimes and those who bore most responsibility for breaching the peace agreements. On 4 August 2000 the Security Council adopted Resolution 1313, which observed "widespread and serious violations"[5] of the Lomé Accord since early May 2000.

14. In due course a treaty between the Government and the UN established the Special Court to prosecute persons most responsible for the commission of international crimes (Articles 2-4 of the Statute) and certain domestic crimes (Article 5).[6] Article 10 was intended to deprive Article IX of the Lomé Accord of any effect in relation to international crimes, although not in relation to any charges brought pursuant to Article 5. (No such charges have in fact been brought). The Secretary-General explained, in his report to the Security Council that Article 10 of the Statute was intended as a "denial of legal effect to the Amnesty granted at Lomé, to the extent of its illegality under international law".[7]

## The Limits of Amnesty: Domestic Law

15. Pardon has been the prerogative of power from time immemorial. A mass pardon, offered to a class of law breakers, is termed an amnesty. There is no formal requirement for its delivery - it may be granted through proclamation, gazettal, fiat, letter or by agreement - but the form in which it comes may require interpretation to decide whether it operates immediately, as a free-standing grant of immunity, or whether there are conditions attached. If the latter, then those conditions must be strictly complied with by the potential beneficiary. There may be conditions which operate to suspend liability rather than extinguish it - an amnesty that is part of a peace agreement, for example, will normally come with the condition that the benefit of immunity will be lost by any who take up arms again.

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[5] Security Council resolution 1313 (2000), para. 2 and see Sixth Report of the Secretary-General on the UN Mission to Sierra Leone, S/2000/832, 24 August 2000, para. 10.
[6] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002.
[7] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 24.



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16. It has been difficult to devise rules that are generally applicable to immunity grants, because these may come in many forms and from many motives. Pardons may be granted benevolently (as a measure of forgiveness for those who have already suffered some punishment), politically (to bring civil wars and insurrections to an end), legally (to rectify a miscarriage of justice) and even festively - to celebrate a ruler's birthday. The early common law developed a set of rules for pardons at a time when they were a regular feature of law enforcement by the King and his officials, and then adapted these rules to cover pardons that were offered to informers and criminals who turned "queen's evidence". Such pardons were invalidated, for example, by fraud or non-disclosure in their procuration, or by failure to fulfill the condition of giving evidence against accomplices, but otherwise they would operate "to clear the person from all infamy... it makes him, as it were, a new man" although it did not create the legal fiction that the beneficiary never committed the crime in the first place.[8] Following the civil war in England, parliament passed various "Acts of Oblivion" to immunise its own forces and to rehabilitate royalists but the most significant amnesty legislation in English history came in 1660 when parliament, by tacit agreement with Charles II, amnestied its own supporters in the run-up to the Restoration. Significantly, this amnesty excluded those who bore greatest responsibility for the key revolutionary act of executing Charles I: not only his judges, but prosecuting counsel and several "intellectual authors" of the regicide (including Cromwell's chaplain) were excluded from this legislative amnesty, and subsequently tried and executed.

17. It has been common "state practice" at the end of civil upheavals to conclude agreements containing provisions which pardon rank and file combatants, and often their leaders as well. Such provisions have been favourably treated by historians and interpreted generously by the courts, most notably in litigation which arose from the amnesty proclamations of President Abraham Lincoln to encourage defection in confederate ranks during the civil war. Lincoln had insisted, against heavy congressional criticism, that former enemies should be forgiven and former enmity forgotten once the oath of allegiance (the condition of obtaining an amnesty) had been taken. In his state of the nation message to congress in 1863, he declared that any reneging on an amnesty would be "a cruel and astounding breach of faith".[9] The US Supreme Court took the same position, ordering the return of property seized from "amnestied" ex-confederates.[10]

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[8] *Phillip v Director of Public Prosecutions*, [1992] 1 AC 545, PC.

[9] Lincoln's third annual message to Congress, 8 December 1863, Program for Reconstruction.

[10] *US v Klein*, (1871), 80 US 13 Wall, 128.



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18. Pardons have, until recently, been regarded as unexceptional when used as a military option that can save many lives at the end of a civil war. Indeed, the wide presidential pardoning power in the United States Constitution was put there precisely because, as founding father Alexander Hamilton explained,

> In seasons of insurrection and rebellion, there are often critical moments, where a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.[11]

Hamilton's language felicitously captures the purpose of peace agreement amnesties throughout the ages: they have served (and continue to serve) at least in the short term as a means of saving lives: a compromise which stops the killing. They have in consequence been welcomed and generously interpreted, particularly when used by governments prepared to reach accommodation with dissidents or to release political prisoners. Thus the word "amnesty" acquired favourable connotations in the humanitarian lexicon - so much so that it was chosen in 1961 as the title of a new human rights organisation, Amnesty International.

19. There has recently been a sea change in attitudes towards impunity, reflected in the development of international human rights law over the past twenty years and a growing recognition that human rights cannot be secure unless political and military leaders tempted to breach them can be deterred by the real prospect of trial and punishment. This growing resolve of the international community to end impunity is also reflected in the way international law has restricted and in some cases denied sovereign immunity for crimes against humanity, a development that drew on the momentous provisions of the Nuremberg Charter. A more critical attitude towards amnesties came in the 1970s as a result of terrorism and torture: governments had to respond to pardon demands from hijackers, whilst human rights courts in Latin America had to work their way around 'acts of oblivion' before they could require the state to investigate death-squad killings or compensate victims of state torture.

20. For all the favourable connotations of amnesty in the context of clemency by a state towards enemies whose cause may have been politically or morally justified, immunity for perpetrators of

[11] *The Federalist*, No.74 (1778), Bourne Edition, 1947, p. 79.



