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Sierra Leone

Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law

Introduction

On 14 August 2000, the United Nations Security Council adopted resolution 1315 (2000) requesting the Secretary-General to negotiate an agreement with the government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes under Sierra Leonean law.

The Special Court for Sierra Leone became operational in 2002 and since then has indicted 13 individuals under its mandate to "prosecute persons who bear the greatest responsibility" for war crimes, crimes against humanity, other serious violations of international humanitarian law and certain crimes under Sierra Leone national law committed since 30 November 1996. Nine individuals are currently in the custody of the Special Court.

From 31 October to 6 November 2003, the Special Court is scheduled to consider Preliminary Motions filed by the Defence. This paper addresses two issues which have been raised by Defence Counsel in Preliminary Motions: (1) amendments to the Rules of Procedure and Evidence in August 2003 which deny defendants the right to appeal decisions on Preliminary Motions challenging the jurisdiction of the Court and other issues which affect the fair and expeditious conduct of proceedings or the outcome of the trial and; (2) the applicability of amnesty provisions in Article IX of the Sierra Leone peace accord signed at Lomé in July 1999.

Amnesty International argues that the right to appeal, as a fundamental right under international human rights law and standards to ensure fair trial and an established principle of contemporary international criminal law, must be ensured by the Special Court.

Amnesty International puts forward arguments 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 amnesty provisions in Article IX of the Sierra Leone peace accord signed at Lomé in July 1999, not only have no place in an international system of justice, but are also prohibited under international law.

I. Rule 72 – denial of the right to appeal

Rule 72, paragraphs (E) and (F), are incompatible with international human rights law and standards and contemporary international criminal law, as reflected in the Statutes, Rules of Procedure and Evidence and jurisprudence of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Statute of the Special Panels in East Timor and the Rome Statute of the International Criminal Court and the Rules of Procedure and Evidence of the International Criminal Court. Indeed, it is inconsistent with the Statute of the Special Court itself. They are also inconsistent with international humanitarian law, which requires that trials be scrupulously fair.

In its application,¹ the Defence submits that Rule 72 (E) as amended at the London Plenary of Judges, is *ultra vires* as it requires that “Preliminary Motions relating to jurisdiction are not subject to review of any kind contrary to basic human rights norms.”²

¹ Amnesty International has examined the following documents submitted to the Special Court for Sierra Leone challenging Rule 72 of the Rules of Procedure and Evidence of the Special Court as amended in London on 1 August 2003:

- The Prosecutor v. Sam Hinga Norman (Case SCSL-2003-08-PT): Application to stay determination of all preliminary motions – Denial of right to appeal, 2 October 2003.
- The Prosecutor v. Sam Hinga Norman (Case SCSL-2003-08-PT): Prosecution Response to the Defence “Application to stay determination of all preliminary motions – Denial of right to appeal,” 13 October 2003.
- The Prosecutor v. Sam Hinga Norman (Case SCSL-2003-08-PT): Prosecution Response to the Defence “Motion– Denial of appeal,” 13 October 2003.
- The Prosecutor v. Sam Hinga Norman (Case SCSL-2003-08-PT): Defence reply to Prosecution response to the Defence “Application to stay determination of all preliminary motions – Denial of right to appeal,” 20 October 2003.
- The Prosecutor v. Sam Hinga Norman (Case SCSL-2003-08-PT): Defence reply to Prosecution Response to the Defence “Motion– Denial of appeal,” 20 October 2003.

Rule 72(E) provides:

“Preliminary Motions made in the Trial Chamber prior to the Prosecutor’s opening statement which raise a serious issue relating to jurisdiction shall be referred to the Appeals Chamber, where they will proceed to a determination as soon as practicable.”

Amnesty International agrees with much of the argument in the briefs submitted by the Defence on the incompatibility of Rule 72 with international human rights law and standards, including Article 14(5) of the *International Covenant on Civil and Political Rights* (ICCPR).

Amnesty International is equally concerned about Rule 72(F) which raises similar concerns regarding the right to appeal:

“Preliminary Motions made in the Trial Chamber prior to the Prosecutor’s opening statement which, in the opinion of the Trial Chamber, raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial shall be referred to the Appeals Chamber where they will proceed to a determination as soon as practicable.”

A. Rule 72 is incompatible with international human rights law and standards

Amnesty International agrees with the submissions by the Defence that that Rule 72 (E) and also Rule 72 (F) deny the right to appeal a conviction or sentence, as recognized in Article 14 (5) of the ICCPR and other international law.³

Article 14(5) provides:

² The Prosecutor v. Sam Hinga Norman (Case SCSL-2003-08-PT): Prosecution Response to the Defence “Application to stay determination of all preliminary motions – Denial of right to appeal,” 13 October 2003.

³ Article 8(2)(h) of the American Convention; Article 2 of Protocol 7 to the European Convention; Article 24 of the Statute of the International Criminal Tribunal for the former Yugoslavia; Article 23 of the Statute of the International Criminal Tribunal for Rwanda; Article 81(b) of the Rome Statute of the International Criminal Court; Section 14 of the UNTAET Regulations establishing Special Panels for East Timor and; Article 7(a) of the African Charter.

“Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

It is clear, as illustrated by the existing Preliminary Motions filed at the Court, that pre-trial decisions on jurisdictional and other matters of law which arise in Preliminary Motions can affect whether a case proceeds to trial and how certain issues will be dealt with at trial and are therefore important factors that can directly affect a decision whether to convict or not. As such, international fair trial standards require that such decisions must be subject to review, with the review taking place in a higher tribunal.

The Appeals Chamber is the sole highest chamber of the Court. If it were to decide Preliminary Motions in the first instance, the defendant would not be able to make an interlocutory appeal against the decision on an error on a question of law at a higher level. Even if the defendant were allowed to raise the issue on appeal post-conviction, the very same Appeals Chamber that made the decision in the first instance could certainly not be viewed as impartial in reviewing its own decisions.⁴

Sierra Leone has ratified the ICCPR without reservation to the Article 14(5). To the extent that the Special Court for Sierra Leone is a creation of the government of Sierra Leone and the United Nations, the government must comply with its obligations under Article 14.

