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SCSL-2003-07-PT
(2609 — 2618)

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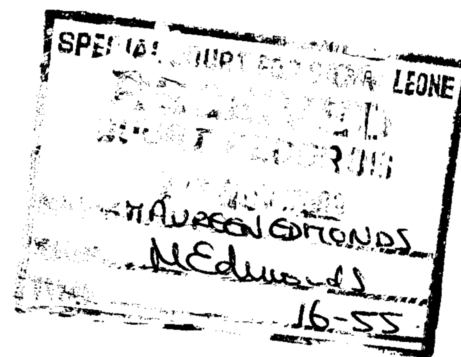
IN THE SPECIAL COURT FOR SIERRA LEONE

IN THE APPEAL CHAMBER



PROSECUTOR

- v -

MORRIS KALLON

FURTHER WRITTEN SUBMISSIONS ON BEHALF OF THE REDRESS TRUST, THE LAWYERS COMMITTEE FOR HUMAN RIGHTS AND THE INTERNATIONAL COMMISSION OF JURISTS.

1. The 'interveners' thank the Court for the opportunity to submit further brief written submissions in response to questions posed during the hearing on 3 November, 2003. We would wish to briefly address the following issues:

   a. Can amnesties for crimes under international law ever be justified;

   b. State practice and the duty to prosecute;

   c. Amnesties and prosecutorial discretion.

a. Can amnesties for crimes under international law ever be justified?

2. As we made plain in our oral submissions, we do not seek to question the legality or the utility of amnesties *in all circumstances*, nor is this Court called upon to do so. Our submission is that the amnesties granted under the Lome Accord should not be applied by this Court, and further that certain types of amnesties are never justified. For instance, "blanket" amnesties, such as those granted under the Lome Accord, which cover all crimes including serious crimes under international law, and which are not made conditional on a

remedy to victims, would in all circumstances be unlawful. The AZAPO decision of the South African Constitutional Court, for instance, finds that amnesties can only be granted on an individualised basis and after certain conditions have been fulfilled.[1] Other authorities, including those cited by the Defendant, completely oppose the giving of blanket amnesties.[2]

3. It is our submission that all amnesties granted in respect of serious crimes under international law – at the very least in respect of crimes against humanity and war crimes, including those committed in non-international armed conflicts, torture and genocide - are in breach of international law, and should not be accepted by an international tribunal. We would remind the Court of the numerous examples provided in our written submissions of international courts and other international bodies applying international law that have deemed amnesties to be unlawful, and that the number of such decisions is increasing. Amnesty International has also put forward detailed reasons for the prohibition of amnesties for crimes under international law.[3]

4. The Court postulated the example that amnesties might be justified where they could be seen to have prevented further bloodshed, indeed where they might 'save thousands of lives'.

5. There is of course an obvious attraction in such an argument and it is easy to see the pressures and temptations of those who are faced with acute political pressures to avoid prosecutions. These pressures do not impact however on the fact that amnesties in respect of serious crimes under international law are unlawful.

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[1] See *Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa*, Constitutional Court of South Africa, Case 17?96 of 25 July 1996, para.20 and para.32

[2] See John Dugard, Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders, International Review of the Red Cross, No.324, 1998, p.445-453: "(...) successor regimes that favour reconciliation (for example, South Africa) or that fear a resurgence of the military (for examply, Chile and Argentina) often prefer amnesty, despite its dubious validity under international law, to prosecution".

[3] See Amnesty International, Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law, AI Index AFR 51/012/2003 of October 2003. The organisation argues that amnesties, pardons and similar national measures of impunity for war crimes, crimes against humanity, genocide, torture, extrajudicial executions and enforced disappearances, such as the Lome Accord amnesties, are prohibited under international law.

6. The *jus cogens* prohibition cannot be displaced by these domestic considerations. Serious crimes under international law breach *jus cogens* norms and therefore give rise to an *erga omnes* obligation to prosecute such crimes. Cherif Bassiouni deals with the consequences of recognizing an international crime as *jus cogens*, writing that in his opinion, the implications of *jus cogens* are those of a duty and not of optional rights, "otherwise *jus cogens* would not constitute a peremptory norm of international law".[4] He concludes:

   > *Thus, recognizing certain international crimes as jus cogens carries with it the duty to prosecute or extradite, the non-applicability of statues of limitation for such crimes and universality of jurisdiction over such crimes ... Above all, the characterization of certain crimes as jus cogens places upon states the obligation erga omnes not to grant impunity to the violators of such crimes.*

