SCSL-2003-07-PT
(1815-1838)

AMICUS CURIAE BRIEF CONCERNING THE AMNESTY PROVIDED BY THE LOMÉ ACCORD

SUBMITTED IN THE CASE OF THE PROSECUTOR V. MORRIS KALLON SCSL-2003-07

BEFORE THE APPEALS CHAMBER OF THE SPECIAL COURT FOR SIERRA LEONE

I. Introduction and Summary of Submission

Pursuant to Rule 74 of the Rules of Procedure and Evidence and Article 5 of the Practice Direction of 22 September 2003, the author of this submission, Professor Diane F. Orentlicher, has been appointed by the Special Court for Sierra Leone (SCSL) at its own invitation to submit an *amicus curiae* brief addressing the legal effect on the exercise of this Court's jurisdiction of the amnesty granted in Article IX of the Lomé Accord (7 July 1999). More particularly, the author has been asked to address this question with special attention to the validity of this type of amnesty under international law.[1] This issue arises by virtue of applicant's motion of 16 June 2003, which asserts that Article IX of the Lomé Accord legally bars or, alternatively, should prevent the SCSL from exercising jurisdiction over crimes committed before the date of the accord.[2]

It is submitted that because Article IX of the Lomé Accord addressed, and could have legal force in respect of, the national legal system of Sierra Leone only, the amnesty does not legally circumscribe the jurisdiction of the SCSL, which has been "established outside the national court system" and operates "independently of the [Sierra Leonean] national system."[3]

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[1]This brief does not address other legal issues that may be relevant to the Court's consideration of the applicant's motion, such as whether the Lomé Accord was terminated by virtue of the resumption of armed conflict following its conclusion. *Cf.* Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L.J. 391, 426 (2001) (suggesting that the Government of Sierra Leone "might maintain that the Lomé Peace Agreement was first breached by the [Revolutionary United Front of Sierra Leone], thereby rendering the Agreement void and releasing the Government from its obligations").

[2]Preliminary Motion Based on Lack of Jurisdiction/Abuse of Process: Amnesty Provision Provided by Lomé Accord (16 June 2003) (hereinafter "First Preliminary Motion").

[3]Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/200/915, para. 39 (2000) (hereinafter "Report of the Secretary-General"). *See also* Special Court Agreement 2002, Ratification Act 2002, art. 11(2) ("The Special Court shall

This conclusion does not turn upon whether the amnesty is compatible with relevant principles of international law. (See Section III.)

To the extent, however, that the applicant's motion is framed in terms of principles that should guide the Court in the exercise of its discretion, international legal principles as well as emerging international policies concerning amnesties may have a significant bearing on the Court's assessment. It is submitted that relevant principles and policies support the exercise of this Court's jurisdiction over international crimes potentially covered by the Lomé amnesty. Any amnesty that encompassed crimes against humanity, serious war crimes, genocide, or torture would be of doubtful validity under international law. (See Section IV.)

It is precisely because of this that, when signing the Lomé Accord as a "moral guarantor," the Special Representative of the United Nations Secretary-General asserted the Organization's interpretation of Article IX as excluding the international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. In effect, then, the applicant asks the Special Court for Sierra Leone to decline to exercise its jurisdiction in deference to an amnesty that undermines the very principles of international law the Court was established to enforce. Applying general principles governing conflicts of law, even a national court outside Sierra Leone would not be required to defer to such an amnesty; much less would a court established pursuant to a mandate of the United Nations Security Council[4] be bound to do so.

II. The Lomé Accord and the Statute of the Special Court for Sierra Leone

The challenge to the Court's jurisdiction over crimes allegedly committed before 7 July 1999 relies upon Article IX of the peace agreement concluded between the Government of Sierra Leone and the Revolutionary United Front (RUF) of Sierra Leone in Lomé, Togo on 7 July 1999. Article IX(2) provides that, after signing the Lomé Accord, the Government of Sierra Leone "shall . . . 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."[5] Article IX(3) provides that

> the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those

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not form part of the Judiciary of Sierra Leone").

[4]SC Res. 1315, para. 1 (2000) (requesting the UN Secretary-General "to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution").

[5]The preceding paragraph establishes an undertaking by the Government of Sierra Leone to "take appropriate legal steps" to grant RUF leader Foday Sankoh (since deceased) "absolute and free pardon." *Id.*, para. IX (1).

> organisations, since March 1999, 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.

The Secretary-General's Special Representative for Sierra Leone, Ambassador Francis G. Okelo, signed the accord as a "moral guarantor" on behalf of the United Nations. On the instruction of the UN Secretary-General, Ambassador Okelo appended to his signature a statement providing: "The United Nations interprets that the amnesty and pardon in article nine of this agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."[6] In its resolution directing the UN Secretary-General to negotiate an agreement with the Government of Sierra Leone to establish the Special Court for Sierra Leone, the UN Security Council recalled this statement, which it characterized as representing the United Nations' understanding of the scope of the amnesty provisions in the Lomé Accord.[7]

The instructions to Ambassador Okelo were apparently issued pursuant to policy guidelines issued by the UN Secretary-General in 1999, which were designed to assist his "envoys and representatives involved in peace negotiations . . . in brokering agreements in conformity with the law and in a manner which may provide the basis for lasting peace."[8] The Secretary-General reiterated the United Nations' position concerning amnesties for serious violations of international humanitarian law in his report to the Security Council on the establishment of the Special Court for Sierra Leone:

> While recognizing 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, the United Nations has consistently maintained the position that amnesty cannot be

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[6] *Quoted in* Human Rights Watch, "The Sierra Leone Amnesty under International Law" (3 August 1999), available at http://www.hrw.org/campaigns/sierra/int-law2.htm. *See also* Report of the Secretary-General, *supra* note 3, para. 23 (paraphrasing the UN representative's interpretive statement).

[7] SC Res. 1315, preamble; UN Doc. S/RES/1315 (2000) ("*Recalling* that the Special Representative of the Secretary-General appended to his signature of the Lomé Accord 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 international humanitarian law").