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serious crime is a betrayal both of the rule of law and of innocent victims of the crime. It is usually the product either of convenience - (e.g. where a state does not have the resources to prosecute and imprison) - or duress, where a government has to offer amnesty as the price of ending a rebellion or of saving the lives of hostages. When international terrorism recrudesced in the 1970s, some governments refused to do deals with terrorists. Those which did felt obliged to keep the bargain, if only because the practical consequence of reneging would be that they could never deal with terrorists again. The legal consequence was considered by the Privy Council in *Attorney General of Trinidad & Tobago v Lennox Phillip.*[12]

21. This is the leading common law authority on the validity of an amnesty, in that case given to a group of insurgents in return for them releasing the prime minister and cabinet ministers whom they were holding hostage in the parliament building after an attempted coup. The amnesty was signed by the acting president, who was safe at army headquarters and its delivery secured the release of the ministers, albeit after several days of further negotiations. The insurgents, who had killed a number of police officers, surrendered in reliance on the amnesty but were immediately detained and prosecuted for murder and treason, offences which carried the death sentence. The Trinidad courts, relying on the Lincoln-era precedents, reluctantly upheld the amnesty by granting *habeas corpus* and even more reluctantly awarded the murderous insurgents damages for being wrongfully imprisoned for the period before their amnesty was upheld. The Privy Council avoided this unpalatable result by applying the rule that no amnesty can dispense with the law - it can only pardon offences committed prior to its proffer and cannot purport to immunise future law-breaking. The amnesty, therefore, was interpreted to carry the implied condition that the insurgents release their hostages and surrender *immediately*: because they had temporised, and attempted for several days to negotiate a more favourable exit, they had invalidated their passport to freedom. Logically, that meant that the state would be entitled to try and to execute them, but the Privy Council avoided this equally unconscionable consequence by deploying the doctrine of abuse of process: it could be seriously unjust to continue the prosecution of men who had surrendered in the belief, induced by the government, that they were entitled to a pardon once they did eventually comply with the condition, and the fact that they were already beneficiaries of *habeas corpus* meant that their liberty, at least, was secure.

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[12] [1995] 1 AC 396, PC.



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22. This solution to the dilemma acknowledges the legality of amnesties given to induce surrender but implies into them a most stringent condition: a condition that in the chaos of war or insurgency can rarely be met. To ameliorate this unfairness, it permits "abuse of process" applications to stop a prosecution where the breach of the condition has been condoned by the government. Whether or not this solution embodies Solomonic wisdom, it provides a practical flexibility for the common law. *Phillip* was subsequently used as authority in the Fiji courts[13] to invalidate an amnesty given to another set of insurgents who held the prime minister and his MPs as hostages. After the proffer, they continued to demand a share in government for themselves before surrendering. Their prosecutions were permitted to go ahead because the rebels had not been misled as to the condition of the amnesty, but their eventual surrender without harming the hostages was accepted as a mitigating factor in their eventual sentences.

23. The modern common law approach to amnesties, exemplified by *Phillip*, thus embodies a compromise in which the rule of law is limited by the demands of necessity, i.e. the moral imperative of saving innocent lives. The courts will uphold the right of the state to grant pardons, even for the most heinous offences (in *Phillip* itself, for the murder of eight policemen and an attempt to overthrow democratic government). If such pardons were automatically invalid, then governments could never induce terrorists or rebels to surrender in reliance upon them and governments should at least have power to decide whether to proffer them. In the Trinidad situation, the President had to balance the need to punish treason and murder against the likely death of the prime minister and twenty hostages held by a hundred rebel gunmen, (plus the further killing of many of those gunmen and some soldiers in an end-of-siege shoot-out). Although all such amnesties are really procured through a form of duress, i.e. by criminal elements putting unbearable pressure upon the authorities to grant the amnesty as the lesser of two or more evils, the common law does not adopt duress as a basis for invalidating the amnesty unless it is applied directly to the official who makes the grant - e.g. by (literally) holding a gun to the head of the President.[14] However, the common law does require strict interpretation of the grant of amnesty and it does imply surrender conditions whenever they can be shown to be the *quid pro quo* of the grant. No amnesty can validly permit future law breaking, even in the course of negotiations over a surrender, so the surrender conditions implied in the pardon must be

[13] *R v George Speight*.

[14] *Mustapha v Mohamed* [1987] L.R.C.Const & Admin. 16, (Malaysian Supreme Court).



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complied with "either promptly or as soon as practicable". The rule, as Lord Woolf explains it in *Phillip*, is that:

> Where a pardon is subject to a condition, then the protection provided by the pardon may not be conferred until the condition has been complied with. However, while the effectiveness of the pardon would then depend upon compliance with the condition, non-compliance with the condition would not affect the time of the grant of the pardon. The grant of the pardon is not to be treated as deferred pending compliance with the condition. This can be of importance when considering the initial validity of the pardon since this has to be judged at the time of the grant; though a pardon which is initially valid may subsequently be rendered valueless before it has had any effect due to non-compliance with the condition to which it is subject.[15]

24. Insurgents, terrorists and common criminals who want to obtain the protection of a pardon must comply promptly with its conditions or else it becomes valueless, in common parlance not worth the paper on which it is written or agreed or proclaimed. It cannot operate as a "plea in bar" to the trial of the beneficiary who, by resuming arms or delaying surrender, has conducted himself so as to lose its benefit. It may, however, become relevant to a motion for abuse of process, an appeal to the court's inherent power to protect a defendant from serious injustice. If the defendant can show that his failure to comply promptly with the amnesty condition was the result of some representation by the state that he would still be permitted to benefit, then the deliberate arousal or cultivation of such legitimate expectation might make it unfair for the state to proceed against him.

