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# AMNESTY, THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION AND THE SPECIAL COURT FOR SIERRA LEONE

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## I. INTRODUCTION

Sierra Leone sits more or less on the cusp of West Africa, and must have nestled snugly against what is now Venezuela when the two hemispheres were once joined. During colonial times it was one of the more developed parts of Africa; it boasts of being the first country in sub-Saharan Africa with a university. But the post-colonial legacy was a miserable one. The country was ruled by a succession of corrupt dictators, who were themselves supported by a wealthy elite that thrived on the trade in illicit diamonds, as well as the more banal forms of corruption that have plagued many countries in the region.

The preamble to the *Universal Declaration of Human Rights* says that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . . .”<sup>1</sup> There was a serious rule of law deficit in Sierra Leone in the 1970s and 1980s and the result was, inexorably, rebellion. In March 1991, the Revolut-

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<sup>1</sup> *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pmb., U.N. Doc. A/810 (1948).

ionary United Front, led by Foday Sankoh and supported by the forces of a rebel group in neighboring Liberia led by Charles Taylor, raided the town of Bombali, which is near the northern border. There was a skirmish, and some deaths. So began a civil war that would last about a decade. It was characterized by a stunning indifference of combatants on all sides to the laws and customs of war, the laws of humanity, and the dictates of the public conscience. Most of it was waged in rural areas, and only at its climax, in January 1999, did armed conflict come to the capital, Freetown.<sup>2</sup>

The "battle for Freetown" was precipitated by complex factors. One of the most important was the concern among the rebel factions about military trials and executions of captured combatants by the courts of the ruling regime. In October 1998, a major treason trial had been held in Freetown before a military tribunal. Those convicted were promptly executed by firing squad, something that was subsequently condemned by human rights tribunals within the United Nations<sup>3</sup> and the Organization for African Unity.<sup>4</sup> According to the October 2004 report of the Sierra Leone Truth and Reconciliation Commission,

[t]he apparent most proximate cause for the attack to take place when it did was the confirmation of the deaths of twenty-four (24) soldiers in the Special Court Martial proceedings of 1998. SAJ Musa was known to repeat a single refrain to motivate his men on their march westwards: "They are killing our brothers." The widely-held belief was that the executions were certainly not at an end, as further trials and indeed Court Martials were foreseen by the Government. Hence, many testimonies referred to the attackers' motives of freeing those who remained in Pademba Road Prison in an act of rescue.<sup>5</sup>

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<sup>2</sup> See generally, PAUL RICHARDS, *FIGHTING FOR THE RAIN FOREST: WAR, YOUTH AND RESOURCES IN SIERRA LEONE* (1996).

<sup>3</sup> See Cases 839/1998, 840/1998 & 841/1998, *Mansaraj et al. v. Sierra Leone*, U.N. Doc. CCPR/C/64/D/839, 840 & 841/1998 (July 2001).

<sup>4</sup> See *Forum of Conscience v. Sierra Leone*, para. 18, *Afr. Comm. on Hum. and Peoples' Rts.*, Comm. No. 223/98.

<sup>5</sup> 3A WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION ch. 3, at 362 (2004) [hereinafter COMMISSION REPORT]. This reference is to the version of the report presented to the President of Sierra Leone on 5 October 2004. Although a published version, consisting of four volumes, was handed over at that time, the Commission did not subsequently release the full report to the general public. The publishers of the report had not done a satisfactory job, and the volumes were riddled with errors and inconsistencies. On 2

The arrival of the conflict in Freetown provoked moves towards negotiations and finally, a peace settlement, which was reached in July 1999.

## II. THE AMNESTY IN THE LOMÉ AGREEMENT

Known as the Lomé Agreement, because it was negotiated in the capital of nearby Togo, the peace settlement provided for a power-sharing government in which the rebel Revolutionary United Front would be given cabinet positions.<sup>6</sup> The parties to the Agreement were the Government of Sierra Leone and the Revolutionary United Front, but it received the benediction of what were called the “moral guarantors,” namely, Togo, the Commonwealth, the Economic Community of West African States (ECOWAS), the Organization of African United (OAU, now known as the African Union), and the United Nations.<sup>7</sup>

Article IX of the Lomé Agreement reads 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.

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November 2004, the Commission disseminated a final version of two sections of the report, entitled “Findings” and “Recommendations,” available at [http://www.nuigalway.ie/human\\_rights/publications.html](http://www.nuigalway.ie/human_rights/publications.html). It is expected that the full version of the report will not be issued until 2005.

<sup>6</sup> Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Sierra Leone-R.U.F./S.L., July 7, 1999 [hereinafter Lomé Agreement].

<sup>7</sup> Lomé Agreement, *supra* note 6, art. XXXIV. See Karen Gallagher, *No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone*, 23 T. JEFFERSON L. REV. 149 (2000); Daniel Macaluso, *Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lomé Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone*, 27 BROOK. J. INT’L L. 347 (2001).

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 [Revolutionary United Front], ex-AFRC [Armed Forces Revolutionary Council], ex-SLA [Sierra Leone Army] or CDF [Civilian Defence Forces] in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.<sup>8</sup>

The “pardon” of Foday Sankoh, leader of the Revolutionary United Front (RUF), was directed at his conviction for treason and sentence to death *in absentia* during the treason trials of the previous year. The more general amnesty covered all of the main players in the conflict, including the national armed forces and a vile pro-government militia, the Civilian Defense Forces (CDF).<sup>9</sup> Testifying before the Truth and Reconciliation Commission about the decision to grant the amnesty, President Kabbah explained: “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.”<sup>10</sup>

The Special Representative of the Secretary-General of the United Nations appended, somewhat belatedly, a handwritten reservation to the agreement declaring that the United Nations could not endorse any amnesty for war crimes, crimes against humanity and genocide: “The United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other

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<sup>8</sup> Lomé Agreement, *supra* note 6, art. IX.

