AMNESTY AND THE *OBLIGATIO ERGA OMNES* TO REPRESS HUMANITARIAN LAW VIOLATIONS: LESSONS FROM THE SIERRA LEONE CONFLICT

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Abstract

The issue of the criminal liability of individuals in both their personal and official capacities is central to human rights adjudication. But this notion becomes a farce if states grant to individuals certain immunities- such as amnesty, asylum or any other exculpating factors. The fact that amnesty have continued to be issued by various government makes it a compelling task for us to look at or determine its proper limits. Among the questions that may arise is: what is the extent of the powers of the government to grant amnesty, whether on a proper interpretation of state's responsibility to grant pardon for crimes committed against it vis-à-vis the duty under international law to punish those who have committed other crimes especially humanitarian law crimes. It is our argument that on a proper interpretation of this responsibility, states do not have an unlimited power to grant amnesty. States owe it as an obligation to its citizens as well as to those within its bodies to bring to book perpetrators of human rights abuse. The combination of the above mentioned factors therefore makes the issuance of amnesty asylum or any other exculpating factor, a total aberration. In this paper a background is given to the historical development of amnesty and the extent of states powers to confer same.

Keywords: Amnesty, erga omnes, humanitarian law

Introduction:

The internecine armed conflict that gripped Sierra Leone in the early 1990s was a tragedy. The civil war was between brothers or people so intimately linked by common experiences and close fraternal bonds. In its character, actors, and consequences, there was a

sense that novel warfare strategies, such as ethnic cleansing, child soldiers, mass rape, banditry, starvation and the use of mercenary had evolved. Also, there existed a large pool of ready and willing youths waiting to be recruited, in fact, children some as young as six years, took up arms against their parents and brothers against brothers.

These crimes had catastrophic consequence as they did not only cause a lot of pain and suffering in human society, they also disorganised domestic life of a large number of countries. Equally, these criminal acts may seriously affect relations between states and the international legal order because they amount to violations of both international and domestic laws. This concern has prompted and provided a great impetus for prosecution. But in most cases, in practice, prosecution has become difficult because of the existence of competing interests – that of justice and reconciliation. Those in favour of reconciliation believe that the grant of amnesty creates the requisite environment for reconciliation and peace. For this reason, it is not surprising that amnesty is now an attractive option and a matter of first choice in a post-conflict peace arrangement. But the important need to reconcile the warring parties in the aftermath of armed conflict, by the grant of amnesty or other forms of pardon is met by an opposing, albeit, strong desire at times to punish those who have acted in violation of humanitarian law crimes. For the many opposed to amnesty; the argument is that, it has become a veritable instrument of impunity for human rights and humanitarian law violations. This conflict indeed presents an interesting dilemma – a choice between moral and legal imperatives in ordering a post-conflict legal regime.

This paper addresses the issue of amnesty and the furore it created in legal circles as to whether amnesties could be used as a facet of Sierra Leone post-conflict settlement. As a backdrop to this study, it is important to provide an account -however fleeting- of the armed conflicts that engulfed Sierra Leone. For, it is only then that we can assess the import of the amnesties so far granted and determine whether they have achieved their purpose. We have, in this paper, attempted to proffer solutions to these and other related issues raised.

The sierra leone armed conflict: the history and actors.

The West African sub-region is notorious for being one of the world's disastrous conflict zones. In fact, many West African states have become, in a sense, to use Mazrui's

metaphor "political refugee[1] states with catastrophic consequences for their citizens and the entire sub region. Sierra Leone, in 1991, became the latest casualty of this trend.

Sierra Leone is a small state that loomed large in the UN's latest department, which is euphemistically dubbed "lessons learnt unit."[2] At Independence from Great Britain in 1961, it had a population of 4.5 million. The country as a result of its huge diamond deposits enjoyed comparative peace and prosperity. But the prosperity was short-lived as corruption took its toll of elected politicians. Dr Milton Margai of the Sierra Leone People's Party (SLPP), was replaced by his half-brother, Dr Albert Margai. Dr Albert Margai ruled from 1964 to 1968, when Dr Siaka Stevens of the All Peoples Congress (APC) became president. The rule of Dr. Siaka Stevens set off two decades of corruption, misrule and authoritarianism. One of the enduring legacies of the protracted misrule of the APC, especially as it related to the outbreak of the civil war in 1999, was the groundswell of an army of unemployed, lumpenised[3] youths from whose ranks the RUF guerrillas were initially recruited. Dr. Stevens was overthrown by President Saidu Momoh in 1992. This was made possible by a group of disgruntled military officers fresh from battle with the Revolutionary United Front (RUF). Then there was Captain Valentine Strasser who overthrew President Momoh and then Tejan Ahmed Kabbah, a democratically elected president. He was overthrown by Major Johnny Paul Koroma. The political history became interspersed with a series of army coups and raids on the diamond mines.