[8] Statement of Secretary-General Kofi Annan on 10 December 1999, *quoted in* Ian Martin, "The Legacy of Abuse — Justice and Reconciliation in a New Landscape," p. 2 (November 2000).

granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.[9]

In accordance with this position, the parties to the treaty establishing the Special Court — the United Nations and the Government of Sierra Leone — agreed to include in the Court's statute a provision affirming that "[a]n 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."[10] This provision became Article 10 of the Statute of the Special Court for Sierra Leone ("SCSL Statute"). The reference to Articles 2 to 4 of the statute is to provisions establishing the Court's subject-matter jurisdiction over specified international crimes; Article 5 extends the Court's jurisdiction to certain crimes under Sierra Leonean law. Thus Article 10 of the SCSL Statute reflects the United Nations' understanding that amnesties for international crimes are invalid.

III. The Legal Effect of the Lomé Amnesty on the Jurisdiction of the Special Court for Sierra Leone

The position taken by the United Nations in respect of the Lomé amnesty has substantial support in international law (see Section IV). Before presenting relevant principles underlying the UN position, it will be useful to clarify how the validity of the Lomé amnesty may bear upon the issues before this Court.

It is submitted that the jurisdiction of this Court does not turn upon the validity of the amnesty provisions of the Lomé Accord. Those provisions purported to establish obligations on the part of the Government of Sierra Leone. At the time the Lomé Accord was signed, the Special Court for Sierra Leone had not even been proposed, much less established.[11] Accordingly, it appears that Article IX of the Lomé Accord was addressed to the question of prosecutions before *national* courts of Sierra Leone. The legal effect, if any, of its implementation is that of a domestic law. And states "cannot use domestic legislation to bar international criminal liability."[12]

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[9]Report of the Secretary-General, *supra* note 3, para. 22 (footnote omitted).

[10]*See id.*, para. 24.

[11]The negotiations leading to the creation of the SCSL were triggered by a request to the United Nations by the President of Sierra Leone dated 12 June 2000, nearly a year after the conclusion of the Lomé Accord. *See* Letter from Ahmad Tejan Kabbah, President of Sierra Leone, to Secretary-General Kofi Annan, UN Doc. S/2000/786, Annex.

[12]Garth Meintjes, *Domestic Amnesties and International Accountability*, *in* INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS 83, 86 (Dinah Shelton ed. 2000). As a former prosecutor of two war crimes tribunals established by the UN Security Council observed, national amnesties "clearly have no standing [in international law] and would not afford a

All that must be established to sustain the jurisdiction of this Court over the crimes encompassed in Articles 2 through 4 of its Statute is that a court such as the SCSL *may* try individuals charged with international crimes. To see why this is so, it is only necessary to recall the principle established in the Trial of Major War Criminals following World War II and subsequently reaffirmed in general international instruments: International crimes may be punished by a court of appropriate jurisdiction regardless of whether they constitute punishable offenses in the domestic law of the state where they occurred.

This principle was made explicit in the Nuremberg Charter in respect of crimes against humanity. The Charter provided that the following acts were crimes within the jurisdiction of the International Military Tribunal for which there would be individual responsibility:

> CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, *whether or not in violation of the domestic law of the country where perpetrated.*[13]

Any doubts about the legal status of this principle were put to rest following the Nuremberg trial. In 1946, the United Nations General Assembly adopted a resolution "affirm[ing] the principles of international law recognized in the Charter of the Nürnberg Tribunal and the judgment of the Tribunal" and directing the Committee on the codification of international law to formulate those principles.[14] Pursuant to the latter mandate, in 1950 the International Law Commission (ILC) adopted *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.*[15] Principle I affirmed that "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment,"[16] while Principle II affirmed: "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

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defense to criminal or civil proceedings before an international court . . . ." RICHARD J. GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 122 (2000).

[13]Charter of the International Military Tribunal, 8 August 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279 (emphasis added).

[14]GA Res. 95(I) (1946).

[15]II Y.B.I.L.C. 374 (1950).

[16]*Id.*

law."[17] The ILC's commentary characterized Principle II as a "corollary to Principle I," and explained: "Once it is admitted that individuals are responsible for crimes under international law, it is obvious that they are not relieved from their international responsibility by the fact that their acts are not held to be crimes under the law of any particular country."[18]

Indeed, the likelihood that those who commit crimes against the basic code of humanity would escape justice in their own countries has long been recognized as a key justification for the extraordinary jurisdiction exercised by international criminal tribunals as well as by national courts exercising universal jurisdiction. This justification had strong resonance in the aftermath of Hitler's crimes; German courts were not to be trusted to prosecute major Nazi war criminals. Thus, one U.S. Military Tribunal operating in Germany observed that surrendering the Nazi defendants before it for prosecution by German authorities would have been the "equivalent [of] a passport to freedom."[19]

If the Court's jurisdiction does not depend upon the validity of the Lomé amnesty, both established and emerging principles of international law concerning amnesties are relevant to the Court's assessment of the applicant's alternative claim that "the Government of Sierra Leone is duty bound to honour the undertaking it made in agreeing to and signing the Lomé Accord"[20] and that the SCSL should not abet the government's abrogation of that agreement by exercising jurisdiction over crimes encompassed in the Lomé amnesty.[21] With this in mind, Section IV of this submission addresses the validity of the Lomé amnesty in light of relevant principles of international law and policies consistently espoused by the United Nations.[22]

IV. International Law Pertaining to Amnesties

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[17] *Id.*

[18] *Id.*, para. 100.

[19] *In re List*, 11 TRIALS OF WAR CRIMINALS, at 757 (U.S. Mil. Trib. – Nuremberg 1948).

[20] First Preliminary Motion, para. 4.

[21] This argument appears to be implied in paragraphs 7 and 9 of the First Preliminary Motion.

[22] A number of commentators have taken a similar approach in their assessments of whether the International Criminal Court (ICC) should decline to exercise its jurisdiction in respect of abuses that are the subject of a domestic amnesty. These analyses generally acknowledge that the ICC is not bound to defer to such an amnesty. The issue, instead, is whether there are any circumstances in which the Court may legitimately decline to exercise jurisdiction in light of a domestic amnesty. *See, e.g.*, Naomi Roht-Arriaza, *Amnesty and the International Criminal Court*, *in* INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS 77 (Dinah Shelton ed. 2000); GOLDSTONE, *supra* note 12, at 122.