<sup>9</sup> *Id.*

<sup>10</sup> His Excellency the President Alhaji Dr. Ahmad Tejan Kabbah, statement before the Truth and Reconciliation Commission (August 5, 2003), *cited in* Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), para. 29, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Mar. 13, 2004), Prosecutor v. Kamara, Case No. SCSL-2004-16-AR72(E), para. 29, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Mar. 13, 2004).

serious violations of international humanitarian law.”<sup>11</sup> This is how it was described in paragraph 54 of the Secretary-General’s report to the Security Council:

As in other peace accords, many compromises were necessary in the Lomé Peace Agreement. As a result, some of the terms under which this peace has been obtained, in particular the provisions on amnesty, are difficult to reconcile with the goal of ending the culture of impunity, which inspired the creation of the United Nations Tribunals for Rwanda and the Former Yugoslavia, and the future International Criminal Court. Hence the instruction to my Special Representative to enter a reservation when he signed the peace agreement, explicitly stating that, for the United Nations, the amnesty cannot cover international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. At the same time, the Government and people of Sierra Leone should be allowed this opportunity to realize their best and only hope of ending their long and brutal conflict. During my short visit to Sierra Leone on 8 July 1999, I witnessed tremendous destruction, suffering and pain, particularly on the faces of the victims of wanton and abhorrent violence. I took the opportunity to encourage all Sierra Leoneans to seize this opportunity for peace, to rally behind the agreement, seek reconciliation, and to look and work towards the future.<sup>12</sup>

On 20 August 1999, the Security Council adopted a resolution welcoming the Lomé Agreement.<sup>13</sup> Instead of an explicit discussion of the amnesty issue, the Resolution couched a rather obscure reference to paragraph 54 within a more general formulation concerning reconciliation. In paragraph 10, the Security Council Resolution

[s]tresses the urgent need to promote peace and national reconciliation and to foster accountability and respect for

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<sup>11</sup> The statement by the Special Representative of the Secretary-General does not appear in the text of the Agreement published by the United Nations (U.N. Doc. S/1999/777). The Truth and Reconciliation Commission was shown an official copy of the Lomé Accord to which the statement was appended in handwriting.

<sup>12</sup> *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, S.C. Res. 836, U.N. SCOR, 54th Sess., para. 54, U.N. Doc. S/1999/836 (1999).

<sup>13</sup> S.C. Res. 1260, U.N. SCOR, 53d Sess., 4035th mtg., U.N. Doc. S/RES/1260 (1999).

human rights in Sierra Leone and, in this context, *takes note* of the views contained in paragraph 54 of the report of the Secretary-General, welcomes the provisions in the Peace Agreement on the establishment of the Truth and Reconciliation Commission and the Human Rights Commission in Sierra Leone, and calls on the Government of Sierra Leone and the RUF to ensure these Commissions will be established promptly within the time-frame provided for in the Peace Agreement.<sup>14</sup>

The language in the Resolution seemed to suggest that the Security Council accepted the compromise in the Lomé Agreement. Its reference to the Secretary-General's comments on amnesty was little more than a perfunctory nod that criticized the amnesty "for the record" but went no further.

### III. THE TRUTH AND RECONCILIATION COMMISSION (THE "COMMISSION")

Given the impunity for perpetrators of human rights violations during the conflict that resulted from the pardon and amnesty clause in the Lomé Agreement, it was felt necessary to ensure that there was some sort of accountability, even if it would not be accompanied by penal sanctions and stigma. For this reason, the parties to the Lomé Agreement agreed to the establishment of a Truth and Reconciliation Commission. Article XXVI of the Lomé Agreement, entitled "Human Rights Violations," states:

1. 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.
2. In the spirit of national reconciliation, the Commission shall deal with the question of human rights violations since the beginning of the Sierra Leonean conflict in 1991. This Commission shall, among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations.
3. Membership of the Commission shall be drawn from a

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<sup>14</sup> *Id.*

cross-section of Sierra Leonean society with the participation and some technical support of the International Community. This Commission shall be established within 90 days after the signing of the present Agreement and shall, not later than 12 months after the commencement of its work, submit its report to the Government for immediate implementation of its recommendations.<sup>15</sup>

As then-Attorney General Solomon Berewa (currently Vice-President) explained at a conference the following year on the establishment of the Commission,

far from being fault-finding and punitive, it is to serve as the most legitimate and credible forum for victims to reclaim their human worth; and a channel for the perpetrators of atrocities to expiate their guilt, and chasten their consciences. The process has been likened to a national catharsis, involving truth telling, respectful listening and above all, compensation for victims in deserving cases.<sup>16</sup>

The 90-day deadline for establishment of the Commission that had been set by the Lomé Agreement proved to be too ambitious, although work on drafting the necessary legislation did begin relatively promptly. By February 2000, Sierra Leone's Parliament had enacted the Truth and Reconciliation Commission Act 2000, authorizing the President of Sierra Leone to appoint seven commissioners who would then begin work to accomplish the Commission's mandate.<sup>17</sup> The "Memorandum of Objects and Reasons," which is attached to the legislation, notes that the Peace Agreement "envisaged the proceedings of the Commission as a catharsis for constructive interchange between the victims and perpetrators of human rights violations and abuses."<sup>18</sup> According to section 17 of the Act, "[t]he Government shall faithfully and timeously implement the

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<sup>15</sup> Lomé Agreement, *supra* note 6, art. XXVI.

<sup>16</sup> Solomon Berewa, *Addressing Impunity using Divergent Approaches: The Truth and Reconciliation Commission and the Special Court*, in TRUTH AND RECONCILIATION IN SIERRA LEONE 59 (2001).

<sup>17</sup> See The Truth and Reconciliation Commission Act 2000 (2000) (Sierra Leone) [hereinafter TRC Act], available at <http://www.sierra-leone.org/trcact2000.html>. See Richard Bennett, *The Evolution of the Sierra Leone Truth and Reconciliation Commission*, in TRUTH AND RECONCILIATION IN SIERRA LEONE 37-51 (2001), for background on the creation of the Commission.