The theatre of conflict in Sierra Leone had both local and international components. Starting with the former, there was the Revolutionary United Front (RUF),[4] a breakaway army faction led by a hitherto unknown former Corporal Foday Sankoh.. He recruited gangs of violent, dispossessed youths and armed them with AK47 rifles for their missions of pillage, rape and diamond-heisting. The RUF had no clear-cut political agenda. It had as its main backer, Charles Taylor, the Liberian war-lord-turned-president who was alleged to have supplied the group with arms in exchange for Sierra Leone diamonds. The RUF on the 23 March 1991 launched a blistering cross-border attack from neighbouring Liberia in Kailahun

[1] Ali A. Mazrui, "The African State as a Political Refugee: Institutional Collapse and Human Displacement" *Int'l J. Refugee* L.21 (Special Issue, 1995) quoted in Dakas CJ Dakas "Responsibility for International War Crimes, Peace, Security in West Africa: Issues, Dilemmas and Challenges," Paper presented at the National Conference of the Nigerian Bar Association (NBA), at Abuja, Nigeria, 22-27 August 2004.

[2] G. Robertson, *Crimes Against Humanity:The Struggle for Global Justice*, 2nd edition, (London: Penguin Books, 2002), p.469,

[3] Charles Ukeje, "Sierra Leone: The Long Descent into Civil War" in Amodu Sesay (ed.), *Civil Wars, Child Soldiers and post-conflict Peace Building in West Africa*, (College Press and publishers LTD, 2003) p.114

[4] Described as "one-of-Africa's nastiest and least rebel movement": *Economist*, January 16, 1999

District.[5] This cross-border attack by the RUF was initially interpreted by the government in Freetown, the capital of Sierra Leone, as a minor skirmish between smugglers and border patrol police, but this soon blossomed into a full-scale civil war that involved both local and international actors and traumatised the small West African state.[6]

There was yet another group, "The Sobels", an acronym for Soldiers turned Rebels. This group was made up of the remnants of the armies from the ousted regime of Johnny Paul Koroma. Both the RUF and Sobels, together, fought the government of President Tejan Kabbah, the militia groups- the Westside boys, and "The Kamajor"; with the Economic Community of West African States Monitoring Group (ECOMOG) Force also being an interested party. The Westside boys were the president's militia group while the *Kamajor* militia group was a civil defence force made up of local hunters and other local volunteers armed with crude weapons and locally fabricated guns, who assumed responsibility for defending their communities from the rampaging soldiers and rebel forces.

In mid-1995, the government of Sierra Leone tacitly accepted its own helplessness and military failure in repulsing the invasion when it hired *Executive Outcomes*, the South African based private mercenary outfit, to bolster its forces, both to retrain its forces and assist on the battlefield. Although these mercenaries initially proved effective as elections were successfully held, it later became a prominent liability not only on the battlefield, but also as a drain on the nation's lean purse. The mercenaries probably helped in prolonging the war because of their juicy monthly pay of US$ 1.5million per person from a poor country whose army could have benefited greatly had such huge monies been expended on equipping it.[7]

The international involvement saw the participation of different countries and military groups. There was also the involvement of Nigeria, Ghana, Guinea, Liberia, National Patriotic Forces of Liberia, (NPFL), Libya, Burkina Faso and Britain, as well as other international organisations. The government of Nigeria and the British government intervened in Sierra Leone at the invitation of the elected government of the country. Although initially the British government was there for the purpose of evacuating its nationals, the British force (not acting pursuant to any UN mandate) proved necessary to

[5] See generally, Charles Ukeje, "Sierra Leone: The Long Descent into Civil War" in Amadu Sesay (ed.) *Ibid*, pp.113 and 118.

[66] The Local actors included "The Sobels, an acronym for "Soldiers turned Rebels", the Kamajors and the Westside boys, while on the international/external front, we had the Economic Community of West African States (ECOWAS) Monitoring Group (ECOMOG), the United Nations Assistance Mission in Sierra Leone (UNAMSIL) and the *Executive Outcomes*, the South African based private mercenary outfit.

[7] See Yusuf Bangura, "Reflections on the Abuja Peace Accord", *The African Development*, *op.cit*

provide some stability and to frighten the RUF (when one of its gangs kidnapped British soldiers, the ensuing Special Air Service (SAS), an anti terrorist commando unit rescued the victims and wiped out twenty-four gang members).[8]

The West African countries came under the banner of the Economic Community of West African States (ECOWAS) Monitoring Group (ECOMOG)[9] and later in accordance with the Lome agreement in November 1999[10] the United Nations permitted and accepted the deployment of troops under the United Nations Mission in Sierra Leone (UNAMSIL). Their involvement which, was covert and more surreptitious and other times created additional complications and concerns.

The government of Nigeria, under General Ibrahim Babangida was uncomfortable not only with Charles Taylor's support of the RUF, but also more importantly, Liberia's clandestine support for the rebels. This was in addition to the fact that the rebels were trained in Libya and that Burkina Faso actually donated mercenaries to assist them. In a national interview, General Babangida made the point clear that the West African leaders could not stomach any intrusion from outside the sub-region with the purpose of taking over the reins of government in Sierra Leone.[11]

Violations of ihl in the conflict

From the period between 1991 and July 1999 when the ceasefire Agreement was signed in Lome, well over 23,000 persons died in the conflict[12]. The most harrowing of the war experiences was the slashing off or chopping off the limbs of innocent people, including women and children, by the RUF forces in other to strike terror in the civilian population. Abduction, rape, sexual slavery and other forms of sexual abuse of girls and women were disappointingly, massive, systematic, organised and widespread. Many of those abducted

[8] Robertson, *op.cit*

[9] The entire idea of ECOMOG from inception to implementation was the brain child of the then military ruler of Nigeria, General Ibrahim Babangida, who had suggested that an ECOWAS Standing Mediation Committee (ESMC) be established to monitor development in the sub-region and make recommendations to the ECOWAS authority for nipping conflicts in the bud.