A. Human Rights Treaty Obligations

1. Treaties Explicitly Requiring Prosecution

It is generally accepted in principle that domestic amnesties might violate certain treaties. More particularly, it is widely agreed that "there can be no amnesty where a treaty requires prosecution."[23] In accordance with this straightforward logic, several human rights treaties would almost surely be violated if a state party adopted a blanket amnesty preventing criminal investigation and prosecution of offenses respecting which prosecution is required. States parties' obligations under several other treaties, including at least one to which Sierra Leone was a party at the time the Lomé Accord was concluded,[24] would likely be violated by some amnesties even though the treaties in question do not explicitly require punishment.

It is generally acknowledged that an amnesty covering genocide would be incompatible with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[25] Article I "confirm[s] that genocide . . . is a crime under international law" which "Contracting Parties . . . undertake to prevent and to punish." Article III identifies various forms of participation in genocide that "shall be punishable," and Article IV provides that "persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[26]

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[23]Roht-Arriaza, *supra* note 22, at 77. *See also* Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 515 (1999) ("A state's prerogative to issue amnesty for an offense can be circumscribed by treaties to which the state is a party. There are several international conventions that clearly provide a duty to prosecute humanitarian or human rights crimes defined therein . . . .").

[24]This reference is to the International Covenant on Civil and Political Rights. *See infra* Section IV.A.2.

[25]Adopted 9 December 1948, G.A. Res. 260 A (III), entered into force 12 January 1951, 78 U.N.T.S. 227 ("Genocide Convention").

[26]Sierra Leone apparently has not ratified the Genocide Convention, but is nonetheless bound to respect the fundamental principles embodied in this treaty. In a 1951 advisory opinion, the International Court of Justice concluded that the principles underlying the Genocide Convention "are recognized by civilized nations as binding on States, even without any conventional obligation." *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), 1951 ICJ Rep. 15, at 23 (28 May). Although the Court did not specify which principles it considered to embody customary international law, the duty to punish genocide lies at the heart of the convention. *See* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2565 (1991). While this principle supports the United Nations' position concerning

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[27] likewise imposes an unambiguous duty to ensure punishment of those suspected of torture. States parties to this treaty must make "all acts of torture" criminal offenses,[28] and, if someone alleged to have committed torture is found in their territory, they must "submit the case to [their] competent authorities for the purpose of prosecution" unless they extradite the suspect.[29] Not surprisingly, then, the committee that supervises states parties' compliance with this treaty has recommended that "[a]mnesty laws should exclude torture from their reach."[30]

A similar enforcement regime operates in respect of the principal postwar treaties regulating armed conflict. A fundamental feature of the four Geneva Conventions of 1949 and Additional Protocol I of 1977 is that they require High Contracting Parties to prosecute persons believed to have committed or to have ordered the commission of grave breaches of the treaties unless they hand the suspects over for trial to another state that has made out a *prima facie* case.[31] In its authoritative commentary to the Geneva Conventions, the International Committee

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application of the Lomé amnesty to genocide, the SCSL has not been given subject matter jurisdiction over genocide.

[27]Adopted 10 December 1984, GA Res. 39/46 (Annex), 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), entered into force 26 June 1987 (hereafter "Convention against Torture"). Sierra Leone ratified the Convention against Torture on 25 April 2001. The practice of the Committee against Torture, which supervises compliance by states parties, suggests that this convention would not apply retroactively in respect of the Lomé Accord, which was concluded before Sierra Leone became a party. *See O.R., M.M. and M.S. v. Argentina*, UN Doc. CAT/C/WG/3/D/1, 2 and 3/1988, para. 7.2 (1989). In the judgment of a trial chamber of the International Criminal Tribunal for the former Yugoslavia, however, the prohibition of torture has the status of *jus cogens* in international law — a status that would invalidate amnesties for torture. *See infra* Section V (discussing *Furund}ija* judgment).

[28]Convention against Torture, *supra* note 27, art. 4(1).

[29]*Id.*, art. 7(1). *See also id.*, art. 5. Explicit obligations of punishment are also set forth in various regional treaties, such as the Inter-American Convention on the Forced Disappearance of Persons, concluded 9 June 1994, entered into force 28 March 1996, arts. I(b and c), III, IV and VI, *reprinted in* 32 ILM 1529 (1994); Inter-American Convention to Prevent and Punish Torture, concluded 9 December 1985, entered into force 28 February 1987, arts. 1, 6, 8, 11, 12, and 14, O.A.S.T.S. No. 67.

[30]Report of the Committee against Torture, UN Doc. A/55/44, para. 61(d) (2000) (recommendations based upon review of Peru's third periodic report).

[31]*See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 75 U.N.T.S. 287; Protocol Additional (No. I) to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts,

of the Red Cross has characterized this duty as "absolute."[32] This explicit obligation applies, however, only in respect of violations that occur in the context of inter-state armed conflict.

2. Treaties that Have Been or Would Likely Be Interpreted to Require Prosecution

While the aforementioned treaties establish an explicit obligation to ensure punishment of certain crimes, other human rights conventions that do not contain similar provisions have been found by their supervisory bodies to require states parties to investigate and, if warranted, prosecute serious violations. These include the International Covenant on Civil and Political Rights (ICCPR)[33] (as interpreted by the Covenant's supervisory body, the Human Rights Committee), the American Convention on Human Rights ("American Convention")[34] (as interpreted by both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights), and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention")[35] (as interpreted by the European Court of Human Rights and, previously, by the now-disbanded European Commission of Human Rights).[36]

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concluded 8 June 1977, entered into force 7 December 1978, art. 85, 1125 U.N.T.S. 3. According to the leading commentary on the Geneva Conventions, this obligation "does not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties." INTERNATIONAL COMMITTEE OF THE RED CROSS, IV COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 593 (Jean S. Pictet, general ed. 1958) (hereinafter "ICRC Commentary"). The 1949 Geneva Conventions have been in force for Sierra Leone since 27 April 1961, when Sierra Leone became independent, by virtue of its succession to the earlier ratification by the United Kingdom. *See* http://www.icrc.org/ihl.nsf/db8c9c8d3ba9d16f41256739003e6371/d8626f1313120dcac1256402003f980b?OpenDocument. Sierra Leone has been a party to the Additional Protocols of 1977 since 1986.

[32]ICRC COMMENTARY, *supra* note 31, at 373 (in commentary to Article 51 of the First Geneva Convention of 1949, "the obligation to prosecute and punish" grave breaches established in Article 49 is characterized as "absolute").