“The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized”⁵

Article 14 is a fundamental right that is not subject to reservation. The *Human Rights Committee* in General Comment 24 on issues relating to reservations made upon ratification or accession to the ICCPR or the Optional Protocols provides that:

⁴ The Human Rights Committee found that confirmation of a judgment by the original trial judge did not satisfy this requirement. [*Salgar de Montejo v. Colombia*, (64 /1979), 24 March 1982, 1 Sel. Dec.127 at 129 - 130]

⁵ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\I\Rev.1 at 14 (1994).

“Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations.”⁶

There is strong evidence supporting the existence of a rule of customary international law to ensure the right of appeal against conviction or sentence:

- Of the 151 states that have ratified the International Covenant on Civil and Political Rights, only 13 have made a reservation to Article 14(5). As the Defence states in its reply to the Prosecutor⁷ most of these reservations limit the ability of prosecutors appealing sentences, not the right of the accused or convicted person to appeal.
- The right of appeal, a fundamental component of the right to a fair trial, is recognized in other international and regional instruments, including, Article 8(2)(h) of the American Convention on Human Rights; Article 2 of Protocol 7 to the European Convention on Human Rights; Article 24 of the Statute of the ICTY; Article 23 of the Statute of the ICTR; Article 81(b) of the Rome Statute of the International Criminal Court; Section 14 of the UNTAET Regulations governing the Special Panels for East Timor and; Article 20 of the Statute of the Special Court for Sierra Leone.

Other subsequent practice by some states, including international agreements, is not sufficient to change this rule. Amnesty International considers that such practice denies the right to a fair trial.

⁶ Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

⁷ The Prosecutor v. Sam Hinga Norman (Case SCSL-2003-08-PT): Defence reply to Prosecution Response to the Defence “Motion– Denial of appeal,” 20 October 2003

B. Rule 72 is incompatible with the Statute of the Special Court for Sierra Leone

Article 20 of the *Statute of the Special Court for Sierra Leone* expressly provides that:

“The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

...

(b) An error on a question of law invalidating the decision.

....

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.”

Issues of jurisdiction and other matters of law raised in Preliminary Motions could in many cases fall under sub-paragraph (b) and, in accordance with Article 20, must be subject to appeal. However, the Appeals Chamber would be precluded from affirming, reversing or revising the decision on Preliminary Motions as Article 20(2) provides that the Appeals Chamber can only make such decisions in relation to “decisions taken by the Trial Chamber.” Even if the sole Appeals Chamber were to be allowed to consider its own decisions on Preliminary Motions in post-conviction appeal, such practice would go against international standards⁸ and the requirement set out in Article 17(2) of the Statute that “[t]he accused shall be entitled to a fair and public hearing....”

C. Rule 72 is incompatible with contemporary international criminal law

The Special Court for Sierra Leone, even though it represents a new judicial model to investigate and prosecute individuals accused of crimes under international law, must ensure that it meets the highest standards of international practice, in particular ensuring observance of international fair trial standards for all defendants. Other international criminal courts guarantee that the accused has the right to have decisions on preliminary motions reviewed by an appeals chamber, but are able to ensure that the review of such motions is expeditious.

⁸ *Supra*, 2.

Two of those most closely involved in the drafting of the ICTY Statute explained why the right to appeal was included in the Statute, even though the high qualifications and extensive experience of the judges of the ICTY would reduce the risk of error, by saying:

“On the other hand, the decisions of a criminal court may have very serious consequences for the persons who come before it. Regardless of the number of judges or their qualifications, there is always the possibility of error. Furthermore, the right of appeal in criminal cases has been recognized in various human rights instruments adopted since Nuremberg. Thus, the Yugoslavia Tribunal Statute establishes two levels of jurisdiction in order to provide for the right of appeal as a fundamental right, as recommended by the Secretary-General.”⁹

Rule 72 (B) of the *Rules of Procedure and Evidence of the ICTY*¹⁰ and Rule 72 (B) of the *Rules of Procedure and Evidence of the ICTR*¹¹ expressly provide that decisions on Preliminary Motions challenging jurisdiction are subject to interlocutory appeal and that, subject to certification by the Trial Chamber, decisions involving an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial may also be subject to interlocutory appeal.

⁹ Virginia Morris & Michael Scharf, *The International Criminal Tribunal for Rwanda*, 604, (Irvington-on-Hudson, New York: Transnational Publishers, Inc. 1998).

¹⁰ Rule 72 of the Rules of Procedure of the International Criminal Tribunal for the former Yugoslavia states:
(B) Decisions on preliminary motions are without interlocutory appeal save

(i) in the case of motions challenging jurisdiction;

(ii) in other cases where certification has been granted by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

¹¹ Rule 72 of the Rules of Procedure of the International Criminal Tribunal for Rwanda states:
(B) Decisions on preliminary motions are without interlocutory appeal, save:

(i) in the case of motions challenging jurisdiction, where an appeal by either party lies as of right;

(ii) in other cases where certification has been granted by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which,

Article 82 of the *Rome Statute of the International Criminal Court*¹² expressly provides for the right to appeal a decision with respect to jurisdiction or admissibility and, subject to leave for appeal being granted,¹³ a decision which involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

The *UNTAET Regulations on the transitional rules of criminal procedure (Regulations 2000/30)* which govern the Special Panels for East Timor do not deal with the issue of Preliminary Motions challenging jurisdiction, however the Regulations do provide for interlocutory appeals of Preliminary Motions, subject to leave being granted, where (1) a decision would cause prejudice to the case as could not be cured by the final decision of the trials; (2) the issue is of general importance to proceedings before the courts of East Timor, or (3) upon other good cause.¹⁴

in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

¹² Article 82 of the Rome Statute provides:

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

.....