[10] S. C. Res. 1270 (1999). This was the second major peace agreement between the then government of Tejan Kabbah and the RUF and was brokered in July 1999, under the auspices of the ECOWAS with the support of the US and UK governments: See "Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone", done in Lome, on the 7th of July, 1999 (S/1999/777), *The African Development*, Vol.XXII, Nos.3 and 4, 1997, pp.243-252.-

[11] See the Transcript of General Babangida nationally televised interview on the Network of Nigerian Television Authority in *West Africa* , 22-28 February 1993, p.282

[12] See generally Dr. C.O. Ndifon And J. E. Archibong , "Violations Of International Humanitarian Law In The Sierra Leonean Armed Conflict: The Lessons For Warlords In Africa"University of Calabar, Calabar, 2005.

were forced to become "wives" or sexual partners of combatants.[13] In extreme cases, men were forced to rape members of their own family. Those who refused "had their limbs amputated as punishment".[14]

The means and methods used ranged from ethnic cleansing to the use of mercenaries, mass rape, banditry, starvation and the use of child soldiers. There existed a large pool of ready and willing youths waiting to be recruited. The children, some as young as six years took up arms against their parents, and brothers fought against brothers. Many were abducted and forced to kill and maim and were supplied with drugs and alcohol. It was not unusual for combatants to be injected with cocaine before being sent into battle where they abducted, raped and maimed thousands of people.[15]The extensive use of child combatants was one of the serious violations of international humanitarian law that occurred.[16]

Torture was widely used by government forces. It was reported that "captives often had their arms bound tightly behind their backs, sometimes resulting in paralysis of the hands and arms".[17] Suspected rebels were beaten, others were stabbed with bayonets. Rape and sexual violence were used as a form of torture. A female RUF Commander was sexually tortured to death by a senior *Kamajor* leader.[18] Captured rebels with signs of torture or mutilation were paraded in towns and villages. They were reportedly "tied up and displayed at a police post in the centre of the town, sometimes imprisoned inside a wire cage. Two women, alleged to have been rebels' girlfriends, were publicly whipped by soldiers in mid-1991 in Segbwema".[19]

The rebels also committed widespread torture. Civilians bore the greatest brunt of the conflict. Those who could not flee faced acute food shortage at home.[20] The fighting prevented aid workers from getting help to civilians.[21] Civilians were used as human shields by the rebels.[22] The RUF rebels deliberately and arbitrarily killed many civilians. They targeted government officials, traditional chiefs, members of the political class and

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[13] Human Rights Watch "Sexual Violence within the Sierra Leone Conflict?" http://www.hrw.org/background/Africa/Sl-bck0226.htm.
[14] Amnesty International, *Report*, 1999, p. 297
[15] BBC, "Brutal Child Army Grows up" at http//www.news.bbc.co.uk/i/hi/world/Africa. See also *The Economist*, January 9, 1999, p. 38.
[16] Articles 77(2), 4(3)(c) 1977 Protocol I Additional to Geneva Conventions of 12 August, 1949, Additional Protocol to the CRC Art. 1.
[17] Amnesty International, *Report*, 1994, p. 260.
[18] Human Rights Watch, note 21, supra.
[19] Note 20, supra.
[20] *The Economist*, March 13, 1999, p. 56.
[21] *The Economist*, October 30, 1999, p. 54.
[22] *The Economist*, January 16, 1999, p. 40.

businessmen.[23] It was reported that "dead bodies lay in the streets, and houses which had either been bombed or subjected to arson attacks, continued to smoulder".[24] The rebels had no respect even for holy places. They entered a mosque and opened fire killing eleven people according to an imam. The only survivor had pretended to be dead.[25]

Throughout the conflicts, the rebels embarked on a campaign of mutilation to discourage Sierra Leoneans from supporting the government. In this respect, they chopped off the limbs, ears and breasts of their victims, including those of children. In May 1996, RUF forces attacked villages in Bo beating, stabbing and cutting civilians with machetes.[26]

There were other violations, one of which was the bombardment of densely populated areas resulting in high civilian casualties.[27] Closely associated with this was indiscriminate bombardment or failure to distinguish civilians and combatants. One incident of erratic bombing by a Nigerian jet killed a dozen civilians in central Freetown.[28]

Taking of hostages, including foreign nationals by the rebels was common.[29] Prisoners and detainees were badly treated by both sides. Many "were held in conditions which in some cases amounted to cruel, inhuman and degrading treatment".[30] For example, prison cells were overcrowded with very poor sanitary conditions. Prisoners were held half-naked and suffered from battle wounds. They lacked food and medication. Both sides conducted summary and irregular trials, without any right of appeal, which led to convictions and public executions.[31]

The history of amnesties in Sierra Leone

In the context of the Sierra Leonean conflict, the government and the Revolutionary United Front (RUF) signed a peace agreement in Abidjan, Cote d' Ivoire, on 30 November 1996.[32] The Accord, which was negotiated, sponsored and supervised, by the sub-regional body, ECOWAS, prescribed, amongst other things, the cessation of hostilities by both the government and the rebel force's, for the return of peace, the establishment of a national body