7. The ICTY took a similar approach in its judgment in the Furundizja case, in relation to crimes against humanity (specifically torture), in the passages attached at Appendix 1 (to which the Court was referred during oral submissions) regarding the implications of the *jus cogens* nature of the prohibition, including the conclusion that any national measure to undermine the principle, such as an amnesty, would not be accorded international legal recognition.[5]

8. In relation to the non-grave breach provisions of the Geneva Conventions, Judge Theodor Meron, now President of the ICTY, wrote:

   > *Given the purposes and objects of the Geneva Conventions and the normative content of their provisions, any state that does not have the necessary laws in place, or is otherwise unwilling to prosecute and punish violators of clauses other than the grave breaches provisions that are significant and have a clear penal character, calls into serious question its good faith compliance with its treaty obligations.* [6]

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[4] Cherif Bassiouni, International Crimes, *Jus Cogens* and *Obligatio Erga Omnes*, 59 Law & Contemp. Probs. 63 (Autumn 1996), p.266

[5] Prosecutor v. Anto Furundzija, Judgment of the Trial Chamber, ICTY, 10 December 1998, paras. 151-157, attached, Appendix 1.

[6] International Criminalization of Internal Atrocities, July, 1995 , 89 A.J.I.L. 554

9. These principles must apply even where the granting of an amnesty might appear to offer an opportunity to save lives. In situations where acute political pressures would appear to militate against prosecution, such as where removing perpetrators from power appears to be an overriding objective, there are means at the disposal of the international community other than amnesties. Chapter VII of the UN Charter deals with measures the UN Security Council can take in the face of threats to international peace and security.

10. One available alternative measure that might be appropriate, in exceptional circumstances only, is to delay a prosecution for a limited period of time. Article 16 of the Rome Statute envisages this when it gives the Security Council the power to delay an investigation or prosecution of the ICC for up to twelve months. The intention behind this provision was to allow temporary deferral in situations where it is considered necessary to enable delicate peace negotiations to proceed. [7] This is entirely different in nature and purpose to an amnesty.

11. Indeed, the obligation to prosecute genocide, war crimes against humanity under the Rome Statute is considered to be so paramount[8] that only the UN Security Council, acting under its Chapter VII powers, can make such a deferral of a case before the ICC.

12. It is further submitted that amnesties covering these serious crimes under international law can never be justified by political expediency. Whilst lives might be saved in the short-term, the imposition of impunity for such serious crimes will ultimately lead to greater loss of life in the future. A simple domestic law example suffices to illuminate many of the problems inherent in the prohibition of prosecution for serious crimes in international law. A national government faced with an offer from a serial rapist that in return for amnesty he would agree not to attack any more women, would be attracted by

[7] See for example Commentary on the Rome Statute of the International Criminal Court, ed. Otto Triffterer, Nomos Verlagsgesellschaft, Baden-Baden, 1999, Article 16, pp.373-382.

[8] The Preamble of the Rome Statute affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation"

the possibility of ensuring the safety of future victims but would be compelled to face the prospect of such attacks because the infringement upon the rule of law implicit in the provision of an amnesty could never be tolerated. If Courts are clear and categoric that amnesties for serious crimes in international law are unlawful then their availability will ultimately be taken off negotiation tables.

b. State practice and the duty to prosecute

13. It was argued by the Defence that the South African amnesty as well as other amnesties implemented by some States show that there is no rule under international law requiring the prosecution of serious crimes under international law. This is not so. The AZAPO decision of the South African Constitutional Court relied largely on the need for ordinary people to reintegrate into society and live together as the basis for granting amnesties for international crimes.[9] Other States that have enacted amnesties for serious crimes under international law have made similar justifications.[10] Statements by representatives from Uruguay, El Salvador and Chile may indicate acknowledgement that their amnesties, while *justified*, could have been contrary to their legal obligation.[11]

14. It is submitted that this attitude confirms rather than weakens the duty to prosecute crimes under international law. In Nicaragua v. United States, the International Court of Justice (ICJ) stated as follows:

> *186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely*

[9] see para 31 in particular
[10] See Roht-Arriaza, State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law, 78 Calif. L. Rev. 451, March 1990, at 496-498.
[11] Id. For instance, a representative from Uruguay assured the U.N. Human Rights Commission that it would investigate human rights violations committed during the prior regime. Further, a Chilean representative assured the Committee that it would investigate disappearances and bring those responsible to justice

rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[12]

15. It is not surprising therefore that whenever the legality of amnesties granted at the national level has been reviewed by an international tribunal or body, they have been found to be unlawful. As presented in our previous written submissions, there have been an increasing number of such findings by international courts, tribunals and human rights treaty bodies.