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

¹³ Rule 155 of the Rules of Procedure of the International Criminal Court state:

1. Where a party wishes to appeal a decision under Article 82, paragraph 1 (d), or Article 82, paragraph 2, that party shall, within five days of being notified of that decision make a written application to the Chamber that gave the decision, setting out reasons for the request for leave to appeal.

¹⁴ Section 27(3) and 27(4) of the UNTAET Regulation 2000/30 on the transitional rules of criminal procedure state:

27.3 Decisions on motions, except as provided in Sections 23 and 27.4 of the present regulation, are not subject to interlocutory appeal. The granting of a motion to dismiss the case for any reason shall be deemed a final decision in the case and shall be subject to appeal as provided in Part VII of the present regulation.

27.4 The Court of Appeal may grant leave to appeal from a decision on a motion where:

In the case of *Milan Vujin*, the *Appeals Chamber of the ICTY*, in accordance with Rule 72(B) of the Rules of Procedure and Evidence upheld the right of Milan Vujin, having shown sufficient grounds for leave, to appeal a contempt conviction handed down in the first instance by the Appeals Chamber.¹⁵ The appeal was heard by a different panel of judges on the Appeals Chamber to ensure a two-tier review process.

In the case of *Dusko Tadic*, the *Appeals Chamber of the ICTY*, specifically upheld the right to appeal on Preliminary Motions on jurisdiction, deciding that such an appeal should be interlocutory and not post-conviction for reasons of fairness to the accused and efficiency:

“Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial... After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected.”¹⁶

D. Rule 72 is incompatible with international humanitarian law

International humanitarian law requires that trials for violations must be scrupulously fair and consistent with contemporary international standards.¹⁷ The Special Court for Sierra Leone, in bringing to justice those who bear the greatest responsibility for serious violations of international law in the territory of Sierra Leone, must ensure that it provides for the highest standards of fair trial.

(a) the decision from which appeal is sought would cause such prejudice to the case of the party seeking leave to appeal as could not be cured by the final decision of the trial;

(b) the issue on which appeal is sought is of general importance to proceedings before the courts of East Timor; or,

(c) upon other good cause being shown by the party seeking leave to appeal.”

¹⁵ The Prosecutor v. Dusko Tadic, “Decision on the application for leave to appeal” Appeals Chamber, 25 October 2000.

¹⁶ The Prosecutor v. Dusko Tadic, “Decision on the Defence motion for interlocutory appeal on jurisdiction” Appeals Chamber, 2 October 1995.

¹⁷ Common Article 3 of the Geneva Conventions states that violations include:

One of the most serious criticisms of the *Nuremberg and Tokyo Charters* as victors' justice was the denial of the right to appeal.¹⁸ It would be unfortunate if convictions in the Special Court were subject to the same criticism, thus undermining the integrity of the Special Court and the precedential value of its judgments.

Conclusion

Rule 72 (E) and (F) of the Rules of Procedure and Evidence of the Special Court deny defendants to right to appeal decisions on Preliminary Motions challenging the jurisdiction of the Court and other issues which affect the fair and expeditious conduct of proceedings or the outcome of the trial. As demonstrated above, this curtailment of the right of appeal violates Article 14(5) of the ICCPR. It is incompatible with the Statute of the Special Court, contemporary international criminal law and international humanitarian law.

II. The prohibition of amnesties for crimes under international law

National amnesties, pardons and similar national measures of impunity for war crimes, crimes against humanity, genocide, torture, extrajudicial executions and

“the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

Article 75 of the Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, highlights certain fair trial guarantees and states:

“persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law;”

¹⁸ Robert Roth & Marc Henzelin, *The Appeal Procedure of the ICC*, in 2 Antonio Cassese, Paola Gaeta & R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary* 1535 (Oxford: Oxford University Press 2002); Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* 240 (Ardlsley, New York: Transnational Publishers, Inc. 2002).

enforced disappearances, such as the amnesty provisions in Article IX of the Sierra Leone peace accord signed at Lomé in July 1999, not only have no place in an international system of justice, but also are prohibited under international law.¹⁹ As the President of the Special Court has stated, prior to assuming his current position, “Just as genocide and torture are repugnant to international law to such an extent that no circumstances can justify them ... so amnesties given to perpetrators of such deeds by frightened or blackmailed governments cannot be upheld by international law”.²⁰

They are also inconsistent with the duty to bring to justice those responsible for such violations recognized in the Preamble to the Rome Statute of the International Criminal Court (Rome Statute).²¹ They deny the right of victims to justice.²² Therefore, as explained in more detail below, such steps cannot prevent the courts of another state, an international criminal court or an internationalised court such as the Special Court of Sierra Leone, from investigating and prosecuting persons suspected of such crimes. Indeed, for such reasons, Amnesty International has

¹⁹ Sierra Leone peace accord, Lomé, July 1999, U.N. Doc. S/1999/777, Art. IX.

²⁰ Geoffrey Robertson, *Crimes against Humanity* 242 (London: Allen Lane, Penguin Press 1999). He added that “international law now imposes an *erga omnes* obligation on states to investigate and prosecute crimes against humanity”. *Ibid.*, 247.

²¹ The states parties to the Rome Statute affirm “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”, determine “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes” and recall “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. Rome Statute, Preamble, paras 4 to 6.