[33]Adopted 16 December 1966, GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, entered into force 23 March 1976, 999 U.N.T.S. 171. Sierra Leone acceded to the ICCPR on 23 August 1996.

[34]Concluded 22 November 1969, entered into force 18 July 1978, 1144 U.N.T.S. 123; O.A.S.T.S. No. 36.

[35]Concluded 4 November 1940, entered into force 3 September 1953, 213 U.N.T.S. 221; E.T.S. 5.

[36]The early jurisprudence of these treaties is summarized in Orentlicher, *supra* note 26, at

Although the analysis supporting these treaty interpretations has varied somewhat, a common theme across different treaty bodies' jurisprudence has been a recognition that the general duty of states parties to "ensure" or "secure" rights enumerated in the relevant convention[37] entails an obligation to take effective measures to investigate serious violations and, where the facts warrant, to bring the perpetrators to justice.[38] A leading decision clarifying the nature of this responsibility, the Inter-American Court's 1988 judgment in the *Velásquez Rodríguez Case*,[39] interpreted Article 1(1) of the American Convention[40] to impose on each State Party "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

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2571-82. As noted below, relevant jurisprudence interpreting the African Charter on Human and Peoples' Rights is less fully developed.

[37]*See* ICCPR, *supra* note 33, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant"); American Convention, *supra* note 34, art. 1(1) ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms"); European Convention, *supra* note 35, art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention").

[38]In addition to this line of analysis, the Inter-American Commission and Court have found that states parties' failure to punish serious violations of the American Convention, such as torture, extrajudicial executions and forced disappearance, violates the guarantee of a fair trial embodied in Article 8(1), the right to judicial protection embodied in Article 25, and the duty pursuant to Article 2 to give domestic legal effect to rights recognized in the American Convention. *See, e.g., Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru)*, 75 Inter-Am. Ct. H.R. (Ser. C) (Judgment), para. 42 (2001).

The European Court has found that Article 13 of the European Convention, which assures victims of violations of the convention the right to an effective remedy, may under some circumstances entail a duty to conduct an investigation capable of leading to punishment. *See, e.g., Kurt v. Turkey*, 1998-III Eur. Ct. H.R. 1142, 27 E.H.R.R. 91, para. 140 (25 May 1998) ("where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure"). *See also Assenov et al. v. Bulgaria*, 28 Eur. Ct. H.R. 652, para. 102 (1998); *Aksoy v. Turkey*, Reports 1996-IV Eur. Ct. H.R., para. 98 (1996).

[39]Inter-Am. Ct. H.R. (Ser. C) No. 4 (Judgment) (1988).

[40]The text of this provision is quoted in note 37.

jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[41] Elaborating on the duty enshrined in Article 1(1) to "ensure" rights set forth in the American Convention, the Court wrote:

> This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.[42]

In the past decade, the supervisory bodies established under the ICCPR, to which Sierra Leone has been a party since 1996,[43] and the American Convention, respectively, have made explicit the implications of their earlier jurisprudence: They have repeatedly affirmed that broad amnesties for serious violations of these two conventions, such as torture, disappearances and extra-judicial executions, are in general incompatible with states parties' treaty obligations.

In a "general comment"[44] on Article 7 of the ICCPR,[45] which proscribes torture, the Human Rights Committee "noted that some States have granted amnesty in respect of acts of torture," and advised: "Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future."[46] In a 1994 decision in a case submitted pursuant to the individual complaint procedure established by the Optional Protocol to the ICCPR, the Committee "reaffirm[ed] its position that amnesties for gross violations of human rights," such as the amnesty law adopted in Uruguay in relation to abuses by the previous military régime, "are incompatible with the obligations of the State party under the Covenant."[47]

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[41] *Velásquez Rodríguez Case*, *supra* note 39, para. 174.

[42] *Id.*, para. 166.

[43] See note 33.

[44] Through its general comments, the Human Rights Committee attempts to provide guidance to states parties on their obligations under the ICCPR.

[45] General comment No. 20 (44) (article 7), UN Doc. CCPR/C/21/Rev.1/Add.3 (1992). This replaced a previous general comment on article 7. *See id.*, para. 1.

[46] *Id.*, para. 15.

[47] *Hugo Rodríguez v. Uruguay*, Comm. No. 322/1988, UN Doc. CCPR/C/51/D/322/1988, para. 12.4 (1994). The Committee found that Uruguay had violated article 7 of the Covenant,

The draft text of a new general comment on Article 2 of the ICCPR would affirm that states parties' general obligation to ensure Covenant rights includes an obligation "to ensure that those responsible" for violations "are brought to justice." This obligation arises

> notably in respect of those violations recognized as criminal under international law, such as torture and similar cruel, inhuman and degrading treatment . . . [summary and arbitrary killing . . . and enforced disappearance . . .] Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, [is often seen as][may be] an important contributing element in the recurrence of the violations. When committed on a systematic basis or on a widespread scale in the context of an attack on a civilian population, these and certain other violations of the Covenant are crimes against humanity. . . . where public officials or State agents are deemed to have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal legal responsibility, as has occurred with certain amnesties.[48]

In comments on states parties' periodic compliance reports, the Human Rights Committee has repeatedly expressed concerns about amnesties that deny the possibility of criminal prosecution (as well as compensation) for serious violations of human rights.[49]

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which ensures freedom from torture, "in connection with article 2, paragraph 3 of the Covenant," *id.*, para. 13, pursuant to which states parties to the ICCPR undertake to provide effective remedies for persons whose rights under the Covenant have been violated. In comments on Uruguay's third periodic report concerning its compliance with the Covenant, the Human Rights Committee had previously expressed concern about Uruguay's amnesty law. *See* Concluding Observations of the Human Rights Committee: Uruguay, para. 7, UN Doc. CCPR/C/79/Add.19 (1993).

[48]Draft General Comment on Article 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.3, draft para. 17 (5 May 2003) (brackets in draft text, signifying that the Committee has not yet reached agreement on final text). While the text quoted above refers specifically to amnesties that relieve government officials or agents from criminal responsibility, another paragraph in the draft general comment affirms the positive obligations of states parties to ensure freedom from certain violations, such as torture, when committed by private actors. *Id.*, draft para. 7.

