Legality of amnesties in international humanitarian law
The Lomé Amnesty Decision of the Special Court for Sierra Leone

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On 13 March 2004, the Special Court for Sierra Leone (SCSL) rendered an important decision on the validity of amnesties under international law.[1] The Appeals Chamber of the SCSL ruled that amnesties granted to persons of the warring factions in the Sierra Leone civil war by the so-called Lomé Peace Agreement are no bar to prosecution before it. This decision is the first ruling of an international criminal tribunal unequivocally stating that amnesties do not bar the prosecution of international crimes before international or foreign courts. The following article will briefly discuss this significant and controversial decision for the development of international humanitarian law and will then examine the most important and critical findings of the ruling, after first giving a brief summary of the legal background to the SCSL, the Lomé Peace Agreement and the Appeals Chamber decision (Lomé Decision) itself.

Legal background to the Special Court for Sierra Leone

The SCSL was established by an agreement between the United Nations and the government of Sierra Leone on 16 January 2002.[2] This newly established ad hoc criminal tribunal is considered to represent a new category of international criminal courts and is largely referred to as a *hybrid* tribunal, since it incorporates various national elements in its Statute.[3] The mandate of the Secretary-General of the United Nations to enter into negotiations with Sierra Leone in order to establish an independent criminal court for the prosecution of serious violations of international humanitarian law was based on Security

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Council Resolution 1315.[4] The Special Court Agreement (the Agreement)[5] and the Special Court Statute (the Statute)[6] were ratified by the Sierra Leone parliament in March 2002 through the Ratification Act that explicitly states: "The Special Court shall not form part of the Judiciary of Sierra Leone."[7] Nor is the Special Court, unlike the two ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), linked to the United Nations. It is therefore an independent international criminal tribunal. It has jurisdiction *ratione materiae* with respect to crimes against humanity, serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, other serious violations of international humanitarian law, and national crimes, such as serious abuse of female children and deliberate destruction of property as defined by national laws of Sierra Leone.[8] The jurisdiction *ratione temporae* runs from 30 November 1996, the date of an earlier ceasefire – the Abidjan Accord – that also provided for an amnesty. The personal jurisdiction is limited to persons "who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law…"[9] The Trial and Appeals Chamber are composed of a minority of judges appointed by the government of Sierra Leone; the remaining judges are appointed by the Secretary-General.[10] This structure and the incorporation of national crimes into the Statute led the Secretary-General to label the Special Court as a "treaty-based *sui generis* court of mixed jurisdiction and composition."[11]

1 *The Prosecutor* v. *Morris Kallon and Brima Buzzy Kamara*, Special Court for Sierra Leone, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber, 13 March 2004) (hereinafter Lomé Decision).

2 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, annex to the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000 (hereinafter Agreement).

3 Avril McDonald, "Sierra Leone's shoestring Special Court", *International Review of the Red Cross*, Vol. 84, 2002, p. 124; Laura A. Dickinson, "The promise of hybrid courts", *American Journal of International Law,* Vol. 97, April 2003, p. 295.

4 UN Doc. S/Res/1315 (2000), 14 August 2000.

5 Agreement, *op. cit.* (note 2).

6 Statute of the Special Court for Sierra Leone, enclosure to the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000 (hereinafter Statute).

7 Article 11(2) of the Special Court Agreement, 2002, Ratification Act, 2002, Supplement to the Sierra Leone Gazette, Vol. CXXX, No. II, dated 7 March 2002 (hereinafter Ratification Act 2002).

8 Statute, Articles 2-5.

9 *Ibid.*, Article 1.

10 *Ibid.,* Article 12.

11 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 9 (hereinafter Report of the Secretary-General).