25. The rule in *Phillip*, relied upon by the applicant as a persuasive common law precedent, has the virtue of requiring beneficiaries to adhere strictly and immediately to the condition upon which their serious criminal actions are to be forgiven. It is, however, anomalous that those who do not so adhere should in some circumstances be given a back-door escape from liability by way of abuse of process. The obvious attraction of invalidating the *Phillip* pardon was to avoid the spectacle of awarding damages to the murderers (who had claimed for wrongful detention) and abuse of process was an appropriate means of saving the necks of the same men who had surrendered in reasonable reliance on the amnesty but not "as soon as practicable". Such fine distinctions are

[15] [1995] 1 AC 410.



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best avoided in conditions of war-time chaos and I see no reason why a government which does grant a conditional amnesty may not vary the conditions in order to permit surrender and disarmament within a reasonable time, so long as no fresh offences are committed in the meantime. Those who breach such a condition, at least without express permission of the authorities, could not make the amnesty a basis for an abuse of process motion. With that caveat, the approach of the Privy Council in the context of an amnesty designed to defuse an attempted coup and hostage crisis may be extrapolated to cover an amnesty which is part of an agreement to end a civil war. In other words, the protection afforded to rebel and government militias by an amnesty which is part of or conditional upon a peace settlement is irredeemably lost if they resume fighting.

26. On this basis, Article IX, the "pardon and amnesty" section of the Lomé Accord may now offer scant protection under the common law. That agreement was a domestic accord which was subsequently (on 18 July 1999) ratified by the parliament.[16] But it would cease to have any validity once the civil war resumed, involving the same militias, and it seems accepted in the Secretary-General's Reports that it did resume, at least after May 2000. Article IX is in its terms predicated upon the purpose of bringing lasting peace to Sierra Leone: hence the "absolute and free pardon" guaranteed to members of militias and former combatants "to consolidate the peace and promote the cause of national reconciliation". After a lull for a few months in the fighting, the Secretary-General reports continual breaches of the all-important ceasefire provision of Article 1, which provided that:

> The armed conflict between the government of Sierra Leone and the RUF/SL is hereby ended with immediate effect. Accordingly, the two sides shall ensure that a total and permanent cessation of hostilities is observed forthwith.

27. There were further provisions (Article XVI) for the disarmament and demobilisation process to commence within six weeks of the agreement and the parties pledged (in Part 5) to recognise "the importance of upholding, promoting and protecting the human rights of every Sierra Leonean as well as the enforcement of humanitarian law". It is impossible to read the amnesty, in its context, as other than conditional on both parties and their respective supporters ceasing hostilities, not only forthwith but permanently. If fighting was resumed by either or both sides, then irrespective

[16] Lomé Peace Agreement (Ratification) Act, 15 July 1999.



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of which party was to blame, this would render the amnesty provision invalid. The other sections of the agreement may in part have been performed, but if the fighting resumed in the way the Secretary-General related, then by the time of the Special Court Ratification Act in March 2002,[17] the amnesty provisions would be as dead as the similarly worded provision in Article 14 of the Abidjan Peace Agreement. Like that previous amnesty, it was a blanket provision intended to afford impunity against the most heinous crimes to all combatants who abided by its terms: applying the rule in *Phillip's* case, any significant resumption of hostilities would drain it of all force and effect.

28. In general terms, it may seem harsh rule that deprives combatants of the benefit of an amnesty because their leaders have resumed hostilities. But that is the inevitable result of an amnesty which is part of a peace agreement between leaders who subsequently breach it. An amnesty is, after all, an enormous indulgence to persons who have murdered and tortured prisoners of war, for example, or directed genocidal attacks. Their victims can only be consoled, if at all, by knowledge that the non-requital of their sufferings will serve some greater good and if that good does not eventuate, for whatever reason, their demand for justice conjoined with the normative force of the rule of law then revives to justify prosecutions. There may be scope in domestic laws for abuse of process applications to avoid serious injustice, for example to a former combatant who deserted or disassociated himself from the renewed fighting or a militia commander who had strictly observed the ceasefire conditions until subjected to an unprovoked attack by the former enemy. But it follows from the rule in *Phillip's* case that amnesties bestowed for the purpose of securing the peace have no force once war breaks out again.

29. On that analysis, if it is proved that hostilities of the same kind broke out between the same parties afterwards, then the Lomé Amnesty would cease to bar prosecutions in domestic law. However, that is not a conclusion I can make without evidence and the Prosecution has not sought to prove the breach of the ceasefire and the resumption of the very hostilities disavowed at Lomé. Instead, the Prosecution contends that the amnesty provision of the Lomé Ratification Act was repealed, as a matter of national law, on 7 March 2002 by the passage through parliament of the Special Court Ratification Act, because of the Westminster convention that a new law supplants previous legislation to the extent of any incurable inconsistency. There is no doubt that parliament, as sovereign, can repeal any pardon validly granted by the executive or even by the parliament itself: this change of policy may not (as a matter of public law) extinguish legitimate

[17] The Special Court Agreement, 2002, Ratification Act, 2002, 7 March 2002.



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expectations aroused by the original grant, although it would in terms remove the amnesty as a bar to prosecution. This would be a draconian step - and the extent of any alleged inconsistency would need to be closely scrutinized by the courts. There is no need to embark on this exercise, however, if the Lomé amnesty has no force in the international law which this court must apply, or else is extinguished in terms by Article 10 of the Statute.