²² See UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 of 29 November 1985, Principle 4 (“Victims ... are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.”). *See, also*, Articles 25 and 18 of the Joint Principles. Article 25 (Restrictions and Other Measures Relating to Amnesty) of those principles provides that “Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds: (a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations referred to in principle 18[.]” The first paragraph of Principle 18 (Duties of States with Regard to the Administration of Justice) recalls the obligation of states to bring to justice those responsible for such violations: “Impunity arises from a failure by States to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations.” In a similar vein, the Van Boven-Bassiouni Principles spell out the duty to prosecute (Principle 4) and the right of victims to “[j]udicial or administrative sanctions against persons responsible for the violations” (Principle 25 (f)), without any suggestion that an amnesty, pardon or similar measure of impunity would be permissible.

consistently opposed, without exception, amnesties, pardons and similar measures of impunity that prevent the emergence of the truth, a final judicial determination of guilt or innocence and full reparations to victims and their families.²³ In addition, leading authorities on impunity have also concluded that amnesties are prohibited for crimes under international law.²⁴

A. Rejection of amnesties at the international level

Amnesties, pardons and similar measures of impunity have been rejected at the international level by the UN Secretary-General, the UN Security Council, the UN General Assembly, UN High Commissioner for Human Rights, the UN Commission on Human Rights, the Yugoslavia Tribunal, the Committee against Torture and the Human Rights Committee. In this regard, they have followed the lead of the 1993 World Conference on Human Rights, which stated that “[s]tates should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law.”²⁵

²³ See, for example, *Chile: Legal brief on the incompatibility of Chilean Decree Law N1 2191 of 1978 with international law - A document published jointly by Amnesty International and the International Commission of Jurists*, January 2001 (AI Index: AMR 22/002/01); *Sierra Leone: Ending impunity - an opportunity not to be missed*, July 2000 (AI Index: AFR 51/60/00); *Sierra Leone: Recommendations on the draft Statute of the Special Court*, November 2000 (AI Index: AFR 51/83/00); *Memorandum to the Select Committee on Justice [of South Africa]: Comments and Recommendations by Amnesty International on Promotion of National Unity and Reconciliation Bill*, 13 January 1995; *South Africa: No impunity for perpetrators of human rights abuses*, 29 July 1999 (AI Index: AFR 53/1099); *United Kingdom: The Pinochet case - universal jurisdiction and the absence of immunity for crimes against humanity*, January 1999 (AI Index: EUR 45/01/99).

²⁴ See generally Kai Ambos, *Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina*, 18 Hum. Rts L.J. 1, 7 (1997); Douglass Cassel, *La Lucha Contra la Impunidad ante el Sistema Interamericano de Derechos Humanos*, in Martin Abregú & Juan Mendez, eds, *Libro Homenaje a Emilio Mignone* (San José, Costa Rica: Inter-American Institute of Human Rights 2001); _____, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 L. & Cont. Prob. 191 (1996) [page proofs]; Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537 (1991); Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 L. & Cont. Prob. 87 (1996) [page proofs]; Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law* (Oxford: Oxford University Press 1995); Simma & Paulus, *supra*, n.8, 315. For a minority dissenting view, see Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 Corn. Int'l L. J. 507 (1999); _____, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?*, 31 Tex. Int'l L. J. (1996).

1. International rejection of the amnesty in the Sierra Leone peace accord

The most striking example of the rejection of amnesties for crimes under international law at the international level is illustrated by the universal rejection at the international level of the amnesty provision in the Sierra Leone peace accord. The *UN Secretary-General* concluded that “[t]he experience of Sierra Leone has confirmed that such amnesties do not bring about lasting peace and reconciliation.” The peace agreement reached in July 1999 had given an amnesty for crimes under international law.²⁶ Shortly afterwards, on 30 July 1999, the Secretary-General commented on the amnesty provision of the peace agreement:

“The agreement provides for the pardon of Corporal Foday Sankoh and a complete amnesty for any crimes committed by members of the fighting forces during the conflict from March 1991 up until the date of the signing of the agreement I instructed my Special Representative to sign the agreement with the explicit proviso that the United Nations holds the understanding that the amnesty and pardon in article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”²⁷

²⁵ World Conference on Human Rights, Vienna Declaration and Programme of Action, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/23, 12 July 1993, para. 60.

²⁶ Article IX (PARDON AND AMNESTY) provided:

- “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, ex-SLA 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 to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.”

Sierra Leone peace accord, U.N. Doc. S/1999/777.

²⁷ Seventh Report of the Secretary-General on the United Nations, Observer Mission in Sierra Leone, U.N. Doc. S/1999/836, 30 July 1999, para. 7. Thus, the Secretary-General implicitly rejected the approach of the

The *UN Security Council* recalled the Secretary-General's 30 July 1999 statement in August 2000 when it provided for the establishment of the Special Court for Sierra Leone, the Statute of which overrides any amnesty provisions, thus implicitly approving the action taken by the Secretary-General in disassociating the UN from the amnesty provisions.²⁸

UN Model Treaty on Extradition, which requires refusal of extradition if the person whose extradition is sought is immune from prosecution or punishment because of an amnesty, at least to the extent that the Model Treaty applies to crimes under international law. Indeed, as a footnote to Article 3 (e) indicates, states were concerned about the scope of this provision, and it suggests that "[s]ome countries may wish to make this an optional ground for refusal".

In the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000, para. 22 (footnote referring to Article 6 (5) of Protocol II omitted), the Secretary-General recalled that,

"[w]hile recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law."

In paragraph 24, he stated that

"[i]n the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

'An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 [crimes against humanity, violations of common Article 3 of the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law] of the present Statute shall not be a bar to prosecution.'

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed."

²⁸ The Security Council recalled that "the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. . .". U.N. S.C. Res. 1315 (2000). Article 10 of the Statute of the Special Court for Sierra Leone expressly provides that an amnesty is not a bar to prosecution for crimes against humanity or war crimes: "An amnesty granted to any person falling within the jurisdiction of the Security Council in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution".

The then *UN High Commissioner for Human Rights* stated in this context that she was:

“particularly concerned . . . about the issue of amnesty laws. I stress that certain gross violations of human rights and international humanitarian law should not be subject to amnesties. When the United Nations faced the question of signing the Sierra Leone Peace Agreement to end atrocities in that country, the UN specified that the amnesty and pardon provisions in Article IX of the agreement would not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”²⁹

The *UN Commission on Human Rights* agreed with the approach of the Secretary-General to the amnesty provisions in the Sierra Leone peace agreement and stated that it:

“[n]otes that the Special Representative of the Secretary-General entered a reservation, attached to his signature of the Lomé Agreement, that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law, and affirms that all persons who commit or authorize serious violations of human rights or international humanitarian law at any time are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice[.]”³⁰

2. International rejection of amnesties in other situations

The *World Conference on Human Rights* in 1993 called upon states “to abrogate legislation leading to impunity for those responsible for grave violations of human

²⁹ Mary Robinson, High Commissioner for Human Rights, *Forward, in The Princeton Principles on Universal Jurisdiction* 17 (Princeton, New Jersey: Program in Law and Public Affairs, Princeton University 2001).