Background to the Lomé Amnesty Decision

On 7 July 1999, the Revolutionary United Front (RUF) and the government of Sierra Leone signed a peace agreement in Lomé, Togo (Lomé Agreement).[12] Article IX of the Lomé Agreement made broad concessions to the RUF including, among other things, a blanket amnesty in order to calm the decade-long civil war.[13] The amnesty granted unconditional and free pardon to all participants in the conflict.[14] The United Nations Special Representative of the Secretary-General for Sierra Leone appended a disclaimer to the agreement, stating that the amnesty provision therein would not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.[15] Article 10 of the Statute accordingly declares: "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."[16] The accused, Kallon and Kamara, unsurprisingly referred to the amnesty provisions of the Lomé Agreement in a preliminary motion and argued, *inter alia*, that not all amnesties are unlawful in international law and that the Lomé Agreement was binding on the government of Sierra Leone, since it constituted an international treaty governed by the Vienna Convention on the Law of Treaties.[17] They held that obligations deriving out of an international treaty could not be altered by a later treaty — the Agreement between the United Nations and Sierra Leone — without the consent of the parties to the Lomé Agreement. Therefore the government of Sierra Leone had acted contrary to its prior and international obligations when it signed the Agreement with the United Nations. More specifically, the defendants argued that the Lomé Agreement obliged the government of Sierra Leone to ensure that "no official or judicial action" would be taken against any members of the RUF and other participants in the conflict.[18] This would include acceding to an extradition request or an agreement to

12 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of 7 July 1999, Lomé, UN Doc. S/1999/777 (hereinafter Lomé Agreement), Annex.

13 Lomé Agreement, Article XI.

14 *Ibid.*

15 Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc. S/1999/836, 30 July 1999, para. 7.

16 Statute, Article 10.

17 Lomé Decision, *op. cit.* (note 1), paras. 22-35.

18 *Ibid.*, para. 24.

establish an international court, as such measures would clearly amount to "judicial or official" actions.

The preliminary motion was decided by the Appeals Chamber without a prior decision of a Trial Chamber, since Rule 72(E) of the Rules of Procedure and Evidence of the SCSL (Rules) provides for a referral of preliminary motions to the Appeals Chamber when an issue of jurisdiction is concerned.

The Lomé Amnesty Decision

In its decision, the Appeals Chamber sets forth its deliberations in three key steps and arguments. First it examines the status of the Lomé Agreement and whether insurgents have treaty-making capacity in international law, and the legal consequences thereof for Article 10 of the Statute. Secondly, the Appeals Chamber considers whether it is authorized to review the legality of its statutory provisions. Thirdly, it examines the limits of amnesties in international law. The judges further discuss whether a prosecution predating the Lomé Agreement amounts to an abuse of process.

With reference to the first argument, the Appeals Chamber finds that the mere fact that the United Nations and other third State parties signed the Lomé Agreement cannot naturally categorize the agreement as an international treaty, creating obligations towards its signatories.[19] The court did not accept the opinion of Kooijmans, who suggested that in certain cases peace agreements could be of an international character if the United Nations were strongly involved in the conflict through peace-keeping forces and had played an active role as mediator in the peace negotiations;[20] in any such cases it should be assumed that the non-State entity had committed itself to its counterparts, the government and the United Nations.[21] The judges, however, argued that the United Nations and third State parties were mere "moral guarantors" with the purpose of observing that the Lomé Agreement was enacted in good faith by both parties. Such moral functions of the guarantors could not presuppose any legal obligation.[22] International agreements in the nature of treaties had to create rights and obligations towards all parties. The Lomé

19 *Ibid.*, paras. 37-42.

20 *Ibid.*, para. 38.

21 Peter H. Kooijmans, "The Security Council and non-State entities as parties to conflicts", in Karel Wellens (ed.), *International Law: Theory and Practice — Essays in Honour of Eric Suy*, M. Nijhoff Publishers, The Hague, 1998, p. 338.