<sup>18</sup> TRC Act, *supra* note 17, Memorandum of Objects and Reasons.



recommendations of the report that are directed to state bodies and encourage or facilitate the implementation of any recommendations that may be directed to others.”<sup>19</sup> Section 6(1) of the Truth and Reconciliation Commission Act 2000 circumscribes the mandate:

The object for which the Commission is established is to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.<sup>20</sup>

Only in July 2002 were the Commissioners appointed and sworn into office. After a somewhat chaotic preliminary phase, the Commission began its formal activities in early December 2002, and concluded its public hearings in early August 2003. The Report was submitted to the President in early October 2004.

Observers of the Truth and Reconciliation Commission often discussed the amnesty issue in the context of incentives for perpetrators to testify. Analogies were drawn with the South African Truth and Reconciliation Commission, which offered amnesty to perpetrators in return for thorough and honest testimony about their acts.<sup>21</sup> The South African Commission established a Committee on Amnesty which was empowered to grant amnesty in exchange for “full disclosure” with respect to acts or omissions “associated with a political objective.”<sup>22</sup> It is widely believed that the amnesty was decisive in compelling many perpetrators to participate in the work of the South African Commission. Many questioned how the Sierra Leonean body could entice perpetrators to cooperate with it, given that it had no amnesty to offer in exchange.

But in practice, this did not prove to be such a problem. Perpetrators regularly appeared before the Commission, despite the

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<sup>19</sup> TRC Act, *supra* note 17, § 17.

<sup>20</sup> *Id.* at § 6(1).

<sup>21</sup> Promotion of National Unity and Reconciliation Act, No. 34, §§ 16-22 (1995) (S. Afr.), *as amended by* Acts Nos. 87 (1995), 104 (1996), 18 (1997), 47 (1997) and 84 (1997). See, e.g., ALEX BORAINÉ, *A COUNTRY UNMASKED* (2000), for background on the South African Commission. See generally PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS, FACING THE CHALLENGE OF TRUTH COMMISSIONS* (2nd ed. 2002), for background on truth commissions.

<sup>22</sup> Promotion of National Unity and Reconciliation Act, *supra* note 21, pmbl.

fact that they had no amnesty to gain. They were obviously driven by other factors. Perhaps many simply felt the need to confess. No doubt there were perpetrators who believed they could put a positive “spin” on their acts. The quid pro quo may have been some form of social acceptance. What the Sierra Leonean experience appears to show is that many perpetrators do not need the promise of amnesty in order to come forward and participate in such a Commission. Others, of course, will never testify about their deeds, even when offered an amnesty, as the high rate of non-cooperation among perpetrators in South Africa seems to indicate.

#### IV. ESTABLISHMENT OF THE SPECIAL COURT

There was a renewed outbreak of fighting in Sierra Leone for a few weeks in May 2000, well before the Truth and Reconciliation Commission had been established, but after its enabling legislation had been adopted. The Government quickly mastered the situation, arresting many Revolutionary United Front supporters and, in effect, shifting in its favor the fragile balance in the power-sharing that had been effected at Lomé. Then the Government of Sierra Leone “reassessed”<sup>23</sup> its position with respect to the amnesty. Sierra Leone’s President Kabbah wrote to the Security Council requesting that it establish an international tribunal to prosecute members of the Revolutionary United Front.<sup>24</sup> The President explained that “[t]he purpose of such a court is to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages.”<sup>25</sup> He made explicit reference to the amnesty in the Lomé Agreement:

As you are aware, the atrocities committed by the RUF [Revolutionary United Front] in this country for nearly 10 years in its campaign of terror have been described generally as the worst in the history of civil conflicts. In July 1999, my Government and the leadership of the RUF signed the Lomé Peace Agreement. The aim of this Agreement was to bring peace and a permanent cessation

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<sup>23</sup> Solomon Berewa, *supra* note 16, at 56.

<sup>24</sup> Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786, annex (Aug. 10, 2000).

<sup>25</sup> *Id.*

to those atrocities and the conflict. As a prize for such peace, my Government even conceded to the granting of total amnesty to the RUF leadership and its members in respect of all the acts of terrorism committed by them up to the date of the signing of that Peace Agreement.<sup>26</sup>

But Kabbah said that the Revolutionary United Front had “since reneged on that Agreement.”<sup>27</sup> Attached to the letter was a proposed “Framework for the special court for Sierra Leone.”<sup>28</sup> It, too, stressed that the mandate of the court would be to prosecute members of the Revolutionary United Front:

The mandate of the court could be designed to be narrow in order to prosecute the most responsible violators and the leadership of the Revolutionary United Front. This could result in the numbers being limited to the dozens. This will also allow the court to be quick and efficient in its tasks of doing justice while at the same time breaking the command structure of the criminal organization responsible for the violence.<sup>29</sup>

Nowhere did President Kabbah attempt to clarify whether the Special Court was to be confined to post-Lomé offences, thereby respecting the amnesty provision in the Lomé Agreement, or whether he intended for it to override the amnesty.

The Security Council responded positively to Kabbah’s request. On 14 August 2000, in Resolution 1315, the Council instructed the Secretary-General to negotiate an agreement with the Government of Sierra Leone with a view to establishing a special court.<sup>30</sup> The Resolution’s preamble noted that

the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> S.C. Res. 1313, U.N. SCOR, 55th Sess., 4184th mtg., U.N. Doc S/RES/1313 (2000).

international humanitarian law.<sup>31</sup>

But although the Resolution addressed a number of specific details concerning jurisdiction and related matters, it did not speak specifically to the issue of the amnesty, nor did it propose the temporal jurisdiction of the new tribunal (something which would have, indirectly, indicated a position on the amnesty issue, because had the Council stated that the court would have jurisdiction over pre-Lomé offences this would have implied a retraction of the amnesty). The Resolution "[r]ecogniz[ed] that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace."<sup>32</sup> Notably, the Council once again flagged the significance of the Truth and Reconciliation Commission (it had also done this in its August 1999 resolution welcoming the Lomé Agreement), which had been created largely in response to the amnesty.<sup>33</sup> There was no reference to the Revolutionary United Front in the Council Resolution. Instead, it said that the proposed court should have jurisdiction over all perpetrators, whatever their political affiliation:

*Recommends further* that the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of [crimes against humanity, war crimes and other serious violations of international humanitarian law], including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.<sup>34</sup>

Following talks between the United Nations and the Government of Sierra Leone, in early October 2000 the Secretary-General proposed a draft statute for the Special Court. It was presented within a lengthy report that discussed the relevant issues in detail.<sup>35</sup> The Secretary-General's Report noted that in negotiations about the draft statute of the Special Court, the Government of Sierra Leone had

concluded with the position of the United Nations and

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<sup>31</sup> *Id.* at pmb1.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at para. 3.