³⁰ U.N. Doc. E/CN.4/RES/2000/24 of 18 April 2000, para. 2.

rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law”.³¹

The *UN General Assembly* has opposed legislative and other measures of impunity with regard to crimes against humanity and war crimes.³²

National amnesties and pardons which prevent the emergence of the truth and accountability before the law would be a ground for the International Criminal Court to exercise its concurrent jurisdiction over crimes under Article 17 (2) (a) of the *Rome Statute*.³³ That article provides that in deciding whether a state is unwilling to exercise jurisdiction, the Court should determine whether “[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court”.

A Trial Chamber of the *Yugoslavia Tribunal* in the *Furundzija* case stated:

“It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition on torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision ... would not be accorded international legal recognition.”³⁴

³¹ Vienna Declaration and Programme of Action, Sect. II, para. 60.

³² Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, GA Res. 3074 (XXVIII) (1973), para. 8 (“States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.”).

³³ As Menno Kamminga has observed, “In the terms of Article 17 of the ICC Statute such amnesties [for political killings, torture and forced disappearances] could be an indication of ‘unwillingness or inability of the State genuinely to prosecute’; they would therefore not prevent the ICC from declaring a case inadmissible.” *Final ILA Report, supra*, n. 34, 15.

³⁴ *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T 10 (Trial Chamber 10 December 1998), para. 155.

The *Human Rights Committee* has expressed its concern about the incompatibility of amnesties in *Argentina, Croatia, El Salvador, France, Niger, Peru, the Republic of the Congo* and *Uruguay* with the obligations of states parties under the ICCPR.³⁵ It has welcomed the prohibition in national law of amnesties for violations of the ICCPR, in countries such as *Ecuador*.³⁶

³⁵ The Human Rights Committee has expressed its concern about various national amnesties for grave human rights violations. For example, it noted its “deep concern” over *Uruguay’s* Expiry Law, adopted in a popular referendum, preventing prosecution of police and military officials and requiring that pending prosecutions be dismissed, and it recommended that the law be amended to permit victims to have an effective remedy for human rights violations. Comments of the Human Rights Committee, Uruguay, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. Doc. CCPR/C/79/Add.19, 5 May 1993; Views of 19 July, 1994, Hugo Rodriguez, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (Uruguay). See also General Comment No. 20, U.N. Doc. No. CCPR/C/21/Rev.1/Add.3, 7 April 1992, para. 4, concerning torture.

In addition to amnesties in Uruguay, it has criticized amnesties in *Argentina*: Observations of the Human Rights Committee - Argentina, U.N. Doc. CCPR/C/79/Add.46 (1995), reprinted in U.N. Doc. A/50/40 (1995), para. 146 (“[T]he compromises made by the State party with respect to its authoritarian past, especially the Law of Due Obedience and Law of Punto Final and the presidential pardon of top military personnel, are inconsistent with the requirements of the Covenant.”), para. 153 (“The Committee reiterates its concern that Act 23,521 (Law of Due Obedience) and Act 23,492 (Law of Punto Final) deny effective remedy to victims of human rights violations, in violation of article 2, paragraphs 2 and 3, and article 9, paragraph 5, of the Covenant. The Committee is concerned that amnesties and pardons have impeded investigations into allegations of crimes committed by the armed forces and agents of national security services and have been applied even in cases where there exists significant evidence of such gross human rights violations as unlawful disappearances and detention of persons, including children. The Committee expresses concern that pardons and general amnesties may promote an atmosphere of impunity for perpetrators of human rights violations belonging to the security forces. Respect for human rights may be weakened by impunity for perpetrators of human rights violations.”); *Chile*: Concluding observations of the Human Rights Committee - Chile, U.N. Doc. CCPR/C/79/Add.104 (1999), para. 7 (“The Amnesty Decree Law, under which persons who committed offences between 11 September 1973 and 10 March 1978 are granted amnesty, prevents the State party from complying with its obligation under article 2, paragraph 3, to ensure an effective remedy to anyone whose rights and freedoms under the Covenant have been violated. The Committee reiterates the view expressed in its General Comment 20, that amnesty laws covering human rights violations are generally incompatible with the duty of the State party to investigate human rights violations, to guarantee freedom from such violations within its jurisdiction and to ensure that similar violations do not occur in the future.”); *Croatia*: Concluding observations of the Human Rights Committee: Croatia, U.N. Doc. CCPR/CO/71/HRV, 30 April 2001, para. 11 (“The Committee is concerned with the implications of the Amnesty Law. While that law specifically states that the amnesty does not apply to war crimes, the term ‘war crimes’ is not defined and there is a danger that the law will be applied so as to grant impunity to persons accused of serious human rights violations. The Committee regrets that it was not provided with information on the cases in which the Amnesty Law has been interpreted and applied by the courts. The State party should ensure that in practice the Amnesty Law is not applied or utilized for granting impunity to persons accused of serious human rights violations.”); *El Salvador*: Human Rights Committee - El Salvador, U.N. Doc. CCPR/C/79/Add.34, 21 September 1994, reprinted in U.N. Doc. A/49/40 (1994), para. 215 (“The Committee expresses grave concern over the adoption of the Amnesty Law, which prevents relevant investigation and punishment of perpetrators of past human rights violations