[49]*See, e.g.*, Concluding Observations of the Human Rights Committee: Chile, UN Doc. CCPR/C/79/Add.104, para. 7 (1999); Concluding Observations of the Human Rights Committee: France, UN Doc. CCPR/C/79/Add.80, para. 13 (1997) (addressing amnesty laws for New Caledonia); Concluding Observations of the Human Rights Committee: Lebanon, UN Doc. CCPR/C/79/Add.78 para. 12 (1997); Concluding Observations of the Human Rights Committee: Peru, UN Doc. CCPR/C/79/Add.67, para. 347 (1996); Concluding Observations of the Human Rights Committee: Haiti, UN Doc. CCPR/C/79/Add.49, para. 230 (1995); Concluding

In light of the consistent jurisprudence of the Human Rights Committee, the amnesty provision of the Lomé Accord appears to be incompatible with Sierra Leone's obligations as a party to the ICCPR to the extent that the amnesty covers serious violations of physical integrity, such as torture, extra-judicial executions and disappearances.[50]

The Inter-American Commission on Human Rights has had more numerous occasions to consider whether amnesty laws adopted by states parties to the American Convention are consistent with their treaty obligations. Each time, it has found the state in breach.[51] Notably, it has reached this conclusion even in respect of countries, such as Argentina and Chile, that established a truth commission and a program of reparations for victims. Although fewer challenges to amnesty laws have reached the Inter-American Court, it too has found blanket amnesties to be incompatible with the duty of states parties to the American Convention. In its judgment in the *Barrios Altos Case*,[52] the Court noted that the government of Peru had accepted state responsibility for violating the American Convention in part "as a result of the promulgation and application of" two amnesty laws[53] and concluded:

Observations of the Human Rights Committee: Argentina, UN Doc. CCPR/C/79/Add.46, para. 10 (1995). In its concluding comments on Croatia's initial report, the Human Rights Committee expressed concern about the "implications" of a Croatian amnesty law: "While that law specifically states that the amnesty does not apply to war crimes, the term 'war crimes' is not defined and there is a danger that the law will be applied so as to grant impunity to persons accused of serious human rights violations." Concluding Observations of the Human Rights Committee: Croatia, UN Doc. CCPR/CO/71/HRV, para. 11 (2001).

[50]Any tentativeness in this conclusion reflects the Human Rights Committee's observation that amnesties are "generally" incompatible with the duty of states parties to the ICCPR. *See supra* at text accompanying note 46. Whatever flexibility may be implied by this phrasing, it seems doubtful that the sweeping amnesty for which Article IX of the Lomé Accord makes provision would fall within any exceptions contemplated by the Committee. Thus at least with respect to gross violations that occurred after the ICCPR entered into force for Sierra Leone, an amnesty precluding prosecution of those violations would seem incompatible with Sierra Leone's treaty obligations.

[51]*E.g.*, Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 (Argentina) (1992), Report No. 24/92; Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375 (Uruguay) (1992), Report No. 29/92; Case 10.843 (Chile) (1996), Report No. 36/96; Cases 11.228 et al. (Chile) (1996), Report No. 34/96; Case 11.771 (Chile) (2001), Report No. 61/01; Case 10.480 (El Salvador) (1999), Report No. 1/99; Case 10.488 (El Salvador) (1999), Report No. 136/99.

[52]*Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru)*, 75 Inter-Am. Ct. H.R. (Ser. C) (Judgment) (14 March 2001).

[53]*Id.*, para. 39.

> This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[54]

Later in the same judgment the Court concluded:

> Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which [the case before the Court] is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated.[55]

Jurisprudence concerning the nature of states parties' obligations to ensure civil and political rights is less developed under the African Charter on Human and Peoples' Rights ("African Charter"),[56] which Sierra Leone ratified on 21 September 1983, than under the ICCPR and American Convention. Nevertheless, some decisions of the African Commission on Human and Peoples' Rights ("African Commission") have interpreted the African Charter to impose positive obligations to protect rights and, implicitly, to require effective recourse to criminal justice when serious violations occur.

Although the African Charter does not contain an explicit obligation to "ensure" rights enumerated therein, the African Commission has interpreted Article 1 of the Charter to imply this obligation.[57] In light of this duty, the Commission has found, "[e]ven where it cannot be

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[54] *Id.*, para. 41.

[55] *Id.*, para. 44. The Court subsequently made clear that "the effects" of this judgment "are general in nature," meaning that any application of the amnesties at issue in that case would violate the American Convention. *Barrios Altos Case*, Interpretation of the Judgment on the Merits (Art. 67 American Convention on Human Rights), Judgment of 3 September 2001, para. 18, Inter-Am Ct. H.R. (Ser. C) No. 83 (2001). The Court reasoned: "Enactment of a law that is manifestly incompatible with the obligations undertaken by a State Party to the Convention is *per se* a violation of the Convention for which the State incurs international responsibility." *Id.*

[56] Concluded 26 June 1981, entered into force 21 October 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5.

[57] *See Commission Nationale des Droits de l'Homme et des Liberties/Chad*, Comm. No. 74/92, para. 20 (1995) ("The Charter specifies in Article 1 that the States Parties shall not only

proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders."[58]

More generally, the Commission has observed that "[i]nternationally accepted ideas of the various obligations engendered by human rights indicate that all rights . . . generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to *respect, protect, promote and fulfil these rights*."[59] Drawing in part upon the jurisprudence of other human rights treaty bodies, the Commission interpreted the duties to "protect" and "fulfill" human rights to impose positive obligations upon states parties to the African Charter.[60] After finding the government of Nigeria in breach of several substantive obligations under the Charter, the Commission appealed to the Nigerian government to "[c]onduct[] an investigation into the human rights violations described above and prosecute[e] officials of the security forces" and other "relevant agencies involved in human rights violations."[61]

Serious violations of common Article 3 of the four Geneva Conventions of 1949 and of Additional Protocol No II of 1977, each of which is binding upon Sierra Leone, [62] may also give rise to obligations capable of being subverted by an amnesty. Although the mandatory universal jurisdiction regime for grave breaches of the Geneva Conventions of 1949 and of Additional Protocol No. I applies only in respect of interstate armed conflicts, it is now well established that serious violations of common Article 3 "as supplemented by other general principles and rules

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recognize the rights duties and freedoms adopted by the Charter, but they should also 'undertake . . . measures to give effect to them'. In other words, if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation.").

[58] *Id.*, para. 22.

[59] *Social and Economic Rights Action Center et al. v. Nigeria*, Comm. 155/96, para. 44, 15th Annual Activity Report (2001-02) (emphasis in original).