22 Lomé Decision, *op. cit.* (note 1), para. 41.

Agreement only created a factual situation to the restoration of peace; it did not create rights or duties which could be regulated by international law.[23]

On the basis of the same arguments the Appeals Chamber further considers whether the RUF had treaty-making capacity under international law. The judges opined that the mere fact that insurgents are subject to international humanitarian law may not lead to the conclusion that they are provided with an international personality under international law.[24] The fact that the Sierra Leone government regarded the RUF as an entity with which it could enter into an agreement could not suffice for concluding that the RUF had international treaty-making capacity, since no other State granted them recognition as an entity under international law.[25] The Appeals Chamber found that the validity of the Lomé Agreement's amnesty provision in the domestic law of Sierra Leone is of no importance for its conclusion, as it is concerned only with international crimes and whether the Lomé amnesty bars the SCSL from exercising jurisdiction over such offences.[26]

As for the second argument, the Appeals judges consider whether the court has jurisdiction and inherent powers to review treaty provisions of the Statute or the Agreement on the grounds that they are unlawful.[27] The Appeals Chamber held that it is not vested with powers to declare statutory provisions of its own constitution unlawful. Only in cases where it could be established that the provisions in question, in terms of Article 53 or Article 64 of the Vienna Convention on the Law of Treaties or under customary international law, were void would the Appeals Chamber be empowered to undertake such a measure.[28] However, no foundation for the applicability of these provisions had been provided by the parties.[29] The Chamber explicitly finds that the *Tadić* jurisdiction decision of the ICTY[30] cannot be considered as authority, since the conditions were not alike.[31] The ICTY was established

23 *Ibid.*, para. 42.

24 *Ibid.*, para. 45.

25 *Ibid.*, paras. 47, 48.

26 *Ibid.*, para. 50.

27 *Ibid.*, paras. 61-65.

28 *Ibid.*, para. 61.

29 *Ibid.*

30 *The Prosecutor* v. *Dusko Tadić*, International Criminal Tribunal for the former Yugoslavia, IT-94-I-AR72, Decision on the Defence Motion on Jurisdiction, (Appeals Chamber, 2 October 1995) (hereinafter *Tadić* Decision); the SCSL Appeals Chamber mistakenly quotes the ICTY Trial Chamber decision dating 10 August 1995, see Lomé Decision, *op. cit.* (note 1), para. 57, note 45.

31 Lomé Decision, *op. cit.* (note 1), para. 62.

by a Security Council resolution, whereas the SCSL is a treaty-based tribunal.[32] The *Tadić* Decision only discusses the extent of powers of the Security Council to establish an international criminal court. It did not involve the validity of the provisions of a treaty.[33] The judges nonetheless recognized that the situation would be different where a court is duly established to be called upon to declare the limits of its powers.[34]

In its last argument the Appeals Chamber discusses the limits of amnesties in international law.[35] Here the judges mainly drew on the doctrine of universal jurisdiction to establish their opinion. They determined that the grant of amnesties falls under the authority of the State exercising its sovereign powers.[36] However, where a jurisdiction is universal, such a State could not deprive another State of its jurisdiction to prosecute perpetrators by granting amnesties.[37] The Appeals Chamber opines: "A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember."[38] After referring to *In re List et al.* of the Military Tribunal at Nuremberg and the *Eichmann* case, the Appeals Chamber concludes that the crimes enumerated in Articles 2 to 4 of its Statute are international crimes, which can be prosecuted under the principle of universality.[39] Amnesties granted by Sierra Leone, therefore, cannot cover crimes under international law, as they are subject to universal jurisdiction and by reason of the fact that "the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*."[40] The grant of an amnesty for international crimes therefore is not only in breach of international law, "but is in breach of an obligation of a State towards the international community as a whole."[41] However, the Appeals Chamber finds, too, that there is no customary rule prohibiting national amnesty laws, but only a development towards an exclusion of such laws in international law.[42]

32 *Ibid.*
33 *Ibid.*
34 *Ibid.*
35 *Ibid.*, paras. 66-74.
36 *Ibid.*, para. 67.
37 *Ibid.*
38 *Ibid.*
39 *Ibid.*, paras. 68, 70.
40 *Ibid.*, para. 71.
41 *Ibid.*, para. 73.
42 *Ibid.*, para. 82.