and consequently precludes relevant compensation. It also seriously undermines efforts to re-establish respect for human rights in El Salvador and to prevent a recurrence of the massive human rights violations experienced in the past. Furthermore, failure to exclude violators from service in the Government, particularly in the military, the National Police and the judiciary, will seriously undermine the transition to peace and democracy.”); Concluding observations on the Human Rights Committee: El Salvador, U.N. Doc. CCPR/C/79/SLV, 22 August 2003, para. 6 (reiterating the same concerns expressed in 1994); **France:** Observations of the Human Rights Committee - France, U.N. Doc. CCPR/C/79/Add.80, 4 August 1997, para. 13 (“The Committee is obliged to observe that the Amnesty Acts of November 1988 and January 1990 for New Caledonia are incompatible with the obligation of France to investigate alleged violations of human rights.”); **Haiti:** Comments by the Human Rights Committee - Haiti, U.N. Doc. CCPR/C/79/Add.49, 3 October 1995, reprinted in U.N. Doc. A/50/40 (1995), para. 230 (“The Committee expresses its concern about the effects of the Amnesty Act, agreed upon during the process which led to the return of the elected Government of Haiti. It is concerned that, despite the limitation of its scope to political crimes committed in connection with the coup d’état or during the past regime, the Amnesty Act might impede investigations into allegations of human rights violations, such as summary and extrajudicial executions, disappearances, torture and arbitrary arrests, rape and sexual assault, committed by the armed forces and agents of national security services. In this connection, the Committee wishes to point out that an amnesty in wide terms may promote an atmosphere of impunity for perpetrators of human rights violations and undermine efforts to re-establish respect for human rights in Haiti and to prevent a recurrence of the massive human rights violations experienced in the past.”); **Lebanon:** Concluding observations of the Human Rights Committee - Lebanon, U.N. Doc. CCPR/C/79/Add.78, 1 April 1997, para. 12 (“Such a sweeping amnesty may prevent the appropriate investigation and punishment of the perpetrators of past human rights violations, undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy.”); **Niger:** Comments by the Human Rights Committee: Niger, U.N. Doc. CCPR/C/79/Add.17, 29 April 1993, para. 7 (The Committee stated that the agents of the state responsible for torture and ill-treatment of detainees “should be tried and punished. They should in no case enjoy immunity, *inter alia*, through an amnesty law, and the victims or their relatives should receive compensation.”); **Peru:** Preliminary observations of the Human Rights Committee - Peru, U.N. Doc. CCPR/C/79/Add.67, 25 July 1996, para. 20; Concluding observations by the Human Rights Committee: Peru, U.N. Doc. CCPR/CO/70/PER, 15 November 2000, para. 9 (“The Committee deplores the fact that its recommendations on the 1995 amnesty laws have not been followed and reiterates that these laws are an obstacle to the investigation and punishment of the persons responsible for offences committed in the past, contrary to article 2 of the Covenant. The Committee is deeply concerned about recent information stating that the Government is sponsoring a new general amnesty act as a prerequisite for the holding of elections. The Committee again recommends that the State party should review and repeal the 1995 amnesty laws, which help create an atmosphere of impunity. The Committee urges the State party to refrain from adopting a new amnesty act.”); **Republic of the Congo:** Concluding observations of the Human Rights Committee: Republic of the Congo, U.N. Doc. CCPR/C/79/Add.118, 25 April 2000, para. 12 (“The Committee observes that the political desire for an amnesty for the crimes committed during the periods of civil war may also lead to a form of impunity that would be incompatible with the Covenant. It considers that the texts which grant amnesty to persons who have committed serious crimes make it impossible to ensure respect for the obligations undertaken by the Republic of the Congo under the Covenant, especially under article 2, paragraph 3, which requires that any person whose rights or freedoms recognized by the Covenant are violated shall have an effective remedy. The Committee reiterates the view, expressed in its General Comment 20, that amnesty laws are generally incompatible with the duty of States parties to investigate such acts, to guarantee freedom for such acts within their jurisdiction and to ensure that they do not occur in the future. The State party should ensure that these most serious human rights violations are investigated, that those responsible are brought to justice and that adequate compensation is provided to the victims or their families.”); **Senegal:** Concluding observations by the Human Rights Committee: Senegal, U.N. Doc. CCPR/C/79/Add.10, 28 December 1992, para. 5 (“The Committee considers that amnesty should not be

The *Committee against Torture* has repeatedly criticized amnesties and recommended that they not apply to torture in a number of countries, including *Azerbaijan, Kyrgyzstan, Peru* and *Senegal*, and it has welcomed the absence of amnesties for torture in *Paraguay*.³⁷

The *UN Special Rapporteur on torture* has called for the abrogation of amnesties for torture.³⁸

B. Rejection at the regional level

used as a means to ensure the impunity of State officials responsible for violations of human rights and that all such violations, especially torture, extra-judicial executions and ill-treatment of detainees should be investigated and those responsible for them tried and punished.”).

³⁶ Concluding observations of the Human Rights Committee: Ecuador, U.N. Doc. CCPR/C/79/Add.92, 18 August 1998, para. 7 (“The Committee welcomes the information that article 23 of the Constitution prohibits the enacting of amnesty legislation or granting pardons for human rights violations[.]”)

³⁷ For recent examples of criticisms of amnesties for the crime of torture, see: *Azerbaijan*: Concluding observations of the Committee against Torture: Azerbaijan, U.N. Doc. A/55/44, paras 68, 69 (68. The Committee expresses its concern about the following : . . . (e) The use of amnesty laws that might extend to the crime of torture. . . 69. The Committee recommends that: . . . (c) In order to ensure that perpetrators of torture do not enjoy impunity, the State Party . . . ensure that amnesty laws exclude torture from their reach[.]”); *Kyrgyzstan*: Concluding observations of the Committee against Torture: Kyrgyzstan, U.N. Doc. A/55/44, paras 74 (e), 75 (c) (“74. The Committee expresses its concerns about the following : . . . (e) The use of amnesty laws that might extend to torture in some cases; . . . 75. The Committee recommends that: . . . (c) In order to ensure that the perpetrators of torture and ill-treatment do not enjoy impunity, the State party . . . ensure that amnesty laws exclude torture from their reach[.]”); *Peru*: Concluding observations of the Committee against Torture: Peru, U.N. Doc. A/55/44, paras 59 (g), 61 (d) (“59. The Committee expresses concern about the following: . . . (g) The use of, in particular, the amnesty laws which preclude prosecution of alleged torturers who must, according to articles 4, 5 and 12 of the Convention, be investigated and prosecuted where appropriate; . . . 61. In addition, the Committee recommends that: . . . Amnesty laws should exclude torture from their reach[.]”); *Senegal*: Report of the Committee against Torture, 51 U.N. G.A.O.R. (Supp. No. 44), U.N. Doc. A/51/44(1996), paras 112, 117 (“112. The Committee is concerned that, in its report, the State party invokes a discrepancy between international and internal law to justify granting impunity for acts of torture on the basis of amnesty laws. . . 117. . . The Committee considers the amnesty laws in force in Senegal to be inadequate to ensure proper implementation of certain provisions of the Convention.”). In the case of *Paraguay*, the Committee declared that one of the positive aspects of the state party’s report was that “Paraguay has not adopted any ‘clean slate’ or amnesty act.” Concluding observations of the Committee against Torture: Paraguay, U.N. Doc. A/52/44, para. 192.