## Amnesties in International Law

30. The United Nations and the Government of Sierra Leone agreed to a clause in the Court's Statute which directed that an amnesty (i.e. the Lomé Amnesty) "shall not be a bar to prosecution" for the international crimes referred to in Articles 2-4 of the Statute. Their apparent concern was that the Lomé Amnesty might have some legal life left in it, and the avowed intention was to invalidate it "to the extent of its illegality under international law".[18] No doubt the Secretary-General thought that in international law, no amnesty could bar prosecution for "the international crime of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law" - an understanding spelled out by his representative Ambassador Okelo, at the end of the Lomé negotiations.[19] I must therefore consider whether that understanding represents international law, or wishful thinking. Since international law draws upon state practice and as recently as 2003, a few days before the invasion of Iraq, an amnesty offer was made by the US and UK to Saddam Hussein - a man widely accused of 'genocide, crimes against humanity, war crimes and other serious violations of international law' - the degree to which international criminal law forbids or nullifies amnesties must be open to some question.

31. Amnesty is an almost totemic absolution of rank and file combatants at the end of a civil war. One recent example is found in the peace agreement reached in Liberia in August 2003, with UN support, which requires the transitional government to consider a "general amnesty".[20] Those who claim that international law invalidates all amnesties for all combatants for all international

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[18] Report of the Secretary-General, para. 24.

[19] See S. E. Rowe, "Sierra Leone - The Search for Peace, Justice and Reconciliation", in Canadian Council on International law (Ed.) *Globalisation, People, Profit and Progress*, (Kluwer, 2002), p. 46.

[20] *Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties* LURD, MODEL 18, *Accra*, August 2003, Article 34.



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crimes face not only the reality of state practice, where amnesties in peace agreements are common, but also Article 6(5) in the 1977 Protocol II to the Geneva Conventions:[21]

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

32. Protocol II has not been ratified by some important states and Article 6(5) is in any event a "best endeavours" provision. Although "broadest possible amnesty" would seem to apply to all crimes, it is plain from the context (Section 6 of Protocol II provides minimum standards for war crimes prosecutions) that it is not intended to encourage amnesties which would infringe international law, such as unilateral pardons for crimes (e.g. genocide) which the state is under a compelling duty to prosecute. The drafting history of the sub-section shows that it contemplates a Lincoln-style amnesty ("to restore the tranquility of the commonwealth") for rank and file combatants who have fought on opposite sides according to the laws of war, especially for soliders on the losing side who have been detained by the end of the conflict. This is the basis on which some commentators have re-interpreted 'broadest possible amnesty' to exclude violations of international law, for which an amnesty is unavailable.[22] This point was not specifically considered by the South African Constitutional Court in the AZAPO case[23] which approved an amnesty which was not "blanket" because each person had to be considered in the circumstances of individual cases by a Truth and Reconciliation Commission. The Court drew support from Article 6(5), but did not consider whether "broadest possible amnesty" would exclude persons for international crimes. But it obviously encourages *domestic* amnesties, to restore tranquility to states that have been at war with themselves, by pardoning "persons who have participated in the armed conflict". Sensibly, it would apply to rank and file participants, but not to the authors of such conflicts. Thus, tranquility might well be assisted by pardoning the mass of soldiers in rival armies – the purpose of Article 6(5) – but whether it is assisted by pardoning leaders who gave orders for mass murder of civilians is quite another matter. In South Africa, the Truth and Reconciliation

[21] Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II), 8 June 1977, in force 7 December 1978.

[22] See Inter-Am Comm HR Case 10.480 (El Salvador), Report No. 1/99, para. 116 (1999), stating: "The preparatory work for Article 6(5) indicates that the purpose of this precept is to encourage amnesty,... as a type of liberation at the end of hostilities for those who were detained or punished merely for having participated in the hostilities. It does not seek to be an amnesty for those who have violated international humanitarian law."

[23] *Azanian Peoples Organisation (AZAPO) and others v. President of the Republic of South Africa*, 1996 (4) SA 671 (CC), 691.



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Commission itself used pardon as a plea bargaining device, requiring those who wished to obtain an amnesty to tell, in public, the whole truth and to give evidence against accomplices in the event that any were put on trial.

33. One of the difficulties about invalidating peace settlement amnesties which apply to armies numbering tens of thousands is the practical impossibility of holding effective trials for all accused of war crimes. Another is in distinguishing between the "ordinary" crimes, for which the defendant is immune to prosecution, and the international crimes for which he is not, although both kinds of charges will be based upon the same events. One feature that gives an international crime its special gravity is the fact that it is commonly conceived and directed by state or group leaders, as part of a widespread and systematic persecution. But even within these horrific categories of mass murder and mass torture, there are obvious distinctions in moral culpability between foot-soldiers, accomplices, military authorities and national leaders. The "authors" of international crimes are those with the imagination or the authority - the power to conceive or to implement, or the power to stop. The sea change in the international community's approach to amnesty, from regarding it as the blessing of forgiveness to reproaching it as the curse of impunity, has turned on the dawning realisation of the unacceptability of amnesties for the "authors" of crimes against humanity, i.e. those who bear the greatest responsibility. It seems to me that international criminal law has developed at least so far as to make this same distinction, namely that amnesties cannot absolve the political and military leaders who bear greatest responsibility for genocide, torture, crimes against humanity and grave breaches of international and humanitarian law. This development has come, somewhat ironically, by way of reaction to the very power that political and military leaders have exploited, especially in Latin America, to pardon themselves or to manipulate or pressure new governments to bestow pardons upon them.

34. Although amnesty did not feature in the main trial at Nuremberg, the allies were aware of some local immunity statutes passed by quislings in areas of Nazi occupation. Thus the definition of crimes against humanity in Article 6(c) of the Charter[24] was expressed to apply "*whether or not (the crime was) in violation of the domestic law of the country where perpetrated*". This is the basis for the imposition of criminal responsibility in international law on individuals in relation to crimes against humanity even if they are not crimes in domestic law (and even if they are, if domestic law

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[24] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 279-84.