<sup>35</sup> *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S.C. Res. 915, U.N. SCOR, 55th Sess., 915th mtg., U.N. Doc., S/2000/915, (2000).

agreed to the inclusion of an amnesty clause which would read as follows: 'An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in Articles 2 to 4 of the present Statute shall not be a bar to prosecution.'<sup>36</sup>

The Secretary-General's Report clarified the position of the Government of Sierra Leone with respect to the amnesty. Consequently, the Secretary-General noted, "[w]ith the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed."<sup>37</sup>

Several paragraphs in the Report dealt with the issue of the amnesty:

In addressing the question of the temporal jurisdiction of the Special Court as requested by the Security Council, a determination of the validity of the sweeping amnesty granted under the Lomé Peace Agreement of 7 July 1999 was first required. If valid, it would limit the temporal jurisdiction of the Court to offences committed after 7 July 1999; if invalid, it would make possible a determination of a beginning date of the temporal jurisdiction of the Court at any time in the pre-Lomé period.<sup>38</sup>

The Secretary-General conceded that "amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict," but recalled that "the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law."<sup>39</sup> The Secretary-General's Report noted the objection that had been recorded at the time of the signing of the Lomé Agreement, and the reference to this by the Security Council in its Resolution of August 2000.<sup>40</sup> But the Secretary-General did not refer to his silence in November 1996 when an earlier peace agreement containing an amnesty clause, known as the Abidjan Agreement, had

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<sup>36</sup> *Id.* at para. 24.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at para. 21.

<sup>39</sup> *Id.* at para. 22.

<sup>40</sup> *Id.* at para. 23.

been reached,<sup>41</sup> something at odds with the claim that the United Nations had “consistently” opposed amnesties for serious violations of international humanitarian law.

Negotiations concerning the draft statute of the proposed court continued for more than a year, but there is no evidence in the public record of further discussions of the amnesty issue. The provision agreed to in October 2000, and cited in the Secretary-General’s report, remained unchanged and was incorporated into the final version of the Statute of the Special Court of Sierra Leone as Article 10.<sup>42</sup> In January 2002, the United Nations and the Security Council agreed to the Statute.<sup>43</sup> In about July, at roughly the same time as the Truth Commission began its activities, the Special Court began operations.<sup>44</sup> The

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<sup>41</sup> Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, Sierra Leone-R.U.F./S.L., Nov. 30, 1996, art. 15 [hereinafter *Abidjan Accord*] (“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 [Revolutionary United Front] in respect of anything done by them in pursuit of their objectives as members of that organisation up to the time of the signing of this Agreement. In addition, legislative and other measures necessary to guarantee former RUF 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.”) As at Lomé, the United Nations was also a ‘moral guarantor’ of the Abidjan Agreement. *Id.* at art. 28.

<sup>42</sup> Statute of the Special Court for Sierra Leone, art. 10 (Jan. 16, 2002), available at <http://www.sierra-leone.org/specialcourtstatute.html>.

<sup>43</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Jan. 16, 2002), S.C. Res. 246, U.N. SCOR, 57th Sess., U.N. Doc. S/2002/246, appended to Letter dated 6 March 2002 from the Secretary-General Addressed to the President of the Security Council, app. II (2002).

<sup>44</sup> The establishment of the Court is discussed in some detail in Prosecutor v. Kallon et al., Case Nos. SCSL-2004-15, 16 & 17-AR72(E) (Mar. 13, 2004). On the Court, there is now a considerable literature: Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 EUR. J. INT’L L. 857 (2000); Giorgio Bosco, *The Special Court for Sierra Leone and the Extraordinary Chambers for Cambodia*, 15 RIVISTA DELLA COOPERAZIONE GIURIDICA INTERNAZIONALE 15 (2003); Robert Cryer, *A ‘special court’ for Sierra Leone?*, 50 INT’L & COMP. L. Q. 435 (2001); Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. FORUM 185 (2001); Avril McDonald, *Sierra Leone’s Shoestring Special Court*, 84 INT’L REV. RED CROSS 121 (2002); S. Beresford & A.S. Muller, *The Special Court for Sierra Leone: An Initial Comment*, 14 LEIDEN J. INT’L L. 635 (2001); Melron C. Nicol-Wilson, *Accountability for Human Rights Abuses: The United Nations’ Special Court for Sierra Leone*, [2001] AUSTRALIAN INT’L L.J. 159; Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT’L L. 436 (2002); Abdul Tejan Cole, *The Special Court for Sierra Leone*, 14 INTERIGHTS BULLETIN 37 (2002); J. Cerone, *The Special Court for Sierra*

Parliament of Sierra Leone enacted legislation concerning implementation of the Statute, but this did not touch on the amnesty issue.<sup>45</sup> No doubt, Parliament did not see any need to address the amnesty issue given that the Special Court was an autonomous international institution not subject to the laws of Sierra Leone nor bound by agreements reached by the Government of Sierra Leone. The purpose of the legislation was merely to provide a legal framework for the activities of the Special Court within Sierra Leone, and to impose obligations upon the Government of Sierra Leone to cooperate with the Special Court.