³⁸ Report of the Special Rapporteur on torture to the Commission on Human Rights, U.N. Doc. E/CN.4/2001/66, rec. j (“Legal provisions granting exemptions from criminal responsibility for torturers, such as amnesties, indemnity laws etc., should be abrogated.”).

The *Inter-American Court of Human Rights* has found that amnesties in Honduras and Peru for crimes under international law violate the American Convention on Human Rights.³⁹ In the case of the Peruvian amnesty, the Court stated:

“In the Court’s judgment, the Amnesty Law enacted by Peru precludes the obligation to investigate and prevents access to justice. For these reasons, Peru’s argument that it cannot comply with the duty to investigate the facts that gave rise to the present Case must be rejected.”⁴⁰

Similarly, the *Inter-American Commission on Human Rights* has found that amnesties in Argentina, Chile, Colombia and Uruguay violate the Convention.⁴¹ For example, in a case involving an amnesty by El Salvador, the Inter-American Commission, after reviewing its decisions on amnesties, stated:

“The IACHR has repeatedly stated that the application of amnesty laws that prevent access to justice in cases of serious human rights violations renders ineffective the obligation of states parties to respect the rights and freedoms recognized in the Convention and to guarantee their full and free exercise to all persons subject to their jurisdiction, without discrimination of any kind, as established in Article 1(1) of the

³⁹ *Barrios Altos* Case, Inter-Amer. Ct. Hum. Rts, 20 March 2001 (Reparations), para. 41 (not yet officially reported); *Loayza Tamayo* Case, Inter-Amer. Ct. Hum. Rts (Ser. C), Case No. 42, 27 November 1998 (Reparations), paras 165-171; *Castillo Paez* Case, Inter-Amer. Ct. Hum. Rts (Ser. C), Case No. 43, 27 November 1998 (Reparations), paras 98-108; *Velasquez Rodriguez* Case, Inter-Am. Ct. Hum. Rts (Ser. C), No. 4 (1988) (judgment), para. 174 (“The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”).

⁴⁰ *Loayza Tamayo* Case, *supra*, n. XXX, para. 168.

⁴¹ Inter-American Commission on Human Rights has repeatedly found that national amnesties violated human rights, including: **Argentina**: Report No. 24/92, 82nd Sess., OEA/ser.L/V/II.82, Doc. 24 (2 October 1992); Report N1 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), 2 October 1992; **Chile**: Report N° 36/96, Case 10.843, 15 October 1996, para. 50; *see also* Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11.282, October 15, 1996, para. 50; Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.65s #, à7, 11.675 and 11.705, April 7, 1998, para. 42 ; **Colombia**: Third Report on the Human Rights Situation in Colombia, OAS Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, para. 345; **El Salvador**: Report No. 26/92, 82nd Sess., OEA/ser.L/V/II.82, 24 September 1992; Report N° 136/99, Case 10.488 Ignacio Ellacuría S.J. et al., 22 December 1999, para. 200; Report N1 1/99, Case 10.480 *Lucio Parada Cea et al.*, January 27 1999, para. 107; Report N1 26/92, case 10.287 (*Las Hojas massacre*), 24 September 1992, para. 6; **Uruguay**: Report No. 29/92, 82nd Sess., OEA/ser.L/V/II.82, Doc. 25 (2 October 1992); Report N° 29, 1992.

American Convention. In fact, such laws remove the most effective measure for enforcing human rights, i.e., the prosecution and punishment of the violators.”⁴²

C. Rejection at the national level

National legislation and courts are increasingly rejecting national amnesties for crimes under international law as prohibited by international law. In particular, they have refused to recognize amnesties of foreign courts for crimes under international law.

Over half a century ago, *Allied Control Council Law No. 10* provided that national amnesties for crimes against peace, war crimes and crimes against humanity could not bar prosecutions by the national military tribunals established by the Allies.⁴³ Although a small number of states have enacted amnesty laws and similar measures of impunity for crimes under international law, the current trend in national legislation is to prohibit such measures of impunity, even in states that have experienced large-scale violations of human rights in the past. The draft legislation in *Brazil* to implement its obligations under the Rome Statute expressly excludes recognition of amnesties for genocide, crimes against humanity and war crimes.⁴⁴

Two states in Africa racked by conflict have both adopted legislation providing for amnesties for acts of rebellion, but expressly excluded crimes under international law. The *Democratic Republic of the Congo* adopted legislation on 15 April 2003 provided that, pending adoption of an amnesty law, a temporary amnesty for acts of war and political offences would apply for the period between 2 August 1998 and 4 April 2003, with the exception of war crimes, genocide and crimes against

⁴² Report N° 136/99, Case 10.488, *Ignacio Ellacuría S.J. et al.*, 22 December 1999, para. 200 (footnote omitted).

⁴³ Article II (5) of Allied Control Council Law No. 10, *supra*, n. 5, provided that no “immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment” for crimes against peace, war crimes or crimes against humanity.

⁴⁴ Article 3 of the draft legislation provides:

“The crime of genocide, crimes against humanity and war crimes are imprescriptible and are not subject to amnesty, clemency or pardon.”