Comment on the Lomé Amnesty Decision

The Lomé Decision is of critical importance for the development of international humanitarian law, since it is the first decision of an international criminal court to state that amnesties are no bar to prosecution for all international crimes before international or foreign courts. The ICTY in its *Furundzija Judgement* discussed the validity of amnesties under international law and found that an individual could be prosecuted for torture before an international tribunal, by a foreign State and under a subsequent regime even if the conduct in question had been the subject of an amnesty.[43] However, the judgment limits itself to the unlawfulness of amnesties for the crime of torture and does not reach a similar conclusion with regard to other international crimes. The Lomé Decision therefore goes beyond common international jurisprudence. Despite their relevance for the development of international humanitarian law relating to this subject matter, the findings of the Appeals Chamber are controversial. Not only did the Appeals Chamber fail to examine the validity of amnesties in the domestic legal system of the State that granted them, but in addition drew some critical conclusions that depart from prominent jurisprudence of other international criminal tribunals.

The Appeals Chamber found that it did not have the authority to declare the court's statutory provisions unlawful since the SCSL was created by a treaty.[44] Only where the court were established, or had the authority, to declare its own jurisdictional limits would the judges be empowered to declare a provision of the Statute unlawful.[45] This finding departs from the *Tadić* jurisdiction decision of the ICTY Appeals Chamber. The Appeals judges of the SCSL argued that the ICTY and the SCSL were of a different nature, as the former was directly established by a Security Council resolution. Although the *Tadić* Decision was highly controversial at the time, most authors acknowledged the fact that the ICTY was honestly willing to examine its own legality and the legality of provisions of its Statute.[46] Aldrich expressed a widely shared view that "[on] balance, I prefer the Tribunal's approach, as it emphasizes the right of the individual — the accused — to

43 *The Prosecutor* v. *Anto Furundzija*, International Criminal Tribunal for the former Yugoslavia IT-95-17/1-T, Judgement (Trial Chamber, 10 December 1998), para. 155.

44 Lomé Decision, *op. cit.* (note 1), para. 62.

45 *Ibid.*

46 George H. Aldrich, "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia", *American Journal of International Law*, Vol. 90, January 1996, p. 65.

force the Tribunal to confirm the validity of the provisions of its Statute and even of its own creation. For a criminal tribunal in particular, it is reassuring to know that it finds inherent to the exercise of its judicial function the jurisdiction to examine the legality of its establishment."[47] It seems that the SCSL has departed from such safeguards for the accused. Furthermore, the finding appears to be *ultra vires* in relation to the Statute since Article 14 of the Statute incorporates the Rules of Procedure and Evidence of the ICTR *mutatis mutandis* into its legal system, which the judges of the SCSL may amend only "where the applicable Rules do not, or do not adequately, provide for a specific situation."[48] Rule 72 of those Rules — under which the Appeals Chamber acted in this decision — provides explicitly for objections to jurisdiction.[49] This provision was interpreted in the said *Tadić* Decision and in other decisions of the two ad hoc Tribunals in such a way as to enable the defendants to challenge the legality of the creation of the tribunals and the validity of their provisions.[50] Therefore the finding of the judges that they were not vested with powers to declare statutory provisions unlawful is not convincing: such authority had been acknowledged in prominent jurisprudence of the ICTY and ICTR by way of Rule 72 of their respective Rules, and was again implicitly provided for by the authors of the SCSL Statute through Article 14 thereof. Moreover, the conclusion of the Appeals Chamber judges appears to be inconsistent with their own precedents. In another decision the same judges and Judge Robertson — who was later disqualified from all RUF decisions[51] — referred to the same *Tadić* Decision and stated that inherent powers and jurisdiction are a necessary component of the judicial function of the SCSL "and do not need to be expressly provided for in the constitutive documents of the tribunal."[52]

47 *Ibid*.

48 Article 14 Statute.

49 Rule 72(B) (i) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

50 See *The Prosecutor* v. *Joseph Kanyabashi*, International Criminal Tribunal for Rwanda, ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction (Trial Chamber, 18 June 1997); *The Prosecutor* v. *Momcilo Krajisnik,* International Criminal Tribunal for the former Yugoslavia, IT-00-39-PT, Decision on Motion challenging Jurisdiction — with Reasons (Trial Chamber, 22 September 2000).