[60] *See id.*, paras. 46-48, 57.

[61] *Id.*, concluding paragraphs. In another case, the African Commission noted that "investigations undertaken by the Government" of Sudan into extrajudicial executions were "a positive step, but their scope and depth fall short of what is required to prevent and punish extra-judicial executions." *Amnesty International et al. v. Sudan*, Comm. No. 48/90, 50/91, 52/91, 89/93, para. 51. Turning to the allegations of torture raised in the same set of communications, the Commission expressed its appreciation for "the fact that the government[ ] has brought some officials to trial for torture, but the scale of the government's measures is not commensurate with the magnitude of the abuses." *Id.*, para. 56.

[62] *See supra* note 31.

on the protection of victims of international armed conflict" are international crimes.[63] As such, they are subject to prosecution before the International Criminal Tribunal for the former Yugoslavia (ICTY),[64] the International Criminal Tribunal for Rwanda,[65] the International Criminal Court,[66] and the Special Court for Sierra Leone.[67]

Article 6(5) of Additional Protocol No. II, which governs certain non-international armed conflicts, does not detract from this conclusion. This paragraph provides: "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." The International Committee of the Red Cross (ICRC), the guardian of the Geneva Conventions and Protocols, has made clear that this provision "aims at encouraging . . . a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not

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[63]*The Prosecutor v. Duško Tadi*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 134 (2 October 1995); *see also Prosecutor v. Dalali et al.*, Case IT-96-21-A, Appeals Chamber, Judgment, para. 163 (20 February 2001) ("The Appeals Chamber is in no doubt that the acts enumerated in common Article 3 were intended to be criminalised in 1949").

[64]The Statute of the ICTY does not explicitly mention violations of common Article 3 in its enumeration of crimes subject to the tribunal's jurisdiction. The statute does, however, include violations of "the laws or customs of war." Statute of the International Criminal Tribunal for the former Yugoslavia, art. 3, adopted by the United Nations Security Council, 25 May 1993, SC Res. 827, UN Doc. S/RES/827 (original text); amended by SC Res. 1166, UN Doc. S/RES/1166 (1998); SC Res. 1329, UN Doc. S/RES/1329 (2000); SC Res. 1411, UN Doc. S/RES/1411 (2002); and SC Res. 1481, UN Doc. S/RES/1481 (2003) (hereinafter "ICTY Statute"). The ICTY Appeals Chamber has interpreted this provision to encompass serious violations of common Article 3. *See The Prosecutor v. Duško Tadi*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 86-137 (2 October 1995); *see also Prosecutor v. Dalali et al.*, Case IT-96-21-A, Appeals Chamber, Judgment, paras. 123-74 (20 February 2001).

[65]Statute of the International Criminal Tribunal for Rwanda, art. 4, adopted by the United Nations Security Council, 8 November 1994, S.C. Res. 955, UN Doc. S/RES/955 (original text); amended by SC Res. 1165, UN Doc. S/RES/1165 (1998); SC Res. 1329, UN Doc. S/RES/1329 (2000); SC Res. 1411, UN Doc. S/RES/1411 (2002); SC Res. 1431, UN Doc. S/RES/1431 (2002) (hereinafter "ICTR Statute").

[66]UN Doc. A/CONF.183/9 (1998), as corrected by the *procès-verbaux* of 10 November 1998 and 12 July 1999; entered into force 1 July 2002, art. 8(2)(c) (hereinafter "Rome Statute").

[67]SCSL Statute, art. 3.

aim at an amnesty for those having violated international law."[68]

In view of the jurisprudence developed under the ICCPR and American Convention, it is reasonable to suppose that amnesties covering serious war crimes committed during internal armed conflicts would be *prima facie* incompatible with states' obligations under common Article 3 of the 1949 Geneva Conventions. Like the human rights treaties that have been interpreted by their supervisory bodies to import a duty to punish serious infractions, the Geneva Conventions impose upon states parties a general obligation "to respect and to ensure respect" for their substantive guarantees.[69] "In addition," as the Appeals Chamber of the ICTY has observed,

> the third paragraph of Article 146 of Geneva Convention IV, after setting out the universal jurisdiction mechanism applicable to grave breaches, provides:
>
> > Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.
>
> . . . The ICRC Commentary (GC IV) stated in relation to this provision that "there is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Convention". It then concluded:
>
> > This shows that all breaches of the Convention should be repressed by national legislation. The Contracting Parties who have taken measures to repress the various grave breaches of the Convention and have fixed an appropriate penalty in each case should at least insert in their legislation a general clause providing for the punishment of other breaches. Furthermore, under the terms of this paragraph, the authorities of the Contracting Parties should give all those subordinate to them instructions in conformity with the Convention and should institute judicial or

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[68] *Quoted in* Inter-Am. Comm. H.R., Case 10.480 (El Salvador), Report No. 1/99, para. 116 (1999). The position of the ICRC apparently derives in part from a statement by a Soviet delegate to the conference that drafted Protocol II asserting that the draft text which became Article 6(5) "could not be constructed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever." *Quoted in* Naomi Roht-Arriaza and Lauren Gibson, *The Developing Jurisprudence on Amnesty*, 20 HUM. RTS. Q. 843, 865 (1998).

[69] *See* common Article 1 to the Geneva Conventions of 1949. In the view of the Appeals Chamber of the ICTY, this language supports the view that the acts enumerated in common Article 3 are international crimes. *See Prosecutor v. Dalali□ et al.*, Case IT-96-21-A, Appeals Chamber, Judgment, paras. 163-66 (20 February 2001).

disciplinary punishment for breaches of the Convention.[70]

If, as the ICRC believes, parties to the Geneva Conventions of 1949 must institute punishment for all breaches of the conventions, an amnesty that prevents punishment of violations of common Article 3 would appear to be incompatible with these treaties.