#### V. CONSIDERATION OF THE AMNESTY ISSUE BY THE SPECIAL COURT AND THE COMMISSION

The question of the legality of the repeal of the amnesty was litigated before the Special Court for Sierra Leone in a preliminary motion filed by two of the defendants, Morris Kallon and Brima Bazzy Kamara.<sup>46</sup> Counsel for two other defendants intervened in the case and made representations before the Special Court. The indictments charged both Kallon and Kamara with pre-Lomé offences relating to their activities as leaders of the Revolutionary United Front or the Armed Forces Revolutionary Council. Clearly, they were sheltered from prosecution before the courts of Sierra Leone by the Lomé Peace Agreement. In a ruling dated 13 March 2004, a three-judge panel of the Appeals Chamber dismissed the challenge.<sup>47</sup> The accused sub-

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*Leone: Establishing a New Approach to International Criminal Justice*, 8 ILSA J. INT'L & COMP. L. 379 (2002); Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L.J. 391 (2001); C. Denis, *Le Tribunal special pour la Sierra Leone – Quelques discussions*, [2001] REVUE BELGE DE DROIT INTERNATIONAL 236; Marissa Miraldi, *Overcoming Obstacles of Justice: The Special Court of Sierra Leone*, 19 N.Y.L. SCH. J. HUM. RTS. 849 (2003); D.M. Amann, *Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone*, 29 PEPP. L. REV. 167 (2002).

<sup>45</sup> Special Court Agreement (Ratification) Act 2002, Supplement to the Sierra Leone Gazette, Vol. CXXX, No. II (Mar. 7, 2002).

<sup>46</sup> Prosecutor v. Kallon, Case No. SCSL-2003-07-PT, Preliminary Motion based on lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (June 16, 2003); Prosecutor v. Kamara, Case No. SCLS-2003-10-PT, Application by Brima Bazzy Kamara in respect to Jurisdiction and Defects in Indictment (June 16, 2003).

<sup>47</sup> Prosecutor v. Kallon and Prosecutor v. Kamara, *supra* note 10. Rule 72(D)(i) of the Rules of Procedure and Evidence specifies that preliminary motions dealing with jurisdictional issues may be referred to the Appeals Chamber without any initial finding by the Trial Chamber. Though intended to be comprised of five judges, it had been reduced to three by the resignation of one judge and the recusal of another. The Statute declares that the Appeals Chamber is composed of five judges. It does not authorize the Appeals Chamber to sit as a panel of three. Indeed, the Statute makes

mitted that the Government of Sierra Leone, as one of the partners in the establishment of the Special Court, was bound to respect the amnesty clause in the Lomé Agreement, and that it would be an "abuse of process" for the Special Court to allow cases to proceed that were in violation of the Lomé Agreement.<sup>48</sup>

The Appeals Chamber ruling referred to Article IX of the Lomé Agreement, and then cited at considerable length President Kabbah's letter requesting the establishment of a special court.<sup>49</sup> It affirmed that "[t]he Special Court, though established by agreement between the United Nations and the Government of Sierra Leone, is an autonomous and independent institution."<sup>50</sup> The Appeals Chamber discussed at some length whether or not the Lomé Agreement could be considered to be an instrument of international law. The fact that the United Nations together with other international organizations and States participated in the negotiations and are identified in the document as "moral guarantors" was invoked in support of such a claim. The Appeals Chamber concluded that a peace agreement in an internal armed conflict was not comparable to one for an international armed conflict in this respect, ruling that the Lomé Agreement was not an international instrument.<sup>51</sup> Perhaps if the Special Court had concluded that the Lomé Agreement was indeed an international instrument, there would have been a conflict between two international instruments involving the United Nations and the Government of Sierra Leone, although probably the *lex posterioris* principle of interpretation would still have resolved the debate in favor of the Statute of the Special Court.

Surprisingly, the Appeals Chamber did not consider that the Government of Sierra Leone had in some way repudiated the Lomé Agreement:

No reasonable tribunal will hold that the Government of Sierra Leone has reneged on its undertaking by agreeing to Article 10 of the Statute which is consistent with the developing norm of international law and with the declaration of the representative of the Secretary-General

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provision for alternate judges (art. 12(4)), which seems to suggest that the Trial Chamber and the Appeals Chamber are not properly constituted unless they have the full number present.

<sup>48</sup> Prosecutor v. Kallon and Prosecutor v. Kamara, *supra* note 10, para. 1.

<sup>49</sup> *Id.* at para. 9.

<sup>50</sup> *Id.* at para. 14.

<sup>51</sup> *Id.* at para. 42. See also *id.* at para. 86.



on the execution of the Lomé Agreement.<sup>52</sup>

This is certainly an odd statement from the Special Court. After all, President Kabbah himself had admitted that he had defied the urgings of the international community on the issue of amnesty in agreeing to Article 10 of the Lomé Agreement.<sup>53</sup> Moreover, his letter to the Security Council implied that Article 10 no longer applied because the Revolutionary United Front had itself in some way repudiated the agreement.<sup>54</sup>

The Appeals Chamber did not examine the intriguing issue of renunciation of whether the Revolutionary United Front had repudiated the Lomé Agreement. President Kabbah's letter to the Security Council in 2000 requesting establishment of the Special Court had asserted that in renewing hostilities the Revolutionary United Front had, in effect, "reneged on the agreement."<sup>55</sup> But even if this were true, could this have the effect of canceling the effects of Article IX which granted the pardon and amnesty? The argument seems a fragile one, given that the amnesty applied not only to the Revolutionary United Front fighters, but also to other combatants.<sup>56</sup> Why would the latter be deprived of an amnesty because individuals in another faction had taken up arms? For that matter, why would all members of the Revolutionary United Front lose the benefit of an amnesty because some of their more undisciplined comrades had violated the Agreement? The suggestion that an amnesty in a peace agreement becomes null and void, or that it is voidable, because some parties later violate the agreement does not seem to be sustainable. It is probably a good thing that the Special Court didn't pay any attention to the matter.

The Appeals Chamber launched into a general discussion of amnesty issues although, strictly speaking, this was hardly necessary for it to resolve the simpler question of conflict of laws between the Lomé Agreement and the Statute of the Special Court for Sierra Leone. The "abuse of process" argument, raised by Kallon's counsel, invited the Appeals Chamber to exercise its discretion rather than to declare that there was a legal bar to prosecution.<sup>57</sup> This involved an

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<sup>52</sup> Prosecutor v. Kallon and Prosecutor v. Kamara, *supra* note 10, para. 63.