51 *The Prosecutor* v. *Issa H. Sesay*, Special Court for Sierra Leone, SCSL-2004-15-AR15, Decision on the Defence Motion seeking the Disqualification of Justice Robertson from the Appeals Chamber (Appeals Chamber, 13 March 2004).

52 *The Prosecutor* v. *Sam H. Norman, Morris Kallon, and Augustine Gbao*, Special Court for Sierra Leone, SCSL-2003-08-PT, SCSL-2003-07-PT, SCSL-2003-09-PT, Decision on the Application for Stay of Proceedings and Denial of Right to Appeal (Appeals Chamber, 4 November 2003), para 27.

After the aforementioned findings the Appeals Chamber could have refrained from any further legal deliberation on the legality of amnesties in international law, since it had stated that it did not have the authority to declare Article 10 of the Statute unlawful, but it nevertheless went on to address the question. It is therefore uncertain whether the remainder of the decision is simply *obiter dictum* and therefore of questionable precedential value, or an additional examination of the Special Court's statutory provisions under customary international law. As the decision in this regard lacks clarity, a final conclusion would be mere speculation.

The Appeals Chamber based its Lomé Decision on the doctrine of universal jurisdiction, stating that "[w]here jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty."[53] This conclusion is widely shared among academics.[54] However, the Appeals Chamber did not demonstrate that war crimes in non-international armed conflict are subject to universal jurisdiction. Such jurisdiction applies to grave breaches of the Geneva Conventions and of Additional Protocol I, which require States to prosecute or extradite persons who commit these offences in an international armed conflict.[55] There are no similar treaty provisions concerning the prosecution or extradition of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Therefore violations in non-international armed conflict have traditionally not been considered to be subject to universal jurisdiction.[56] In this regard the Appeals Chamber refers only to the *Eichmann* case[57] and the *Hostage* case[58] to establish universal jurisdiction for international crimes. These trials, however, only charge the accused persons with crimes against humanity and war crimes committed in an international

53 Lomé Decision, *op. cit.* (note 1), para. 67.

54 See Antonio Cassese, *International Criminal Law,* Oxford University Press, Oxford, 2003, p. 315; Gerhard Werle, *Völkerstrafrecht*, Mohr Siebeck, Tübingen, 2003, para. 191; International Law Association, "Final report on the exercise of universal jurisdiction in respect of gross human rights offences", in *Report of the Sixty-Ninth Conference*, London, 2000, p. 417; Princeton Project on Universal Jurisdiction (eds.), *The Princeton Principles on Universal Jurisdiction*, Princeton, 2001, Principle 7(2); Roman Boed, "The effect of a domestic amnesty on the ability of foreign States to prosecute alleged perpetrators of serious human rights violations", *Cornell International Law Journal*, Vol. 33, No. 2, 2000, p. 297.

55 Luc Reydams, *Universal Jurisdiction*, Oxford University Press, Oxford, 2003, p. 55.

56 Denise Plattner, "The penal repression of violations of international humanitarian law applicable in non-international armed conflict", *International Review of the Red Cross*, Vol. 30, 1990, p. 414.

57 *Attorney-General of the Government of Israel* v. *Eichmann*, 36 ILR 18 (District Court of Jerusalem 1961), 5, 12.

58 *In re List et al.*, US Military Tribunal at Nuremberg, Judgment 29 July 1948, printed in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, VIII, p. 1242.

armed conflict. The passage that is also mentioned of the *Arrest Warrant* case of the International Court of Justice (ICJ) refers only to sovereign immunity before certain international criminal courts and does not make any statement in regard to crimes subject to universal jurisdiction.[59] Even though the Appeals Chamber admits that "not every activity that is seen as an international crime is susceptible to universal jurisdiction",[60] its decision falls short of establishing such jurisdiction on a case-by-case analysis for each crime before the court and in particular for war crimes committed in non-international armed conflict. This inadequacy of the Lomé Decision is unfortunate, as there are strong arguments in recent developments of international law for inclusion of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in the prominent list of crimes subject to the principle of universality.[61]