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[23] Amnesty International, "The Extrajudicial Execution of Suspected Rebels and Collaborators" at http://www.amnestyusa.org/countries/sierraleone/document do?/d-E7AE1C28160F9935; see also Amnesty International, *Report*, 1996, p.271.
[24] Winston O. Macaulay, "Freeing Freetown" *BBC Focus on Africa* Vol.9 No.2 (April-June, 1998) p. 11.
[25] Fergal Kean, "Agony Words Cannot Describe" at http://news.bbc.co.uk/1/hi/world/Africa/288722.stm.
[26] Amnesty International, *Reports*, 1997, pp. 278-279.
[27] Macaulay, note 24, supra.
[28] *The Economist,* note 19, supra.
[29] Amnesty International, *Report*, 1996, p. 271.
[30] Amnesty International, note 23, supra.
[31] Ibid.
[32] For the full text of the Abidjan Peace Accord see Yusuf Bangura, "Reflections on the Abidjan Peace Accord", African Development, Appendix 1 Vol.XXII, Nos.3 & 4, 1997, pp.243-252

to be called Commission for the Consolidation of Peace; Disarmament, Demobilisation and Re-integration of former Combatants, the international monitoring of the encampment, demobilization and re-integration process; withdrawal of *Executive Outcomes*, the mercenary outfit engaged by the government; turning the RUF into a political movement with all the rights, privileges and duties under the law; *Blanket Amnesty From Prosecution* for all RUF members in spite of the atrocities they had committed and so on. The Organisation of African Unity (OAU), the United Nations Organisation (UNO), the Commonwealth and the Government of Cote d' Ivoire were nominated as "moral guarantors" to oversee the faithful implementation of the agreement.[33]Regrettably, the peace agreement did not achieve its goal. The RUF was not interested in peace, instead, it continued with its programme of killing and pillaging.

In July, 1999, however, there was another attempt at peace: The Lome Agreement. The peace agreement which was entered into between the Revolutionary United Front (RUF) and the Sierra Leonean government was brokered by several governments and international organisations and was signed on 7 July 1999, in Lome, Togo.[34]

The Lome Accord recalled previous unsuccessful attempts at resolving the conflict and motivated by the need to meet the desire of the people of Sierra Leone for a definitive settlement of the fratricidal war in their country and for genuine national unity and reconciliation provides in Article IX as follows: 1. "In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon. 2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement. 3. To consolidate the peace and promote the cause of national reconciliation, the government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons currently outside the country for reasons related

[33] "Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), *African Development,* Vol. XXII, nos.3 & 4 (1997), pp.243-252

[34] For the text of the agreement see in *Accord: An International Review of Peace Initiatives*, (Conciliation, Resources, 2000) pp.67-77. See generally, Charles Ukeje, "Sierra Leone: The Long Descent into Civil War" in Ahmadu Sesay, *Civil Wars, Child Soldiers and the Post Conflict Peace-building in West Africa*, (College Press and publishers ltd, 2003) p.113

to the armed conflict shall be adopted, ensuring the full exercise of their civil and political rights with a view to their re-integration within a framework of full legality."

Under Article XXI, provision is made for the immediate and unconditional release of political prisoners, prisoners of war as well as non-combatants. Under Article XXXIV, the Government of the Republic of Togo, the United Nations, the OAU, ECOWAS and the Commonwealth of Nations also undertook, just as was the case in the first Agreement, to be moral guarantors that [the] Peace Agreement is implemented with integrity and in good faith by both parties. Pursuant to the terms of the Lome Accord, Foday Sankoh eventually became the Vice President and was also in charge of the state's rich diamond mines.[35] The Lome Accord, like one commentator noted, was achieved at an extraordinary price:

> *The democratically elected government [of Tejan Kabbah] was forced to share powers with rebels who were pardoned for the most grotesque crimes against humanity, and their leader [Foday Sankoh] liberated from prison, was made Deputy Prime minister in charge of the nation's Diamond Resources, the very object of his ruthless campaign.*[36]

The Lome Accord, in comparative terms, contributed to the restoration of peace in Sierra Leone.

The obligation to repress international humanitarian law violations

The Sierra Leone conflict in spite of the large foreign involvement has been classified by the United Nations,[37] the Statute of the Special Court for Sierra Leone (hereafter referred to as the "special court") and jurisprudence emanating from the SCSL[38], as non-international armed conflict. This classification therefore makes Article 3 common to the four Geneva

[35] Dakas, *op.cit*. pp11-12
[36] Robertson, *op.cit* p.465
[37] See Resolution 1315 of 14 August 2000,
[38] *The Prosecutor v Morris Kallon and Brima Buzzy Kamara*, Special Court for the Sierra Leone (SCSL) – 2004 -15 – AR 72 (E) and SCSL – 2004 – 16 – AR 72 (E), Decision on Challenge to jurisdiction: Lome Accord Amnesty (Appeals Chamber, 13 March 2004), *Prosecutor v. Moinina Fofane and Allieu Kondewa* Case No. SC-SL-04-14-T, 2 August 2007.