<sup>53</sup> His Excellency the President Alhaji Dr. Ahmad Tejan Kabbah, *supra* note 10.

<sup>54</sup> Letter, *supra* note 24.

<sup>55</sup> *Id.*

<sup>56</sup> Lomé Agreement, *supra* note 6, art. IX.

<sup>57</sup> Prosecutor v. Kallon and Prosecutor v. Kamara, *supra* note 10, para. 54. The "abuse of process" doctrine has already been recognized in the case law of international criminal tribunals. See Prosecutor v. Barayagwiza, Case No: ICTR-97-19-AR72, para.

assessment of the validity of the amnesty itself. The Appeals Chamber recognized that any State has the sovereign right to grant amnesty to rebels for "acts of rebellion and challenge to the constitutional authority of the State."<sup>58</sup> However, "[i]t is where, and in this case because, the conduct of the participants in the armed conflict is alleged to amount to international crime that the question arises whether in such a situation a State has the same choice to dispense with the prosecution of the alleged offenders."<sup>59</sup> The Appeals Chamber in effect declared that Sierra Leone could not legally declare an amnesty for "crimes under international law that are the subject of universal jurisdiction."<sup>60</sup> It continued: "[I]t stands to reason that a state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*."<sup>61</sup> The Special Court endorsed the argument of the Prosecutor that there is a "crystallizing international norm that a government cannot grant amnesty for serious violations of crimes under international law."<sup>62</sup>

Furthermore, citing Professor Diane Orentlicher, who had filed an *amicus curiae* brief, the Appeals Chamber said "the grant of amnesty . . . is not only incompatible with, but is in breach of an obligation of the State towards the international community as a whole."<sup>63</sup> Apparently Professor Orentlicher, as well as the NGO Redress, which also intervened before the Appeals Chamber, had invoked the existence of treaty obligations requiring States to try and extradite for certain crimes. But Sierra Leone's treaty obligations in this area are really rather narrow. Of course it is a party to the Geneva Conventions, with the accompanying duty to prosecute or extradite grave breaches. But grave breaches can only be committed in international armed conflict,<sup>64</sup> so the entire concept finds no real application to the civil war in Sierra Leone. Indeed, grave breaches are not mentioned in the Statute of the Special Court. That leaves the obligations under the

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74, Decision (Nov. 3, 1999).

<sup>58</sup> Prosecutor v. Kallon and Prosecutor v. Kamara, *supra* note 10, para. 20.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at para. 71.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at para. 82.

<sup>63</sup> *Id.* at para. 74.

<sup>64</sup> Prosecutor v. Tadic, Case No. IT-94-1-AR72, para. 84, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995); Prosecutor v. Delalic, Case No. IT-96-21-T, para. 202, Judgment (Nov. 16, 1998).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>65</sup> Kallon and Kamara were not indicted for torture, however, so the Torture Convention finds no application either. In any case, grave breaches and torture make up a rather limited subset of international crimes compared with the broad claim, by the Appeals Chamber, that these principles applied to all of the crimes listed in Articles 2 to 4 of the Statute of the Special Court, which comprise crimes against humanity, violations of Common Article 3 to the Geneva Conventions and of Protocol Additional II to the Conventions, and some other specific serious violations of international humanitarian law. There is no treaty obligation, on Sierra Leone or for that matter any other State, concerning a duty to try or extradite for crimes against humanity, violations of Common Article 3 and Protocol Additional II, or the other "serious violations" listed in the Statute, such as conscripting child soldiers.

The whole discussion displays confusion by the Appeals Chamber about the distinction between treaty obligations and customary international law. No doubt Professor Orentlicher had invoked the relevant treaty provisions as evidence about the direction in which customary law was evolving, rather than as proof of the broad assertion that the Special Court made about a duty to try and extradite. The Special Court seemed to allude to the possibility that it might be going a bit too far. After all, even the *amici* had phrased their comments cautiously. Professor Orentlicher, for example, carefully said that amnesties for international crimes were "highly doubtful" rather than simply prohibited by international law.<sup>66</sup> Accordingly, the Special Court wrote that "[e]ven if the opinion is held that Sierra Leone did not breach customary law in granting an amnesty, this court is entitled in the exercise of its discretionary power, to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing . . . ."<sup>67</sup> Courts, of course, should apply the law, but should they also apply "the direction in which the law is developing"? This is an odd approach, to say the least.

The discussion by the Appeals Chamber is replete with such

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<sup>65</sup> Prosecutor v. Kallon and Prosecutor v. Kamara, *supra* note 10, para. 82 (The Appeals Chamber refers to the norms cited by Professor Orentlicher, namely those in the Torture Convention, the grave breach provisions of the Geneva Conventions and the Genocide Convention. Only the Torture Convention is applicable to the Sierra Leone conflict. Sierra Leone has not even ratified the Genocide Convention.).

<sup>66</sup> *Id.* at para. 83.

<sup>67</sup> *Id.* at para. 84.

extravagant language. The “obligation to protect human dignity” is a very broad remit, and it seems excessive to argue that this is both *jus cogens* and *erga omnes*. Surely the Court meant to refer to “serious violations of international humanitarian law.” But even here, its rather facile and unsubstantiated claim that these crimes generally attract universal jurisdiction is not in harmony with academic writing on the subject<sup>68</sup> nor does it adequately reflect the uncertainties on this matter reflected in recent individual opinions of the International Court of Justice.<sup>69</sup> Perhaps the judges of the Appeals Chamber were anxious for the judicial glory of being the first to make such broad pronouncements in an area where the law is undoubtedly evolving? But rather than promote incremental progress in this area, the judgment is likely to be dismissed as a superficial and exaggerated treatment of a complex question.