c. Amnesties and Prosecutorial Discretion

16. The duty to prosecute crimes under international law, like the duty to prosecute any crime, is naturally subject to factors such as the sufficiency of the evidence. For instance, the UN Convention against Torture imposes a duty to carry out a "prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed ..."[13] A set of Principles now before the UN on the right to reparation for serious violations of international human rights and humanitarian law provides:

Those gross violations of international human rights and serious violations of humanitarian law that constitute crimes under international law require the duty to investigate and, if there is sufficient evidence, the duty to prosecute the person alleged to have committed the violations and, if found guilty, the duty to punish the perpetrator. Moreover, in these cases, States shall cooperate with one

[12] Nicaragua v. United States of America, International Court of Justice, Judgment of 27 June 1986, para.186.

[13] Article 12, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee against Torture, responsible for monitoring compliance with the Convention, has criticized states for failing to take steps to carry out thorough and impartial investigations; see for example Encarnacion Blanco Abad v. Spain, case no. 59/1996, decision of 14 May 1998.

> *another and assist international judicial organs competent in the investigation and prosecution of these violations.*[14]

17. The duty to prosecute does not mean that any particular court or tribunal is obliged to prosecute every individual carrying responsibility. Particularly in situations where crimes have been committed on a massive scale, decisions have to be made. So, for instance, the Rome Statute for the International Criminal Court sets out the framework for the scope of prosecutorial discretion, including the possibility that the Prosecutor might decide not to proceed with an investigation or a prosecution if he determines it would not be in the interests of justice.[15] However the Prosecutor's discretion to halt an investigation or a prosecution on this basis is limited by the requirement that the decision be reviewed by the Pre-Trial Chamber. The mandate of the Sierra Leone Special Court itself is limited in Article 1 of its Statute to prosecuting "persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996".

Conclusions

18. International law has moved a long way since the days of Abraham Lincoln, indeed it was only a few generations ago that Raphael Lemkin first failed to persuade the international community that genocide was a crime. Recent years have seen a clear trend against recognition of amnesties for the most serious crimes of international concern, even if there is not yet full consensus on the precise list of crimes to which it applies. Few now deny that amnesties for torture and for grave breaches of the Geneva Conventions are unlawful. We submit, citing considerable support from international and national jurisprudence and practice as well as academic opinion, that amnesties for

[14] Section III, Paragraph 4, The Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of [gross] Violations of International Human Rights Law and [serious] Violations of International Humanitarian Law, Revised Draft, (Rev. 24 October 2003), revised by the Chairperson-Rapporteur and the two independent experts, Mr. van Boven and Mr. Bassiouni, to be presented for adoption to the UN Commission on Human Rights in 2004. Basic principles and guidelines on the right to a remedy and reparation for victims of [gross] violations of international human rights law and [serious] violations of international humanitarian law, Revised Draft, (Rev. 24 October 2003), III (4). – There is no official citation in the version I have – I enclose it so you can attach if you want.

[15] Article 53, Rome Statute.

crimes against humanity and for war crimes committed in the context of a non-international armed conflict must similarly be unlawful.

19. This Court should not accept the Lome amnesties. Such amnesties have no extra-territorial effect, nor do they bind an international tribunal. Every international body that has reviewed the legality of amnesties for crimes under international law has found them to be contrary to international law. Amnesties can be justified neither on policy nor on legal grounds. The continuing re-enforcement of the obligation to end impunity for serious violations should lead this Court inexorably to the conclusion that amnesties should have no place in the lexicon of laws concerned with crimes against humanity and other serious breaches of international criminal law.

RICHARD HERMER

17 NOVEMBER 2003

DOUGHTY STREET CHAMBERS

LONDON

APPENDIX 1

EXTRACTS FROM THE JUDGMENT OF THE ICTY TRIAL CHAMBER IN THE CASE OF PROSECUTOR v. ANTO FURUNDZIJA, 10 DECEMBER 1998

(b) The Prohibition Imposes Obligations Erga Omnes

151. Furthermore, the prohibition of torture imposes upon States obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

152. Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner.

(c) The Prohibition Has Acquired the Status of Jus Cogens

153. While the erga omnes nature just mentioned appertains to the area of international enforcement (lato sensu), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules.[170] The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

154. Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.

155. 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,[171] and then be unmindful of a

State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.[172] 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 in addition 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. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: "individuals have international duties which transcend the national obligations of obedience imposed by the individual State".[173]

156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty- making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in Eichmann, and echoed by a USA court in Demjanjuk, "it is the universal character of the crimes in question i.e. international crimes which vests in every State the authority to try and punish those who participated in their commission".[174]

157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.