Conventions 1949[39] and the 1977 Additional Protocol II[40] and rules of customary international law relevant.[41]

These laws provide the basis for criminal responsibility. In particular, Protocol II, Article 4 relating to fundamental guarantees makes frequent reference to acts of individuals, while Protocol II, Article 19, imposes obligation to disseminate the rules of IHL. The obligation to “ensure respect “for the provision of humanitarian law [in this regard the state is required not only to ensure that its own agents respect these provisions, but also to ensure that all people under its jurisdiction do so] is also applicable in internal conflicts.[42]

The above trend regarding common Article 3 and Protocol II as amounting to international crimes was applied to the Rwanda and the Yugoslavia conflicts. In 1994, the UN Security Council adopted the Statute of the International Criminal Tribunal for Rwanda (ICTR), which took “an expansive approach” relative to the Additional Protocol II. Article 4 of the ICTR statute specifically conferred jurisdiction over violations of common Article 3 of the Geneva Convention and the Additional Protocol II, thereby recognising that those violations constitute international crimes. Furthermore, in 1995 ICTY Appeals Chamber in *Tadic (International appeal)* confirmed that the main body of international humanitarian law also applied to the internal conflicts as a matter of customary law, and that in addition, serious violation of such rules constitute war crimes.[43]

The International Criminal Court (ICC) which confers jurisdiction on the tribunal to try violations of humanitarian law in internal armed conflict as a form of war crime[44] is no less significant. The adoption of the International Criminal Court (ICC) Statute, followed by the Statute of the Special Court for Sierra Leone, can be regarded as a culmination of a law-making process that in a matter of few years led both to the crystallization of the set of customary rules governing internal armed conflict and to the criminalization of serious

[39] UNTS,Vol 75 (1950). Sierra Leone became a state party in 10/6/1965.
[40] The Protocol Additional to the Geneva convention of 12 August 1949 and Relating to the Protection of Victims in Non- International Armed Conflicts(Protocol II) of June 10, 1977
[41] Sierra Leone became a state party to Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims in International Armed Conflicts (Protocol I) of June 10, 1977 and The Protocol Additional to the Geneva convention of 12 August 1949 and Relating to the Protection of Victims in Non- International Armed Conflicts(Protocol II) of June 10, 1977, on the 21/10/1986.
[42]
[43] See the decision of the Special court for Sierra Leone in *Prosecutor v. Moinina Fofane and Allieu Kondewa*, Case No. SC-SL-04-14-T, where the trial Chamber relying on a long line of cases reaffirmed this position of the law..
[44] See Article 8 (2) (c) – (f)

breaches of such rules (in the sense that individual criminal liability may ensue from serious violations of those rules).[45]

The offences created by the Statutes of the Special Court of Sierra Leone specifically cover crimes against humanity,[46]war crimes applicable in non-international armed conflict in violation of Article 3 common of the Geneva convention and of Additional Protocol II[47] and other serious violations of international humanitarian law relating to civilians, civilian objects and child soldiers.[48]

By Articles 2, 3 and 4 of the Statute of the SCSL individual criminal responsibility is imposed for these crimes on all perpetrators, whether they be superior or subordinate officials.[49]

Finally it must be pointed out that that jurisdiction is conferred on both national and international courts in respect of violation of these laws.

Validity of the amnesty in sierra leone: the case of the lome agreement.

The validity of the amnesty in Sierra Leone came up for decision by the Special Court for Sierra Leone (SCSL) in *The Prosecutor v Morris Kallon and Brima Buzzy Kamara.*[50] What was in contention was the Lome Peace Agreement. The accused persons, Kallon and Kamara, challenged their trial by way of a preliminary motion, that it violated the amnesty provisions of the Lome Agreement. As we may recall, the amnesty clause was contained in a peace agreement entered into between the RUF and the Sierra Leone government. The accused were RUF fighters.

It was argued on behalf of the applicants that it was wrong to assume that all amnesties are unlawful under international law and that the Lome Agreement was one of those occasions when a grant of amnesty was not unlawful since it constituted an international treaty governed by the Vienna Convention on the Law of Treaties. Also, part of the argument was that the obligations deriving from an international treaty could not be altered by a later treaty (in this case, the Agreement between the United Nations and Sierra Leone) without the consent of the parties to the Lome Agreement.[51] To this end, it was

[45] See Report of the International Commission of inquiry on Darfur to the United Nations Secretary General, pursuant to the Security Council 1564 of 18 September 2004.
[46] Article 2, Statute Court Special Leone of 16 January 2002.
[47] Article 3, *Ibid.*
[48] Article 4, *Ibid*
[49] Paragraph 27, Udombana, *Ibid*, p.15
[50] Special Court for the Sierra Leone (SCSL) – 2004 -15 – AR 72 (E) and SCSL – 2004 – 16 – AR 72 (E), Decision on Challenge to jurisdiction: Lome Accord Amnesty (Appeals Chamber, 13 March 2004)
[51] Lome Decision, *op.cit* paras 22-35

strongly argued that the government of Sierra Leone had acted contrary to its prior international obligations when it signed the Agreement with the United Nations. More specifically by the terms of the Lome Agreement, the government of Sierra Leone was obligated to ensure that "no official or judicial action would be taken against *any members of the RUF* and other participants in the conflict."[52] This would include acceding to an extradition request or an agreement to establish an international court as such measures would clearly amount to "judicial or official" actions.[53]