The Truth and Reconciliation Commission reached a very different conclusion on these issues. With particular reference to its mandate to “address impunity,” the Commission considered that it should express an opinion on the Lomé Agreement’s pardon and amnesty. According to the Commission’s Report,

The Commission is unable to condemn the resort to amnesty by those who negotiated the Lomé Peace Agreement. The explanations given by the Government negotiators, including in their testimonies before the Truth and Reconciliation Commission, are compelling in this respect. In all good faith, they believed that the RUF would not agree to end hostilities if the Agreement were not accompanied by a form of pardon or amnesty.

Accordingly, those who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict. Amnesties may be undesirable in many cases. Indeed there are examples of abusive amnesties proclaimed by dictators in the dying days of tyrannical regimes. The Commission also recognizes the principle that

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<sup>68</sup> See, e.g., MARC HENZELIN, *LE PRINCIPE DE L’UNIVERSALITÉ EN DROIT PÉNAL INTERNATIONAL* [THE PRINCIPAL OF UNIVERSALITY IN INTERNATIONAL CRIMINAL LAW] (2000); LUC REYDAMS, *UNIVERSAL JURISDICTION, INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* (2003).

<sup>69</sup> For example, see the individual opinion of President Guillaum in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 I.C.J. 121 (Feb. 14, 2002).

it is generally desirable to prosecute perpetrators of serious human rights abuses, particularly when they rise to the level of gravity of crimes against humanity. However amnesties should not be excluded entirely from the mechanisms available to those attempting to negotiate a cessation of hostilities after periods of brutal armed conflict. Disallowing amnesty in all cases is to deny the on-ground reality of violent conflict and the urgent need to bring such strife and suffering to an end.

The Commission is unable to declare that it considers amnesty too high a price to pay for the delivery of peace to Sierra Leone, under the circumstances that prevailed in July 1999. It is true that the Lomé Agreement did not immediately return the country to peacetime. Yet it provided the framework for a process that pacified the combatants and, five years later, has returned Sierra Leoneans to a context in which they need not fear daily violence and atrocity.<sup>70</sup>

These comments do not specifically address the legal issues concerning the objection formulated by the Special Representative of the Secretary-General to the amnesty clause. But the Commission Report also raised questions about the wisdom of the objection. It noted that in an earlier peace agreement, reached at Abidjan in November 1996, there was an amnesty clause that was roughly equivalent to the one in the Lomé Agreement. The United Nations had similarly endorsed the Abidjan Agreement, but there was no comparable reservation or objection. The Commission's Report stated: "It is not clear why unconditional amnesty was accepted by the United Nations in November 1996, only to be condemned as unacceptable in July 1999. This inconsistency in United Nations practice seems to underscore the complexity of the problems at hand."<sup>71</sup>

The Commission did not enthusiastically endorse the amnesty, but nor did it condemn it. Moreover, it did question the wisdom of withdrawing it a year later. According to the Report: "The Commission finds that in repudiating the amnesty clause in the Lomé Peace Agreement, both the United Nations and the Government of Sierra Leone have sent an unfortunate message to combatants in future wars

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<sup>70</sup> 3B COMMISSION REPORT, *supra* note 5, ch. 6, at 4.

<sup>71</sup> *Id.* at 3. In *Prosecutor v. Kallon*, *supra* note 10, para 58, defense counsel made a similar point.

that they cannot trust peace agreements that contain amnesty clauses.”<sup>72</sup> In other words, whatever the wisdom of actually granting an amnesty, taking it away once it was granted seemed to be a dangerous precedent.

## VI. CONCLUSIONS

In Sierra Leone, two different but complementary accountability mechanisms came to quite contrary conclusions on the question of amnesty. The Special Court ruled that the amnesty in the Lomé Agreement, to the extent that it purported to cover crimes against humanity and war crimes, was contrary to customary international law, or at the very least, to “crystallizing” or “emerging” customary international law.<sup>73</sup> The Special Court did not address the matter from a pragmatic standpoint. The Truth Commission, on the other hand, dealt with the matter essentially on a practical level, and did not directly confront the issue of the legality of the amnesty. For the Commission, the decision by the negotiators at Lomé to agree to amnesty in return for peace was not patently unreasonable. To the extent that it was a *sine qua non* for the end of armed conflict, the grant of amnesty was acceptable. The Commission did not endorse amnesties in all situations, but it refused to second-guess those who, in the heat of battle so to speak, saw no alternative. Moreover, the Commission questioned the advisability of withdrawing amnesties once they have been granted. The consequence of this, warned the Commission, is to forever remove amnesty from the toolbox of conflict resolution and peace negotiation.<sup>74</sup>

In the past decade or so, amnesty has become very much of a dirty word for activists and many scholars in the field of international human rights and international humanitarian law.<sup>75</sup> Even the Secretary-General of the United Nations, in his August 2004 report to

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<sup>72</sup> 3B COMMISSION REPORT, *supra* note 5, ch. 6, at 3.

<sup>73</sup> Prosecutor v. Kallon, *supra* note 10.

<sup>74</sup> 3B COMMISSION REPORT, *supra* note 5, ch. 6, at 6.

<sup>75</sup> For some of the debate, see, e.g., ANDREAS O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE (2004); John Dugard, *Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question*, 13 S. AFR. J. HUMAN RIGHTS 258 (1997); Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT'L. L. AND POL. 485 (1996); Michael Scharf, *Swapping amnesty for peace: Was there a duty to prosecute international crimes in Haiti?*, 31 TEXAS INT'L L. J. 1 (1996); Michael Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507 (1999).

the Security Council on the rule of law and transnational justice, said that peace agreements and Security Council resolutions and mandates should "Reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court."<sup>76</sup> This extreme position is unfortunate, because amnesty serves a very useful purpose in making peace. On this point, there is no shortage of national practice in support of the contention, including the Lomé Agreement and the post-apartheid transition in South Africa. There are, to be sure, many disgraceful examples of dictators granting themselves amnesties. But a defence of the practice in some circumstances should not be viewed as a justification of amnesty under all circumstances. The issue does not lend itself to absolute answers. The usefulness, the viability and the legitimacy of an amnesty reside in complex dynamics of the peace process.