B. General International Law

Outside the framework of the treaties addressed in Section IV.A, United Nations bodies, officials, and experts have repeatedly affirmed the principle that states should bring to justice those who are responsible for serious violations of human rights, especially those constituting international crimes. In 1973 the UN General Assembly proclaimed *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*,[71] which provide that war crimes and crimes against humanity "shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to . . . trial and, if found guilty, to punishment."[72]

More recently, the General Assembly has endorsed principles affirming that states should prosecute those responsible for serious violations of human rights law that may not necessarily rise to the level of crimes against humanity or constitute war crimes. For example, in 1989 the General Assembly endorsed[73] Resolution 1989/65 of the Economic and Social Council, which adopted *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*.[74] These principles eschew blanket amnesties in respect of illegal executions: "In no circumstances . . . shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions."[75]

In 1992, the UN General Assembly adopted a *Declaration on the Protection of All Persons from Enforced Disappearance*.[76] Affirming that "[a]ll States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an

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[70] *Id.*, paras. 165-66 (footnotes omitted).

[71] GA. Res. 3074, UN Doc. A/9030 (1973).

[72] *Id.*, Principle I. *See also id.*, Principle 5.

[73] GA Res. 162, para. 3; UN Doc. A/RES/44/162 (1989).

[74] ECOSOC Res. 1989/65 (Annex).

[75] *Id.*, Principle 19.2.

[76] GA Res. 47/133, UN Doc. A/RES/47/133 (1992).

act of enforced disappearance, who are found to be within their jurisdiction or under their control,"[77] the declaration makes explicit what human rights treaty bodies have found implicit in the duty to prosecute persons suspected of gross violations: Blanket amnesties for such offenses are generally incompatible with states' human rights obligations. Article 18 provides that "[p]ersons who have or are alleged to have committed [acts of enforced disappearance] shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction."

The *Vienna Declaration and Programme of Action*, adopted by the United Nations World Conference on Human Rights in 1993, provides: "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."[78] In a 1999 resolution, the UN Commission on Human Rights urged governments "to promote the speedy and full implementation" of the Vienna document, "in particular" the provision quoted above.[79]

A *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*[80] adopted in 1997 by the sub-commission of the UN Human Rights Commission addresses measures to combat impunity in greater depth. The principles, proposed by Special Rapporteur Louis Joinet, affirm that "[i]mpunity is a failure of States to meet their obligations to investigate violations, take appropriate measures in respect of the perpetrators, particularly in the area of justice, [and] to ensure that they are prosecuted, tried and duly punished."[81] Accordingly, the principles assert that even amnesties aimed at securing conditions conducive to a peace agreement should exclude "perpetrators of serious crimes under international law and the perpetrators of gross and systematic violations may not be included in the amnesty unless the victims have been [able] to avail themselves of an effective remedy and obtain a fair and effective decision."[82]

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[77] *Id.*, art. 14.

[78] Vienna Declaration and Programme of Action, Part II.B.5, para. 60, adopted by the United Nations World Conference on Human Rights, 25 June 1993, UN Doc. A/CONF.157/24 (Part I) at 20-46 (1993).

[79] CHR Res. 1999/32, para.2.

[80] Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Annex II, UN Doc. E/CN/4/Sub.2/1997/20 (hereinafter "Joinet Principles").

[81] *Id.*, Principle 20.

[82] *Id.*, Principle 28(a). The Joinet Principles have often been cited in support of the Inter-American Commission's conclusions in cases challenging amnesty laws. *See, e.g.*, Case 10.480 (El Salvador), Report No. 1/99, para. 110 (1999).

With respect to crimes under international law, the 2000 draft of proposed UN principles and guidelines on the right to a remedy and reparation for victims of violations of human rights and humanitarian law provides that "[v]iolations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecution of these violations."[83] Notably, in recent years the United Nations Security Council, too, has affirmed the responsibility of states "to end impunity and to prosecute those responsible for genocide, crimes against humanity and serious violations of humanitarian law."[84]

In light of many of the developments noted above, the United Nations Special Rapporteur on Torture has concluded that the principle condemning amnesties that lead to impunity for serious violations of internationally-protected human rights has the status of customary international law:

> In the light of the consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights has become a rule of customary international law, the Special Rapporteur expresses his opposition to the passing, application and non-revocation of amnesty laws (including laws in the name of national reconciliation, the consolidation of democracy and peace, and respect for human rights), which prevent torturers from being brought to justice and hence contribute to a culture of impunity. As before, he calls on States to refrain from granting or acquiescing in impunity at the national level, inter alia, by the granting of amnesties, such impunity itself constituting a violation of international law.[85]

As has often been noted, non-binding declarations and the views of UN experts do not by

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[83]Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, UN Doc. E/CN.4/2000/62, Annex, para. 4 (2000).

[84]Statement by the President of the Security Council, UN Doc. S/PRST/2002/41, p. 1 (2002). *See also* Statement by the President of the Security Council, UN Doc. S/PRST/1999/6, p. 2 (1999) ("The Council affirms the need to bring to justice, in an appropriate manner, individuals who incite or cause violence against civilians in situations of armed conflict or who otherwise violate international humanitarian and human rights law"); Statement by the President of the Security Council, UN Doc. S/PRST/1998/18 (1998) ("The Council stresses the obligation of all States to prosecute those responsible for grave breaches of international humanitarian law").

[85]Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN. Doc. A/56/156, para. 33 (2001).

themselves establish duties under customary international law. (Nor, it must be added, do statements of the Security Council.) On this basis, some commentators have challenged the view that customary international law imposes a duty to punish even conduct constituting crimes against humanity.[86] Alongside merely hortatory statements urging states to punish such crimes, it is argued, states have had frequent recourse to amnesties — and in the past the United Nations has been midwife to some of those amnesties.[87]

There is, however, growing support in state practice for the position asserted by the Special Rapporteur on Torture. Some amnesties commonly cited to exemplify state practice in support of amnesties have been found by domestic courts to violate the relevant state's obligations under international law (although it should be noted that these rulings have emphasized the relevant state's treaty obligations, while other decisions have upheld amnesties).[88] In August 2003 Argentina's Congress and Senate voted to repeal two 1980s-era amnesty laws[89] — a move supported by Argentina's president.[90] In a decision now pending before Argentina's Supreme Court of Justice, the National Court of Appeal for Federal Criminal and Correctional Cases had previously confirmed a federal judge's ruling declaring invalid the

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[86]*See, e.g.*, Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 520-21 (1999).