The preliminary motion was decided by the Appeals 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.[54]In its decision, the Appeals Chamber considered three key issues: first, the status of the Lome Peace Agreement was examined and whether insurgents have treaty-making capacity in international law and the legal consequence thereof for Article 10 of the statute. Secondly, the Appeals Chamber considered whether it is authorised to review the legality of its statutory provisions. Thirdly, it examined thelimits of amnesties in international law. The judges further discussed whether the prosecution predating the Lome Agreement amounts to an abuse of court process.[55]

The Special Court for the Sierra Leone (SCSL) on 13 March, 2004 ruled that the amnesties granted to persons of the warring factions in Sierra Leone civil war by the "Lome Peace Agreement" were no bar to prosecution before it. The UN-backed court held that it was an independent, autonomous court and dismissed the preliminary motions that challenged the jurisdiction of the court on the strength of the amnesty provisions of the Lome Accord.[56] The court relied on the doctrine of universal jurisdiction as its main plank and the court determined that the grant of amnesties falls under the authority of the state exercising its sovereign powers,[57] however, where the jurisdiction is universal such a state cannot deprive another state of its jurisdiction to prosecute perpetrators by granting amnesties.[58] In the opinion of the Appeals Chamber, "a state cannot bring into oblivion and forgetfulness a

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[52] *Ibid*, para 24 (italics supplied for emphasis)
[53] See generally Meisenberg, *op.cit,* pp.839 - 840
[54] *Ibid*.
[55] See generally Simon M. Meisenberg, "Legality of Amnesties in International Humanitarian Law: The Lome Amnesty Decision of the Special Court of the Sierra Leone", *International Review of the Red Cross* (IRRC) Volume 86. No.856, (December 2004)
[56] *Prosecutor v Morris Kallon,* Decision of 13 March, 2004 and *Prosecutor v Allieu Kondewo*, Decision of 25 May 2004, *www.sc-sl.org*
[57] Lome Decision, *op.cit*, para.67
[58] *Ibid.*

crime, such as a crime against international law, which other states are entitled to keep alive and remember".[59]

Amnesties granted by Sierra Leone cover crimes under international law as they are subject to universal jurisdiction. The obligation to protect human dignity is a peremptory norm and is in the nature of *obligatio erga omnes.*[60] The action of granting amnesty for international crimes is, therefore, not only in breach of international law, "but is in breach of an obligation of a state towards the international community as a whole."[61] According to the SCSL, the prosecution of international crimes "is a peremptory norm and has assumed the nature of an *obligatio erga omnes*".[62]

This decision is critical to the development of international humanitarian law in that it is the first decision of an international criminal court to state that amnesties are no bars to prosecution for all international crimes before international and/or foreign tribunals or courts. By the above judgment, the primacy of *obligatio erga omnes* on statee seems to have been reaffirmed. States and the international community can exercise jurisdiction over a person who is subject to an amnesty since the prohibition of war crimes is now *jus cogens*. The resultant effect is that, international tribunals and foreign courts will both be seised of jurisdiction in respect of them.

However, sadly and regrettably, the Appeals Chambers of the SCSL found that there is no customary rule prohibiting national amnesty laws but only a development towards an exclusion of such laws in international law.[63]This latter conclusion, with respect, is wrong. War crimes by their very nature are international crimes. In fact, Article 3 common to the Geneva Convention 1949 and the 1977 Additional Protocol II are considered to be part of customary international law. In the SCSL decision of *Prosecutor v. Moinina Fofane and Allieu Kondewa,*[64] the trial chamber I of the SCSL agreed with the Appeals Chamber that "the core provisions in Articles 3 of the statute (i.e. Article 3 common to the Geneva Convention 1949 and the 1977 Additional Protocol II) formed part of customary international law at the relevant time"[65], and that "[a]ny argument that these norms do not entail individual

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[59] The following cases were referred to as relevant: in *re List et al*, 8 UN Law Reports of the Trials of War Criminals and the *Eichmann* case, Int'l L Rep 277 (Sup. Ct, Israel, 29 May 1962) as well as Articles 10 of its statutes which provide that amnesty granted to any person or crimes falling within the jurisdiction of the court (Article 2 to 4) shall not be a bar to prosecution.
[60] *Ibid*, para. 71
[61] *Ibid* para 73
[62] *Ibid*, para 50
[63] *Ibid,*para.82
[64] Case No. SC-SL-04-14-T, 2 August 2007.
[65] *Ibid*

criminal responsibility has been put to rest in ICTY and ICTR jurisprudence." The Appeals Chamber had also held that customary international law "represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws.

Again in *Tadic* the ICTY Appeals Chamber held: "The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallized, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two acts of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions[…],but also applies[…] to the core of additional Protocol II of 1977."Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Most provisions of this protocol can now be regarded as declaration of existing rules or as having crystallized emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.

Customary International Law therefore imposes criminal liability for serious violations of common Article 3 as supplemented by other general principles and rules on the protection of victims of internal armed conflict. This comes with the responsibility, indeed the duty, imposed upon states to repress such violations. This duty which is mandatory is applicable to all forms of armed conflicts.