The attempt to resolve the challenging issue of amnesties by reference to the doctrine of universal jurisdiction moreover only partly covers the factual subject, as the jurisdiction of the Special Court is a truly unique one deriving from the cession of judicial powers from the State of Sierra Leone, and not first and foremost from universal jurisdiction. As the SCSL is established by a bilateral agreement, its jurisdictional powers primarily derive from Sierra Leone's own jurisdiction, based on the territorial and nationality principle. In international law a State can naturally only confer, through a treaty, powers and authorities it possesses (*nemo plus juris transferre potest quam ipse habet*). Only from such powers can the SCSL derive its jurisdiction. Hence the conclusion that third States have jurisdiction to prosecute persons who were covered by a domestic amnesty is not entirely applicable to the SCSL. Even though it is a "certain international criminal court" in the sense of the cited *Arrest Warrant* case, this conclusion does not change the aforementioned principles of international law, since the *obiter dictum* of the ICJ refers only to immunities from prosecution before certain courts.[62]

59 See *Case concerning Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo* v. *Belgium*), Judgment, ICJ Reports 2002, para. 61.

60 Lomé Decision, *op. cit.* (note 1), para. 68.

61 Thomas Graditzky, "Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts ", *International Review of the Red Cross* ,Vol. 322, 1998, pp. 29-56; Theodor Meron, "International criminalization of internal atrocities ", *American Journal of International Law*, Vol. 89, 1995, p. 554; International Law Association, *op. cit.* (note 54), pp. 408-409.

62 Simon M. Meisenberg, "Die Anklage und der Haftbefehl gegen Charles Ghankay Taylor durch den Sondergerichtshof für Sierra Leone", *Humanitäres Völkerrecht*, Vol. 17, No. 1, 2004, p. 30.

In mainly invoking the concept of universal jurisdiction to establish that the Lomé amnesty is no bar to prosecution, the Appeals Chamber seems to be ignoring the fact that the SCSL is dependent on the judicial cooperation of the authorities of Sierra Leone. The Appeals Chamber misinterprets the meaning of "official or judicial action" mentioned in Article IX(2) of the Lomé Agreement, as it limits its conception of such measures to the ratification of the Agreement and the Statute. In all current cases where accused persons have been arrested, their capture and transfer to the premises of the SCSL were carried out by the Sierra Leonean authorities because the Special Court, like the ICTY and ICTR, lacks a police force of its own. These actions were based on Article 17(2) of the Agreement, which stipulates that the government of Sierra Leone "shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers…"[63] Such actions by Sierra Leone are undoubtedly of a judicial and official character. As the Appeals Chamber does not declare Article IX of the Lomé Agreement to be illegal in the domestic system of Sierra Leone,[64] such measures by the national authorities consequently would still be in contradiction to that agreement. The argument of the court's universal jurisdiction over international crimes to establish the illegality of amnesties for the purpose of prosecution by the SCSL as a treaty-based international criminal court is therefore not persuasive.

The core question of the Appeals Chamber should have been whether Article IX of the Lomé Agreement has generally violated international law and whether any amnesties granted were consequently invalid and henceforth not to be considered by the SCSL. By linking the complex issue merely to the principle of universality the Appeals Chamber simplifies and eliminates the fundamental questions at stake. The particular question of an *erga omnes* obligation to prosecute was not accurately discussed by the judges. On the one hand they adopt an opinion by Cassese stating that "if a State passes any such law [on amnesty], it does not breach a customary rule."[65] Yet on the other hand, the same paragraph within the Lomé Decision states that prosecution of international crimes "is a peremptory norm and has assumed the nature of an obligation *erga omnes*."[66] If such *erga omnes* obligations in