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bars prosecution for them). Hence the International Law Commission summary of "Principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal"[25] includes as principle 2:

> The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

35. This would logically include the situation where a domestic amnesty purports to immunise a person or a class of persons from prosecution for acts which collectively can be characterised as an international law crime. It was to prevent quisling leaders from claiming any benefits from their own amnesty statutes that Allied Control Council Law No. 10[26] provided that no Nazi-era law could bar military tribunal trials or punishment for crimes against peace, war crimes or crimes against humanity.[27]

36. In the 1980s the Inter-American Commission took its stand on this principle to invalidate self-amnesty laws passed under pressure from military leaders who were involved in approving torture and "disappearances" that were common policy in, for example, Chile, Argentina, Guatemala and El Salvador in the preceding decade. Many of these amnesties were upheld by local courts, in defiance of the Commission, and despite the fact that its rulings were consistent applications of the principles in the Inter-American Convention on Human Rights. Even an amnesty approved by a plebiscite was condemned by the Commission: the excuse that it showed "the express will of the Uruguayan people to close a painful chapter in their history" was ruled contrary to the obligation to investigate human rights violations and hence a violation of the rights of relatives of the disappeared.[28]

37. An example of a case adjudicated by the Inter-American Court in this period was that relating to the *Los Hojas* massacre. After the El Salvador legislative assembly passed an amnesty decree

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[25] Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted by the United Nations International Law Commission, 2 August 1950, (1950) *Yearbook of the ILC*, vol. II, 374.
[26] Allied Control Council Law Number 10, adopted at Berlin 20 December 1945, (1946) 3 Official Gazette of the Control Council for Germany, 50-55.
[27] See Article II(5).
[28] Inter-American Commission on Human Rights, Uruguay Report - Legal Effects of the 1986 amnesty law (confirmed by referendum), incompatible with the ACHR, [1992] 13 HRLJ, No. 9-10, 340, Report No. 29/92, 2 October 1992, para. 22; Argentina Report - Amnesty laws and Presidential decree of pardon violate the victims' human rights, ibid, 336-9, Report No. 28/92, 2 October 1992.



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specifically providing impunity for all army officers who participated, the Inter-American Court ruled that

> the present amnesty law, as applied in these cases, by foreclosing the possibility of judicial relief in cases of murder, inhumane treatment and absence of judicial guarantees, denies the fundamental nature of most basic human rights. It eliminates perhaps the single most effective means of enforcing such rights, the trial and punishment of offenders.[29]

The Court held that the government, responsible for the armed forces, had by legislating an amnesty breached the victim's rights to life (Article 4), personal security and integrity (Article 5), due process (Article 8) and juridical protection (Article 25) and had failed to comply with its Article 1 obligation to guarantee human rights to all its citizens.

38. In 1992, when this decision was delivered, it was treated disrespectfully: the government reacted to the court's ruling by passing an even broader amnesty law. Nonetheless, it marked the beginning of a refusal by international courts and commissions to countenance the spectacle of the state forgiving itself its own wrongs or the increasing phenomena of new governments giving amnesties at the insistence of one continuing branch of the old - the military and the police. These decisions had the result of denying the benefit of amnesties to those who bear greatest responsibility for crimes against humanity - high ranking state officials who could not be pardoned by the state itself and rebel leaders who force a war-weary government to offer them a pardon in exchange for peace.

39. In the same year - 1992 - the Human Rights Committee ruled that the obligation in the International Covenant on Civil and Political Rights ("Civil Covenant") to provide an effective remedy against violation of rights by state officials meant that the amnesties for acts of torture:

> are generally incompatible with the duty of states to investigate such acts; to guarantee prosecution of such acts within their jurisdiction; and to ensure that they do not occur in

[29] Inter-American Commission on Human Rights, El Salvador Report - State's responsibility for 1983 Las Hajas massacre, [1993] 14 HRLJ, No. 5-6, 167, Report No. 26/92, 24 September 1992, para. 169.



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the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[30]

40. All international human rights treaties have rules that require governments to investigate violations and provide an effective remedy. By Article 2(3) of the Civil Covenant, for example, state parties undertake to ensure that victims of rights violations "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". In case of violations as grave as crimes against humanity, it may be that no remedy short of prosecution could be considered "effective" (see paragraph 53 below). Article 2(3) does not provide individuals with a right to force a state to prosecute, but does put an obligation on the state to prosecute any suspects who have been credibly accused as a result of the investigation.[31]

41. Conventions dealing with crimes against humanity and war crimes consistently require legal action to be taken against suspects. Thus, the Torture Convention requires each state party to ensure prompt and impartial investigation of torture allegations (Article 12).[32] The Genocide Convention[33] imposes an obligation to punish, irrespective of whether perpetrators are 'constitutionally responsible rulers, public officials or private individuals' (Article 4), after trial either by 'a competent tribunal' of the state where the act occurred or by an international penal tribunal (Article 6). The 1949 Geneva Conventions[34] provide that states have an obligation to search for war criminals, and to bring them (irrespective of their nationality) before their own courts or else extradite them for trial in another jurisdiction. The Civil Covenant and the European[35] and Inter-American Conventions[36] all require that rights be respected and protected by law and that victims shall have an effective remedy in the event of violation. When the right to life is violated, certainly on the scale of genocide or massacre, only prosecution could be "effective".

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[30] Human Rights Committee, General Comment no. 20 (on Article 7), 44th session (1992).
[31] See *Bautista v Columbia* (1995), HRC 27, para. 8.6.17.
[32] *Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, 4 February 1985*
[33] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UN General Assembly on 9 December 1948, 78 UNTS 277.
[34] See e.g. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Article 146.
[35] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, in force 3 September 1953, 213 UNTS 221.
[36] American Convention on Human Rights, 22 November 1969, in force 18 July 1978, 1144 UNTS 123.