In the light of the foregoing, and despite the criticisms, the Lome Decision seems to have unwillingly established certain jurisprudential landmarks without expressly intending it. The Statute of the Special Court for Sierra Leone, can be regarded as a culmination of a law-making process, that in a matter of few years, led both to the crystallisation under the ICC statute of the set of customary rules governing internal armed conflict and to the criminalisation of serious breaches of such rules (in the sense that individual criminal liability may ensue from serious violations of those rules).[66]There is also now competence of domestic courts over extra-territorial offences.

Limits of amnesty law in non-international armed conflict

The power to grant amnesty is a discretion that governments exercise. But this discretion is not limitless or absolute. Conceptually, amnesty abolishes or blots the particular

[66] See Report of the International Commission of inquiry on Darfur to the United Nations Secretary General, pursuant to the Security Council 1564 of 18 September 2004.

offence that the guarantee committed. The state's right to grant amnesty must therefore necessarily relate to those who have infracted its sovereignty, by rebellion or other means, and in which capacity the state is the victim. Thus, the state may find that its interests, such as national reconciliation, are best served by an amnesty.

The failure of the SCSL to specifically rule that war crimes in non-international armed conflict are international crimes and that the amnesties granted by the Lome Agreement cannot be justified both in international and national laws has made some to erroneously argue that the power to grant amnesty in non-international armed conflict is without limits. Those who hold this view seems to base their argument on the provision of Article 6 (5) of the 1977 Additional Protocol II to the Geneva Conventions 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."

What is the proper interpretation of the provision? Do the words: "grant the broadest amnesty to persons who have participated in armed conflict" mean that the authorities in civil wars or non-international armed conflicts are equipped with broad powers, a *carte blanche* to grant blanket amnesty to all those who took part in armed conflicts and have violated fundamental rules of international humanitarian law?

It is our submission that the pardon envisaged under Article 6 (5) of 1977 Additional Protocol II, the provision in question is that which relates to violation of domestic laws like the commission of treasonable offence or petty crime in the course of armed conflict and not for war crimes, crimes against humanity, genocide and other serious violations of IHL. The Appeals chamber in *Prosecution v. Tadic*[67]acknowledged this when it held that "the fact that a combatant simply appropriated a loaf of bread in an occupied village would not amount to a 'serious violation of international humanitarian law' although it may be regarded as falling foul of the basic principle (of IHL)[68]. This is a more permissible interpretation of Article 6 (5) of 1977 Additional Protocol II and it would be mistaken to take the provision as a licence to grant pardon to those who have committed humanitarian law violations. [69]

Further, it is incongruous to argue that Article 6 (5) of 1977 Additional Protocol II (which covers non-international armed conflict only) was intended to excuse the punishment

[67] IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (CA), 2 October 1995, para.94.
[68] *Ibid*
[69] *Prosecutor v. Moinina Fofane and Allieu Kondewa* Case No. SC-SL-04-14-T, 2 August 2007.

of such heinous international law crimes[70] at the domestic level for the reason that they are committed in non-international armed conflict, while yet, at the same time the Geneva Conventions of 1949 and Additional Protocol I of 1977 deems it convenient to punish the same offence if committed in the context of international armed conflicts. Why should punishing such crimes be based on whether they were committed in international or non-international armed conflicts? In the Tadic case the ICTY was faced with similar dilemma when it asked: "Why protect civilians from belligerent violence or ban rape, torture or wanton destruction of hospitals, churches, museums or private property, as well as proscribed weapons causing unnecessary suffering when two sovereign states are engaged in war, and yet refrained from enacting same bans providing the same protection when armed violence has erupted only within the territory of a sovereign state?"[71]

It is in the light of this that the need for a common standard cannot be over-emphasis; more so, there is nothing to suggest that the classification of the armed conflict has effect on the conduct of the parties involved. As noted by Thomas Graditzky, "alas, history offers all too many examples of wantonly destructive behaviour in civil wars, with Cambodia, Somalia, and Rwanda springing to mind. Faced with such events, the international community can no longer turn a blind eye. There is a growing determination to see perpetrators of atrocities committed in the course of armed conflict held responsible for their acts; and development in human rights law have already made inroads into the argument of sovereignty which has blocked such aspiration in the past."[72]

Today, there is no dichotomy between the classifications of armed conflicts for the purpose of applying IHL. A common core traverses international humanitarian law rules applicable to armed conflicts per *se* regardless of the character. International humanitarian law has now progressed from a single express reference to the system of 'grave breaches' provided for in the Geneva Conventions to the assimilation of all 'serious violations,' which, it becomes increasingly clear, include those committed in internal armed conflicts. According to SCSL in *Prosecutor v. Moinina Fofane and Allieu Kondewa*[73] relying on a long line of cases noted that "since the 1930s, the aforementioned distinction [between belligerency and

[70] International Humanitarian Law has now progressed from a single express reference to the system of 'grave breaches' provided for in the Geneva Conventions to the assimilation of all 'serious violations,' which, it become increasingly clear, including those committed in internal armed conflicts.
[71] *Prosecutor v Dusko Tadic* (1995) Case No. IT-94-I-AR 72 delivered 2nd October 1995 (jurisdiction decision) p.488, para. 96 - 97
[72] Thomas Graditzky, "Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed conflicts," 31 March 1998, *IRRC, No.322,pp.29-56, at p.29.*
[73] Case No. SC-SL-04-14-T.