[87]*See* Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?* 31 TEX. INT'L L.J. 1, 36-37 (1996). It should be noted that the examples cited by Professor Scharf predate the adoption by the United Nations of the previously-noted policy concerning amnesties in the context of peace negotiations. Moreover a number of recent amnesties exclude serious violations of international humanitarian law or have been narrowed through interpretation. For example the 1996 Guatemalan amnesty law explicitly excluded "the crime of genocide, torture, forced disappearance, as well as those which are imprescriptible or which do not permit the extinction of penal responsibility in conformity with internal law or international treaties ratified by Guatemala." *Ley de Reconciliation Nacional* (the National Reconciliation Law), Cong. of the Rep. of Guatemala, Decree No. 145-96, art. 8, passed Dec. 18, 1996 (entered into force 1 January 1997).

[88]A number of decisions declining to invalidate domestic amnesties also found that the amnesties violated the relevant state's treaty obligations but concluded that internal law prevailed or that the treaties in question were not in force at the relevant time. For discussion of cases from the mid-1990s, see Naomi Roht-Arriaza & Lauren Gibson, *supra* note 68.

[89]*See* Larry Rohter, *Argentina: Legislators Back Amnesty Repeal*, N.Y. TIMES, 14 Aug. 2003; Debora Rey, AP, *Argentina Approves Ending Laws on Amnesty*, WASH. POST, 22 Aug. 2003. The legislation declared the two 1980s-era laws "irredeemably invalid."

[90]*See Past crimes; Argentina's armed forces*, ECONOMIST, 12 July 2003; Larry Rohter, *Argentine Congress Likely to Void 'Dirty War' Amnesties*, N.Y. TIMES, 21 Aug. 2003.

1980s-era laws. Other Argentine courts subsequently followed suit.[91]

Surveying state practice in an article published in 2001, one commentator concluded that "[i]nternational practice offers considerable, but not yet entirely conclusive, support" for the argument that "awarding amnesties to perpetrators of gross human rights offenses is in itself prohibited under international law."[92] It is not necessary, however, to determine whether customary international law prohibits all or even most amnesties for serious violations of international human rights to see that, pursuant to general principles of state responsibility, a state might breach established norms prohibiting such conduct as crimes against humanity by virtue of wholesale impunity for those crimes.[93]

V. Relevance of International Legal Principles and Policies Concerning Amnesties for the Jurisdiction of the Special Court for Sierra Leone

For reasons set forth earlier, it is submitted that the jurisdiction of this Court does not depend upon the invalidity of the domestic amnesty contemplated in the Lomé Accord.[94] The remaining question raised by the applicant's motion is whether the Court should refrain from exercising its jurisdiction over these crimes in light of the Lomé amnesty. On this question, the repeated denunciations of broad amnesties covering atrocious crimes by numerous UN bodies and officials should be enough to still any possible doubt.[95]

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[91]These and other judicial developments are summarized in Amnesty International, *Argentina: The Full Stop and Due Obedience Laws and International Law*, AI Index: AMR 13/004/2003 (April 2003), available at http://web.amnesty.org/library/index/engamr130042003.

[92]Menno T. Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 23 HUM. RTS. Q. 940, 956 (2001).

[93]*See* Orentlicher, *supra* note 26, at 2582-83.

[94]*See* Section III, *supra*. Addressing a somewhat analogous question — whether a domestic amnesty in one country can serve to bar another state from prosecuting the crimes covered in the amnesty — one commentator has observed that, "even if it is assumed that at least some types of amnesties are not incompatible with international law, the bottom line is that in any case amnesties lack extra-territorial effect. They therefore do not affect treaty obligations or entitlements under customary international law to bring gross human rights offenders to justice wherever they are. This reasoning applies most clearly to blanket amnesties that are obviously self-serving . . . . The same reasoning applies, however, to more palatable amnesties, such as the ones awarded by South Africa's Truth and Reconciliation Commission." Kamminga, *supra* note 92, at 958.

[95]*Cf.* Martin, *supra* note 8, p. 2 (even where general amnesties preventing prosecution for serious violations of human rights are not incompatible with treaty obligations, they "undermine principles endorsed in General Assembly resolutions").

An observation in respect of the ICC by Gerhard Hafner, a state delegate to the diplomatic conference that adopted the ICC's statute and a member of the UN International Law Commission, is equally pertinent here. In the view of Hafner and his co-authors, it would "run counter to the basic objectives of the United Nations [in establishing the Court to combat impunity] if respect for amnesties granted by individual states had become an obligation of the ICC."[96] That the Lomé amnesty very likely would violate international legal obligations of Sierra Leone if permitted to have its full effect reinforces this conclusion.

The jurisprudence of the ICTY affirms this position. In the view of an ICTY trial chamber, a domestic amnesty covering crimes whose prohibition has the status of a *jus cogens* norm "would not be accorded international legal recognition."[97] In *dictum*, the chamber explained:

> The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. 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 absolving its perpetrators trough 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. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime.[98]

A set of principles adopted in 2001 by international jurists, which aim at constraining the exercise of universal jurisdiction within principled limits, reflects a similar position. Principle

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[96]Gerhard Hafner, Kristen Boon, Anne Rübesame and Jonathan Huston, *A Response to the American View as Presented by Ruth Wedgwood*, 10 EUR. J. INT'L L. 108, 111 (1999).

[97]*Prosecutor v. Anto Furund}ija*, Case No. IT-95-17/1-T, Judgment, para. 155, 10 December 1998.

[98]*Id.* (footnotes omitted).

7(2) of the *Princeton Principles on Universal Jurisdiction*[99] provides:

> The exercise of universal jurisdiction with respect to serious crimes under international law . . . shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state.

Pursuant to Principle 7(1), amnesties "are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law," which Principle 2(1) defines as including war crimes, crimes against humanity, genocide and torture.

VI. CONCLUSION

The jurisdiction of the Special Court for Sierra Leone over the crimes included in Articles 2-4 of its statute that were committed before 7 July 1999 does not turn upon the validity of the amnesty provisions of the Lomé Accord. The compatibility of the Lomé amnesty with Sierra Leone's obligations under international law may, however, be relevant to the Court's consideration of the applicant's argument that the Court should decline to exercise its jurisdiction over crimes covered by the amnesty. To the extent that the amnesty encompasses crimes against humanity, serious war crimes, torture and other gross violations of human rights, its legal validity is highly doubtful and in any event contravenes the United Nations' commitment to combating impunity for atrocious crimes — a commitment underlying the establishment of the Special Court itself.

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27 October 2003

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[99] Available at http://www.princeton.edu/~lapa/unive_jur.pdf.

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