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42. State practice supportive of the duty to prosecute crimes against humanity may be found in many UN resolutions. In 1973, the General Assembly adopted a set of Principles of International Co-operation in the Detection, arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity.[37] Principle I provides that suspects shall be subject to tracing, arrest, trial and, if found guilty, to punishment. The 1993 Vienna Declaration is to similar effect.[38] Although there have been many such publicized failures to prosecute, these have been *realpolitik* failures, in some cases explained by the practical impossibility of financing and organizing proper trials for thousands of perpetrators (although Rwanda, notably, has attempted this task). This justification for inaction from lack of resources cannot be advanced as an excuse for failure to prosecute the handful of persons who bear the greatest responsibility for international crimes.

43. In 1988 came the ground-breaking decision of the Inter-American Court in the *Velasquez Rodriguez Case*,[39] concerning a student who "disappeared" at the hands of the Honduran military, which then denied its responsibility for his murder. The Court held the Honduran Government liable under the Inter-American Convention:

> the state must prevent, investigate and punish any violation of the rights recognised by the Convention... The state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation..."[40]

44 I conclude this brief survey of current attitudes by international legal bodies towards the impermissibility of amnesty statutes at least in relation to perpetrators alleged to bear command responsibility for massacres, by citing recent decisions of two courts of high persuasive authority. In its judgment in the *Barrios Altos Case*, which concerned the responsibility of senior government officials (including ex-President Fujimora) for authorizing a mass killing of fifteen students, the Inter-American Court held in terms that blanket amnesties were incompatible with the duties of state parties to the Inter-American Convention:

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[37] GA resolution 3074(XXVIII), 3 December 1973.
[38] A/CONF.157/23, 12 July 1993.
[39] Inter-Am Ct HR, (Ser. C) No. 4 (Judgment) (1988).
[40] Ibid, paras 166, 174 and 176.



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> This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are impermissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extra-judicial summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognised by international human rights law.[41]

45. An ICTY Trial Chamber has ruled that a domestic amnesty covering crimes the prohibition of which has the status of a *jus cogens* norm "would not be accorded international legal recognition". In *Prosecutor v Anto Furundzija* the Court noted:

> It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a state say, taking national measures authorising or condoning torture or resolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and would not be accorded international legal recognition... What is even more important is that perpetrators of torture acting upon or benefiting from these national measures may nevertheless be held criminally responsible for torture, whether in a foreign state, or in their own state under a subsequent regime.[42]

46. The African Commission on Human Rights has adopted the same approach in condemning an amnesty law in Mauritania[43], in promulgating the Robben Island guidelines for the prohibition and prevention of torture[44] and in condemning various states for failing to conduct investigations and failing to prosecute senior officials of security forces and governments involved in human rights violations.[45]

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[41] *Barrios Altos Case (Chumbipuma Aguirre et al. v Peru)*, 75 Inter-Am Ct HR (Ser. C) (Judgment) (2001), para. 41.
[42] *Prosecutor v Furundzija*, Case No. IT-95-17/1, Judgment, 10 December 1998, para. 155.
[43] *Mauritania Communications* 54/91 61/91 96/93 98/93 164/97-196/97 2110/98.
[44] Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or degrading Treatment or Punishment in Africa, 14 February 2002, see Guideline 16 on the duty of states to ensure "that there is no immunity from prosecution for nationals suspected of torture".
[45] See decision in *Social and Economic Rights Actions v Nigeria*, COMM 155/96, para. 44.



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47. There is a substantial body of cases, comments, rulings and remarks which denies the permissibility of amnesties in international law for crimes against humanity and war crimes. The Human Rights Committee ("HRC"), the Committee against Torture, the Special Rapporteur on Torture, the Inter-American Court and Commission, the ICTY, the African Commission and many renowned jurists speak with one voice in finding that blanket amnesties are impermissible (although the HRC adds "in general"): they produce impunity and violate state duties to investigate and punish perpetrators as well as the victims' rights to justice. But to survey all these statements is necessarily to observe the depressing number of occasions on which they have been provoked by state practice to the contrary. The fact that international legal bodies universally condemn states which grant amnesties for crimes against humanity has not stopped states, including the most powerful (as with the US/UK amnesty offer to Saddam Hussein in 2003[46]) from resorting to them in cases of perceived necessity. The Prosecution argues that a rule prohibiting amnesty has now crystallised as a universal norm of international law, but since that crystallisation process must show support in state practice as well as juristic writing, how can the practice of states to grant amnesties be explained away? To some extent, perhaps, by the fact that state practice looks not only to what states do, but whether they have any qualms about doing it: many states still torture, but they do not admit to doing so and international law finds a consensus in the fact that they all deplore its use. There is, too, a hand-wringing quality about the excuses for amnesty by states which grant them: these can range from Peru's confession (in the *Barrios Altos Case*) that international law was thereby violated, to the reaction of the UK foreign minister when taxed with his offer of impunity to Saddam: "the world is imperfect".[47] States condemned for granting amnesties are beginning to show some embarrassment when called to account by the UN Human Rights Commission for breaching legal obligations. This official response of "confession and avoidance" is taken into account in identifying the crystallization of a rule of customary international law, in the way described by the ICJ in *Nicaragua v US*:

> In order to deduce the existence of customary rules, the court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with the given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a state acts in a way *prima facie* incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the

[46] See para. 30 above.

[47] Jack Straw, interviewed BBC, 10 January 2003. See Hansard, Vol. 936, 19 March 2003, for the Prime Minister's comments.