insurgency] has gradually become more blurred and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict."[74] In the words of the Appeals Chamber of the ICTY:

> *A state sovereignty-oriented approach has been supplanted by human being-oriented approach. Gradually, the maxim of Roman law hominum causa omne jus constitutum (all law is created for the benefit of human beings) has gained firm foothold in the international community as well. It follows that in the area of armed conflict, the distinction between interstate war and civil wars is losing its value so far as human beings are concerned.*[75]

In Tadic case the Tribunal came to the irresistible conclusion that notwithstanding the wording of Common Article 2 of the Geneva Conventions (which relates to international armed conflicts) there exist certain rules and principles protecting civilian population which apply to both international and internal strife. In the words of the Appeals Chamber, "...it cannot be denied that customary rules have developed to govern internal strife. These rules cover such areas as protection of civilian objects, in particular, cultural property, protection of all those who do not (or no longer) take part in hostilities, as well as principles of means and methods of conducting hostilities"[76]

This is the position of the law as established in a long line of cases.[77] All in all, what seems important is the protection of the individual *qua* individual rather than the particular state. If over a decade ago, there have been some doubts about the validity of this claim; a

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[74] *Prosecutor v. Norman, Fofana and Kondewa*,SCSL-04-14-AR72(E), Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Nature of the Armed Conflict (AC), 25 May 2004, paras 21-24 [Appeal Decision on the Nature of Armed Conflict],citing *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (TC), 2 September 1998, paras 601-617 [Akayesu Trial Judgment]; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America*), (1996) ICJ Reports 14, paras 218-219, 255; *Prosecutor v. Delalic, Music, Delic and Landzo*, Judgment, IT-96-21-T, Judgment (TC), 16 November 1998, para. 298 [Celebici Trial Judgment]; Tadic Appeal Decision on Jurisdiction, paras 102, 137*; Prosecutor v. Delalic, Music, Delic and Landzo*, Judgment, IT-96-21-A, Judgment (AC), 20 February 2001, paras 143, 147, 150 [Celebici Appeal Judgment].

[75] *Prosecutor v Dusko Tadic* (1995) Case No. IT-94-I-AR 72 delivered 2nd October 1995 (jurisdiction decision) p.488, para. 96 - 97

[76] *Tadic*, p.587, para 127

[77]See Appeal Decision on Nature of Armed Conflict, para. 24, citing Tadic Appeal Decision on Jurisdiction, paras 129-136, Celebici Trial Judgment, para. 307; Celebici Appeal Judgment, paras 159-174. See also Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, para. 14: "Violations of common Article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused."

multitude of developments at both the national and international levels should have served to dispel it.[78]This argument is critical to the development of international humanitarian law against impunity.

Conclusion

As we have noticed amnesty is often granted after a conflict and as an instrument in the post-conflict peace-building process. It does not have as its major concern the principle of justice. To many statesmen it is necessary to give priority to the political goal of assuaging passions inflamed not only by war itself but also by propaganda which accompanied it. The debate mainly addresses the desirability of such a course of action as a political tool. So it is all about the official act of "forgetting" and this is considered as indispensable to facilitating a new beginning.

Amnesty is not a necessary evil but a voyage in impunity. The phenomenon of amnesty although universal in nature has grave consequences. Its existence constitutes an affront to the rule of law, as a result, an obstacle to democracy. For a budding democracy like Sierra Leone, impunity renders its constitution meaningless and encourages the perpetration of violence. In addition, such a climate has the tendency of weakening the judiciary and damaging the political credibility of the executive.

The causes of impunity are legion. Firstly, a culture of impunity may, either by the government's acts of commission or omission, become entrenched. They could be as a result of the deliberate act of government such as amnesty, asylum, immunity or pardon. Secondly, it may be as a result of the non-deliberate act of government, such as the lack of national or adequate law, failure or collapse of the legal system, lack of resources and of independent and impartial judiciary, reliance on the principle of sovereignty and non-interference which hampers the exercise of adequate political will.

Whatever is the cause or the reason for impunity, the state's obligation to do justice is overriding. The standard of justice is not about doing mere justice to the vanquished (*etiam hosti justitia)*, or retributive justice, it demands true justice-the just punishment of offenders. In order to end impunity the following policy suggestion is made: (1) national implementation of treaty provisions, including human rights education, (2) respect for human

[78] See Argentina: "*Amicus Curiae* Brief on the incompatibility with International Law at the full stop and due obedience laws" presented by the International Commission of Jurists, Amnesty International and Human Rights Watch before the National Chambers for the Federal Criminal and Correctional Matters of the Republic of Argentina (June 2001) *ICJ, Occasional Papers*, 2001, p.23

rights and humanitarian principles as a matter of international law, and not politics, focus must be placed on judicial and quasi-judicial monitoring procedures; (3) consolidation and improvement of the international monitoring procedures, rather than continued proliferation of legal rules; (4) the universality of human rights can only become effective if we de-emphasise duties, values and other efforts that are intended to water-down the rights and right-based approaches and (5) there is the need to build bridges between good governance, democracy and human rights.

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