63 Agreement, Article 17(2).
64 Lomé Decision, *op. cit.* (note 1), para. 50.
65 *Ibid.*, para. 71.
66 *Ibid.*

international law do exist, then they also have to apply to Sierra Leone, and the grant of a blanket amnesty would consequently be in breach of international law. The contradiction becomes more evident when the judges — by agreeing to the *amicus curiae* submissions of Orentlicher — declare that the grant of amnesty for international crimes "is not only incompatible with, but is in breach of an obligation of a State towards the international community as a whole."[67] Apart from the fact that the Appeals Chamber does not provide any references for its conclusions but merely refers to the material provided by the *amicus curiae*, there are uncertainties about the sources of law being applied by the Chamber. For example, it rejects the proposition that there is a crystallizing international norm that a government cannot grant amnesty for serious crimes.[68] It accepts only that "such a norm is developing under international law."[69] Then again, the Appeals Chamber maintains: "Even if the opinion is held that Sierra Leone may not have breached customary law in granting an amnesty, this court is entitled in the exercise of its discretionary power, to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity."[70] This finding opposes the opinion adopted earlier by Cassese, who expressed the view that customary law has not yet crystallized and therefore advocated prosecutions under the doctrine of universal jurisdiction.[71] Admittedly, there is a move towards abandoning amnesties in current international law, as shown by the waiver of the Representative of the Secretary-General appended to the Lomé Agreement. However, it is doubtful whether an international norm that is still taking shape can already constitute custom, as the Appeals Chamber seems to imply. Even though crystallizing custom can also exert a considerable influence on international courts,[72] the findings of the judges and their declaration of their "discretionary power" to attribute little or no weight to the grant of amnesties, despite their conclusion that such custom is still developing, is striking and raises questions about the sources of law applied.

67 *Ibid.*, para. 73.

68 *Ibid.*, para. 82.

69 *Ibid.*

70 *Ibid.*, para. 84.

71 Cassese, *op. cit.* (note 54), p. 315.

72 See E. Jéménez de Aréchaga, "International law in the past third of a century", 159 *Recueil des Cours* (1978), p. 20.

It is not submitted that blanket amnesties have a standing in the international legal system. Many international conventions provide for the prosecution or extradition of offenders of certain international crimes, and it seems as though at least unconditional amnesties may be implied as the counterpart to such a duty.[73] In this regard the Appeals Chamber provided some guidance by its reference to such treaty obligations, namely those laid down in the Genocide Convention, the Torture Convention and the four Geneva Conventions. However, the applicability of these treaties in the context of the SCSL is questionable and the Appeals Chamber did not provide any support for a conclusion with regard to war crimes in non-international armed conflict. The crimes before the court do not come within the grave breaches regime of the four Geneva Conventions. For violations in non-international armed conflict of Article 3 common to the Geneva Conventions and of Additional Protocol II there is, as mentioned above, no explicit provision entailing an obligation to prosecute or extradite. Moreover, the Genocide Convention is not of particular importance in the case of the Sierra Leonean conflict, since it is assumed that the crimes were generally not committed with a genocidal intent, which is again the reason why the Statute does not contain such crimes.[74] In addition, the applicability of the Torture Convention is open to doubt, as it refers to reprehensible conduct by State officials. Even though torture in human rights treaties and international humanitarian law has a number of common characteristics, the ICTY expressly held that the definition of torture in international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law.[75] The appellants Kallon and Kamara did not occupy official State positions in or for Sierra Leone before the signing of the Lomé Agreement. It would have been the task of the Appeals Chamber to specifically establish treaty obligations with respect to crimes adjudicated before its jurisdiction and the appellants' indictment.

The Appeals Chamber tends to assume the existence of specific duties to prosecute international crimes rather than to sincerely establish such obligations. None of the conventions referred to expressly prohibit or

73 Naomi Roht-Arriaza, "Special problems of the duty to prosecute: Derogation amnesties, statutes of limitations, and superior orders", in Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, Oxford, 1995, p. 57.