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state's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[48]

48. It may therefore be said that state practice is changing to conform with the consistent view that blanket amnesties are, at least "in general", impermissible in international law for international crimes. What can also be detected, in what may be the development of an interim position, is a focus on major malefactors, the intellectual or commanding 'authors' of torture and genocide, who will not be permitted to escape through a pardon that exonerates their underlings. The mesh of the international law dragnet may be excessively loose at this rudimentary stage of its development, but it nonetheless serves to entangle the biggest fish - those who can credibly be accused of bearing the greatest responsibility for international crimes.

49. This is not so much a limitation on the rule as an application of it to those whose level of responsibility demands retribution, irrespective of cost or convenience or other apparently counter-veiling public interest. This follows from the fundamental duties and rights outlined above, which have been identified in the Conventions and invoked to demonstrate an obligation to prosecute. That obligation must be more powerful - indeed, overwhelming - when applied to those political and military leaders without whose authorisation or encouragement the crimes against humanity would not have been committed by "small fry" and common soldiers. Such leaders are the real "perpetrators of serious crimes under international law" who cannot benefit from a peace agreement under the simple principle of the Vienna Declaration that "states should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law".[49] There is no doubt that the sea change in international opinion is a reflection of public concern at the spectacle of truculent leaders, credibly accused of the worst human rights violations, living happily ever after an actual or implied amnesty. Removing them from the stage is no longer enough: the clear implication from all human rights treaties is that they must face justice, although their followers may be spared as a reconciliation measure. In my judgement, the rule against impunity which has crystallized in international law is a norm which denies the legal possibility of pardon to those who bear the greatest responsibility for crimes against humanity and for widespread and serious war crimes - certainly those which involve "serious violations" of

[48] (1996) ICJ reports, para. 186.
[49] World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, A/CONF.157/23, 12 July 1993, para. 60.



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Common Article 3 of the Geneva Conventions. The current state of the rule against impunity is neatly reflected in the Statute of the Special Court for Sierra Leone: Article 1 restricts the Court's jurisdiction to those who bear the greatest responsibility, and Article 10 denies amnesty to those very persons.

50. There are ways other than criminal prosecution to bring war crimes home to war criminals and offer some solatium to victims. Truth and Reconciliation Commissions ("TRC") have been much in vogue in transitional times, sometimes as an easier alternative for governments but increasingly as a genuine forum for truth telling and as a means to map a post-conflict future. But apart from a few well-publicized examples from South Africa, TRC procedures do not usually produce confessions of guilt from political and military leaders or powerful state officials.[50] Those who bear greatest responsibility seem to bear least sense of shame: they have usually defended their actions as having been required by the national interest. The TRC process, involving public confrontation with victims or relatives, may produce a degree of individual reconciliation when policemen and soldiers apologise, but not the sense of closure for grieving relatives which comes after a trial and sentence of major culprits. The message that most helps victims to come to terms with human loss - that their suffering has not been in vain because the perpetrator is locked away and other perpetrators may be deterred - is not available. Truth commissions may reveal truth, in the sense of finding out where bodies are buried and who ordered the disappearance and why: but that sort of truth without a follow-up prosecution, is unlikely to produce much satisfaction. Naming and shaming is no path to reconciliation when those who are named remain unashamed. Financial compensation from a national commission or through civil actions is another alternative. But many such victims feel demeaned by the notion that money can meaningfully compensate for their loss other than as a measure of punishment (the satisfaction of the ex-President Marcos torture victims derived not from the size of their damages award but from the fact it had been extracted from his own secret bank accounts[51]). Once again, these alternatives to criminal trial point to the need to penalize those who bear greatest responsibility - such as rulers, arms dealers, government officials and other mongers of war whose ill-gotten gains may be traceable and confiscatable as part of their sentence after conviction at a criminal trial.

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[50] See *Prosecutor v Norman*, Case No. SCSL-2003-08, Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone, 28 November 2003, para. 22

[51] *Hilao v Marcos*, 25 F.3d 1467 (9th Cir. 1994).



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51. The stage I discern international criminal law to have reached is to have produced a rule that invalidates amnesties offered under any circumstances to persons most responsible for crimes against humanity (genocide and widespread torture) and the worst war crimes (namely those in Common Article 3 of the Geneva Conventions). In the sphere of international law, the acts of these perpetrators (if capable of proof beyond reasonable doubt) must always remain amenable to trial and punishment. That prospect may deter them from accepting a peace settlement and may cause more loss of life in the short run, but less in the long run: we cannot speculate. The rule is one of international law, however, and cannot prevent one state or alliance of states from offering a safe haven to a tyrant. The haven will only be "safe", of course, so long as he remains in it. States which wish to offer effective amnesties to international criminals must be prepared to suffer their continuing presence and to abide the consequences - political, diplomatic and perhaps in time legal - of their actions.

<u>Abuse of Process</u>

52. The consequence of the Court's ruling in its Decision on Challenge to Jurisdiction: Lomé Accord Amnesty[52] is that this amnesty cannot operate in international law to provide immunity from prosecution to those alleged to bear the greatest responsibility for crimes against humanity. Article 10 of the Special Court's Statute cannot be disapplied, because it complies with - indeed it embodies - a rule of customary international law. This applicant, however, has a fall-back position: if the amnesty cannot bar his prosecution, might it nonetheless, on the assumption that he can prove that he personally complied with its terms, be prayed it in aid of an application to stop his trial on the grounds of abuse of process? I will answer this question in principle, recognizing the possibility that some commanders guilty of pre-Lomé war crimes may be able to prove that in reliance upon the amnesty they laid down arms and never took them up again, or only took them up out of necessity to defend against unprovoked attacks from enemy forces which were breaching the ceasefire. That fact would provide, in my view, significant justification of sentence were they convicted, but can it serve to bar their trial in the first place?