In practice, even those who advocate an uncompromising position on amnesty acknowledge that it can never be applied in the real world. The Special Court for Sierra Leone was given jurisdiction only over "those who bear the greatest responsibility" for the serious violations of international humanitarian law that occurred during the conflict in Sierra Leone.<sup>77</sup> The United Nations has given the Special Court a budget that is probably sufficient to prosecute about ten offenders. The prosecutions are limited temporally, to acts committed subsequent to 30 November 1996,<sup>78</sup> whereas the conflict had begun more than five years before that date. By establishing a Special Court with such a limited ambit, and such modest resources, and making no other proposal or demand for prosecution by other means, the United

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<sup>76</sup> *The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General*, S.C. Res. 616, U.N. SCOR, 59th Sess., at 21, U.N. Doc. S/2004/616 (2004). See also U.N. SCOR, 59th Sess., 5052nd mtg. at 5, U.N. Doc. S/PV.5052, for his remarks to the Security Council. But it is surely significant that in the debate on this document in the Security Council, on 6 October 2004, there was no consensus on this controversial point. Only two delegations expressly supported the Secretary-General on this point (Brazil, *id.* at 14, and Costa Rica, U.N. SCOR, 59th Sess., 5052nd mtg. at 26, U.N. Doc. S/PV.5052 (Resumption I) (2004)), while two others expressed significantly more hesitant views on the subject (South Africa, *id.* at 12; and India, *id.* at 23). The President's Statement approved by the Council at the end of the debate made no reference to the issue of amnesty. See *id.* at 37-38.

<sup>77</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, *supra* note 43, pmbl.

<sup>78</sup> *Id.* at art. 1.

Nations is in effect promoting and encouraging amnesty and impunity for the vast bulk of perpetrators in Sierra Leone. The Special Court might have considered the inconsistency of the United Nations' position before making such extreme declarations about customary international law. In a war in which tens of thousands committed abominably inhumane acts, the difference between the position taken by the United Nations and that manifested in the Lomé Agreement amounts to ten individuals.

Of course, the arguments that the Special Court can only prosecute such a small number consistently boil down to pragmatic considerations. For example, in justifying the decision not to consider pre-November 1996 offences, the Secretary-General said that going back earlier in the decade would "create a heavy burden for the Prosecution and the Court."<sup>79</sup> Can this be a criterion dictated by principle, by a belief that customary international law compels prosecution of all perpetrators of crimes against humanity and war crimes? The debate about amnesty seems to be loaded with grandiose declarations about fundamental principles of customary international law that even fervent advocates of uncompromising prosecution do not really believe or attempt to put into practice. According to the Appeals Chamber, then, shouldn't the United Nations also be condemned for violating customary international law by in effect guaranteeing impunity for all pre-November 1996 offences as well as for all of those who do not meet the exalted status of "those who bear the greatest responsibility"?

The "conventional wisdom" on the significance of amnesties is actually reflected in a treaty provision, Article 6(5) of *Additional Protocol II to the Geneva Conventions*.<sup>80</sup> *Protocol II*, which was adopted in 1977, deals solely with non-international armed conflict. Early drafts of the treaty had attempted to incorporate a prisoner-of-war concept into civil wars, but States refused to go so far. What remained of the effort was encapsulated in Article 6(5): "At the end of hostilities, the authorities in power shall endeavor 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."<sup>81</sup> This sage

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<sup>79</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, *supra* note 35, para. 26.

<sup>80</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, Art. 6(5), 1125 UNTS 609.

<sup>81</sup> *Id.*



text reflects centuries of accumulated human experience and seems to have two purposes. The first is to promote an end to the conflict by, in effect, discouraging combatants from fighting to the death, in essentially the same manner as the norms concerning the rights of prisoners of war. It is axiomatic that if combatants are assured of humane treatment as prisoners, to be followed by release at the end of the conflict, they will not feel compelled to fight as hard as they might otherwise. The second is to encourage reconciliation, which is of particular importance in non-international armed conflicts. The Commentary on the Protocol, prepared by the International Committee of the Red Cross, states: "The object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided."<sup>82</sup> Peace and reconciliation are both legitimate values that should have their place in human rights law. They need to be balanced against the importance of prosecution rather than simply discarded.

The problem with the conclusions of the Special Court on the issue of amnesty is that they are too absolute. They most certainly go beyond existing law, as is evident from even a cursory reading of the judgment. Their effect, for example, is to condemn not only the peacemakers at Lomé but also a process in South Africa that was supervised by such noble souls as Nelson Mandela and Desmond Tutu. The Special Court is, of course, quite correct to note that a grant of amnesty under one jurisdictional regime cannot deprive another of the authority to prosecute where universal jurisdiction exists.<sup>83</sup> This should not be a controversial proposition, and it applies to international criminal tribunals as much as it does to third states. A national amnesty cannot block prosecution by the International Criminal Court, where it has jurisdiction, any more than the Lomé Agreement can block prosecution by the Special Court for Sierra Leone. In its judgment on amnesty, the Special Court should have confined itself to this proposition rather than wander further.

But in declaring that Sierra Leone actually violated customary international law by granting the amnesty, the Special Court attempted to establish a principle that applies to all armed conflicts to the effect that peace cannot be bargained for amnesty. Ever. The corollary of

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<sup>82</sup> YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1402 (1987). It is often stated that the provision is not meant to cover genocide, war crimes and crimes against humanity, but in fact there is nothing in the Commentary nor, apparently, in the *travaux préparatoires*, to suggest this.

<sup>83</sup> Prosecutor v. Kallon, *supra* note 10, para. 67.

such a claim can only be the assertion that war should continue, even where combatants are prepared to lay down their arms in return for an assurance that they will not be prosecuted. The Truth and Reconciliation Commission found this to be too extreme and untenable a proposition. Let us hope that its more balanced position will be taken into account by those who attempt to assess the evolving practice in this field, given that practice is one of the principal ingredients in the formation of customary international law.