74 Report of the Secretary-General, *op. cit.* (note 11), para. 13.

75 *The Prosecutor* v. *Dragoljup Kunarac et al.*, The International Criminal Tribunal for the former Yugoslavia, IT-96-23-T & IT-96-23/1-T, Judgment (Trial Chamber, 22 February 2001), para. 496.

expressly provide for amnesties. An exception is Additional Protocol II to the Geneva Conventions, Article 6(5) of which stipulates that "[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". In the *AZAPO* case this provision was used to justify conditional amnesties, stressing the need for reconciliation and peaceful transition.[76] The Appeals Chamber unfortunately did not discuss the need of war-torn societies for peaceful transition and refused any comparison with the said case by plainly stating that this decision dealt with domestic law and therefore was not applicable to the internationally founded SCSL.[77] Given the fact that the judges based their findings on the principle of universality, such a conclusion is only consistent. But it is also regrettable, since the SCSL plays an integral part in Sierra Leone's progress towards a peaceful transition. Nevertheless, it is meanwhile widely accepted that the rationale of Article 6(5) of Additional Protocol II does not justify amnesties for serious violations in internal armed conflict because such violations, as pointed out above, are international crimes under customary international law.[78] Article 6(5) therefore refers only to legitimate acts of hostility,[79] and its mere existence does not imply that there is no duty to prosecute crimes in non-international armed conflict.

The unbalanced reasoning of the Lomé Decision, according to which amnesties are to be rejected unconditionally, raises concerns that affect provisions relating to the court's own functioning, as well as provisions of international humanitarian law. Under the former, the Special Court has jurisdiction to prosecute persons who have "the greatest responsibility" for the crimes committed in Sierra Leone.[80] The Statute's disregard for those "least

76 See *The Azanian Peoples Organization (AZAPO)* v. *The President of the Republic of South Africa*, 4 SA 653 (Constitutional Court 1996), para. 53.

77 Lomé Decision, *op. cit.* (note 1), para. 73.

78 Yasmin Naqvi, "Amnesty for war crimes: Defining the limits of international recognition", *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, p. 604; Avril McDonald, "Sierra Leone's uneasy peace: The amnesties granted in the Lomé Peace Agreement and the United Nations' dilemma", *Humanitäres Völkerrecht*, Vol. 13, No. 1, 2000, p. 19; Roht-Arriaza, *op. cit.* (note 73), pp. 58-59; Christian Tomuschat, "The duty to prosecute international crimes committed by individuals", in Hans-Joachim Cremer *et al.* (eds.), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger*, Springer Verlag, Berlin, 2002, p. 348; Jessica Gavron, "Amnesties in the light of development in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly*, Vol. 51, January 2002, pp. 102-103.

79 Gavron, *Ibid*.

80 Statute, Article 1.

responsible" is not strictly speaking an amnesty. But in reality the effect is the same, as the Lomé Decision did not expressly declare the amnesty invalid for Sierra Leone's domestic legal system.[81] Such measures narrowly concentrating on the instigators and leaders of an armed conflict are highly pragmatic, since any other approach would jeopardize the SCSL's mandate. At the same time pragmatism might occasionally lead to impunity, as shown by the aforesaid statutory provision. Effective international humanitarian legislation has to take these specific situations into account. It is essential to strike a balance between impunity and facilitating a peaceful transition for a war-torn country. Limited and qualified amnesties must be seriously considered in this regard and may not be unconditionally rejected. It is necessary to find valid international parameters for such qualified amnesties as measures of last resort.[82] Since the SCSL had to deal with unconditional amnesties, it is understandable that it did not contribute to such a more balanced approach.

Conclusion

The Lomé Decision of the Special Court for Sierra Leone is a step towards the abolition of blanket amnesties for mass atrocities rather than a landmark in the development of international humanitarian law. The Appeals Chamber did not address Sierra Leone's own duty to investigate and prosecute in international law, but merely based its findings on the principle of universality. Such an approach is unconvincing, owing to the unusual place of the Special Court in international law, and incompatible with the country's legal obligation to transfer arrested persons to the court, since the court lacks its own enforcement mechanisms. The court should have specifically established treaty obligations for Sierra Leone to prosecute with regard to all crimes before it and to non-international armed conflict in particular, rather than invoke the principle of universal jurisdiction in order to rule that the amnesties granted are no bar to prosecution before an international and foreign court.

81 Lomé Decision, *op. cit.* (note 1), para. 50.

82 See Naqvi, *op. cit.* (note 78), p. 583.