53. Abuse of process is a common law doctrine by which a national court has an inherent power permanently to stay a properly brought prosecution on two broad grounds: 1) if it concludes that a

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[5]· *Prosecutor v Morris Kallon* (Case No. SCSL-2004-15-AR72(E)) and *Prosecutor v Brima Bazzy Kamara* (Case No. SCSL-2004-15-AR72(E)), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004.



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fair trial is impossible and 2) if, although possible, to conduct such a trial would inevitably undermine the integrity of the court or of the justice system.[53] The first ground is applicable to international criminal courts - indeed is one of the defining characteristics of the "independence" required of any legal tribunal. The second, however, confronts the logic of the unforgivable crime: how can it ever undermine a court's integrity to conduct a fair trial when the charge is as heinous as a crime against humanity? The cases where national courts have invoked the second head generally concern prosecutions brought in circumstances where the law has not provided an adequate defence (e.g. of entrapment) or where the defendant has been brought into the jurisdiction unlawfully or in breach of extradition requirements.[54] International crimes are so grave that it is difficult to see how inducements to commit them could be relevant other than to mitigation, and the extradition breaches that might stop the trial of a fraudster in a national court can hardly be allowed to abort the prosecution of an Eichmann. A national court may use its inherent power as an expression of its disapproval of police or prosecutorial misconduct, on the principle that the end does not justify the means. *Eichmann* suggests that punishing crimes against humanity is an obligatory end that unlawful means may in some circumstances justify, although certainly not if they themselves amount to international crimes. An international criminal court would undermine its own integrity were it to permit a prosecution to go ahead based on a confession extracted by torture, for example, so the second head of abuse, if it is available to international tribunals, must necessarily be more limited in its application than in domestic courts.

54. That is, perhaps, the lesson of the *Barayagwiza* case[55] where the ICTR Appeals Chamber at first applied the doctrine of abuse of process to release a defendant because of prosecutorial misconduct, then subsequently ordered his re-arrest and trial after hearing fresh evidence that the prosecutor's conduct was not so bad after all. There is no moral or any other equivalence between prosecution "misconduct" - usually the product of ineptitude or over-zealousness - and a defendant's alleged misconduct if it involves giving orders for mass murder. In this situation, it would be inappropriate to discipline the prosecutor by freeing the defendant. Curial strictures, which may lead to the prosecutor's dismissal or demotion or payment of liabilities in costs, are the appropriate remedy in such cases, unless the delay consequent upon the misconduct has caused such prejudice to the defence (e.g. through the death or fading memory of defence witnesses) that

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[53] *R v Latif* [1996] 1 WLR 104, per Lord Steyn.
[54] R v Horseferry Road Magistrates' Court Ex parte Bennett, [1994] 1 AC 42.
[55] *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999.



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a fair trial is no longer possible. Proof of serious prejudice to the conduct of the defence is the precondition for a successful abuse application on the first ground and will be a matter for the Trial Chamber to assess. I cannot immediately see how reliance on an amnesty could be pleaded as a cause of such serious prejudice to a defendant that a fair trial would be impossible: the evidence in relation to his conduct prior to Lomé will not be affected by his actions afterwards.

55. The second ground, defined as "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"[56] was relied upon in *Barayagwiza*, which adopted the leading common law authorities on abuse.[57] The court found that the prosecution had been egregiously negligent, and "the only remedy available for such prosecution inaction and the resultant denial of his rights is to release the appellant and dismiss the charges against him".[58] I consider this to be an unsatisfactory approach, for reasons given in the preceding paragraph. It was based on the second head of abuse, as defined above, which focuses too broadly on "pre-trial impropriety or misconduct". If a fair trial is still possible, pre-trial impropriety or misconduct will not normally be a reason to stop it. On the other hand, it is possible to envisage situations where even a fair trial, without any prosecution misbehaviour, would be a spectacle destructive of public confidence in the justice system, as in the case of an obviously deranged or dying defendant in the dock.

56. There can be no question of prosecutorial misconduct by proceeding in the face of the Lomé Amnesty, given that Article 10 of the Statute expressly provides that an amnesty shall not bar a prosecution. That does not dispose of an argument based on the second head of abuse under which it may be open to a defendant to claim that his trial, however fair, would nonetheless be destructive of public confidence in the court or the system of international justice it dispenses. But the performance of a condition in order to obtain an amnesty does not obliterate the guilt irrevocably attached to the commission of a crime against humanity for which the amnesty is given. There can be no basis for the abuse argument, (namely that an international criminal court would confound its own mission by denying a defendant, accused of bearing greatest responsibility for inhuman crimes, the benefit of an invalid amnesty promise on which he relied) when international law denies such persons the benefit even of a valid amnesty. Amnesty compliance may, however, be invoked in support of the second head of abuse in a situation which

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[56] Ibid, para. 77.
[57] Ibid, paras 74-77.
[58] Ibid, para. 106.



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is not suggested here, namely when the prosecutor in the course of pre trial proceedings offers a pardon to an indictee - e.g. in return for a guilty plea and "queen's evidence" against accomplices - and then reneges on the deal. This is a literal abuse of process which, as national court decisions show, affects the conscience of the court and may well incline it to hold the prosecutor to his word if the defendant has performed his side of the bargain. But the Special Court Prosecutor is in no way concerned with or affected by the Lomé Amnesty, and is obliged by statute to disregard it. That disregard cannot amount to an abuse of process.

## Conclusion

57. There is no reason to disapply Article 10 of the Statute: it reflects customary international law which nullifies amnesties given to persons accused of bearing great responsibility for serious breaches of international law. There is no evidence before this court of Prosecution misconduct of a kind that would amount to an abuse of process.



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Done at Freetown this twenty-fifth day of May 2004

Justice Robertson

SPECIAL COURT FOR SIERRA LEONE
SCSL

[Seal of the Special Court]



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