Bill no. . . ., _ . . . 2002, Defines the crime of genocide, crimes against humanity, war crimes, and crimes against the administration of the International Criminal Court, rules on legal cooperation with the International Criminal Court, and makes other provisions, (*available at: http://www.mj.gov.br/sal/tpi/anteprojeto_eng.htm*) Art. 3.

humanity.⁴⁵ A similar provision is incorporated in the current draft legislation implementing the Rome Statute.⁴⁶ The *Côte d'Ivoire* has adopted an amnesty covering all acts connected with the recent rebellion, except for crimes under international law and serious human rights violations.⁴⁷ In Europe, *Croatia* has excluded war crimes from an amnesty law.⁴⁸ Amnesties for genocide, torture, enforced disappearances, abductions and political murders are prohibited in the 1998 Constitution of *Ecuador*.⁴⁹ The 1994 Constitution of *Ethiopia* prohibits amnesties.⁵⁰

⁴⁵ *Decret-loi N°03-001 du 15 avril 2003 portant amnistie pour faits de guerre, infractions politiques et d'opinion, Art. 1* (« En attendant l'adoption de la loi d'amnistie par l'Assemblée Nationale et sa promulgation, sont amnistiés, à titre provisoire, les faits de guerre, les infractions politiques et d'opinion commis pendant la période allant du 2 août 1998 au 4 avril 2003, à l'exception des crimes de guerre, des crimes de génocide et des crimes contre l'humanité. »).

⁴⁶ *Projet de loi portant mise en oeuvre du statut de la cour penale internationale* (available at : <http://www.amnesty.org/icc>), Art. 17 (« Les infractions et les punis prévues par la présente loi sont imprescriptible. Elles ne sont susceptibles ni d'amnistie ni de grace. »).

⁴⁷ Article 4 of that law provides:

“La présente loi d'amnistie ne s'applique pas:

a) aux infractions économiques

b) aux infractions constitutives de violations graves des droits de l'homme et du droit international humanitaire.

c) plus particulièrement aux infractions qualifiées par le code pénal ivoirien de crimes et délits contre le droit des gens, crimes et délits contre les personnes, crimes et délits contre les biens, y compris les infractions spéciales prévues et punies par la loi n° 88-650 du 7 Juillet 1988 modifiée par la loi n° 89-521 du 11 mai 1989 relative à la répression des infractions en matière de commercialisation des produits agricoles et la loi n° 94-497 du 6 Septembre 1994 portant répression de l'exportation illicite de produits agricoles.

d) aux infractions visées par les articles 5 à 8 du *Traité de Rome sur la Cour Pénale Internationale (CPI)* et la *Charte Africaine des Droits de l'Homme et des Peuples*.”

La loi n° 2003-309 du 8 août 2003 portant amnistie, Art. 4.

⁴⁸ Concluding observations of the Human Rights Committee: Croatia, U.N. Doc. CCPR/CO/71/HRV, 30 April 2001, para. 11. Although the Committee expressed concern that the term war crimes was not defined and that there was a danger that the law could be misapplied, the adoption of the law is a recognition by the state that war crimes cannot be subject to amnesties.

⁴⁹ Constitution of Ecuador, 1998, Art. 23 (2).

In addition, the government of *East Timor* has proposed the enactment of an amnesty law that would exclude genocide, crimes against humanity and war crimes from its scope.⁵¹ Under the 1998 Constitution of *Venezuela*, amnesties for violations of human rights and crimes against humanity are prohibited.⁵²

There are numerous examples of national courts deciding to exercise jurisdiction over persons accused of crimes under international law covered by national amnesties in other countries. In the *United Kingdom*, the House of Lords permitted the Magistrate's Court to determine whether the extradition of the former President of Chile in the Pinochet case could proceed despite a national amnesty and a similar measure of impunity. A trial court in *Argentina* held that amnesties for crimes against humanity violated international law as incorporated in Argentine law.⁵³ The Congress in *Argentina* annulled two amnesty laws. A *French* investigating judge (*juge d'instruction*) "concluded that Chile's amnesty law had not deprived French courts of their jurisdiction to prosecute crimes committed against

⁵⁰ Article 28 (1) (Crimes against Humanity) of the 1994 Constitution of Ethiopia provides:

"Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitations. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ."

⁵¹ Although the draft legislation has been criticized for a number of reasons, including ambiguity and unequal application (see Joint Systems Management Program, The Draft Law on Amnesty and Pardon, A JSMP Report, Dili, East Timor (November 2002) (*available at*: <http://www.jsmp.minihub.org/Reports>), the essential point is that the government has recognized that amnesties for genocide, crimes against humanity and war crimes is not acceptable under international law. Article 3 provides:

"Equally granted amnesty are acts practiced by the members of any components of the Resistance who, in the past, integrated to criminal conduct, as long as they are not crimes of war, of genocide or against humanity as stated in Article 160 of the Constitution of the Republic."

Law of Amnesty and the Pardons of Punishments, Law no. 1/2002, 20 May 2002 (not enacted as of 29 October 2003) (*available at*: <http://www.jsmp.minihub.org>).

⁵² Constitution of Venezuela, 1998, Art. 29.

⁵³ *Simon and Del Cerro* Case, Order of 6 March 2001, Case No. 8686/2000, *Juzgado Nacional en lo Criminal y Correccional Federal No. 4, Buenos Aires*. The order has been appealed to the Supreme Court.

French citizens.”⁵⁴ In the Pinochet case, *Belgium, France, Spain* and *Switzerland* all sought the extradition for trial of the former President of Chile for alleged extrajudicial executions, enforced disappearances or torture, despite the amnesties in Chile. Another *French* judge has held that a Mauritanian amnesty that covered acts of torture had no legal effect in France and would not be recognized.⁵⁵ On 12 July 2001, the Nuremberg Prosecutor in *Germany* issued an international arrest warrant for a former Argentine general accused of an enforced disappearance, even though that crime was covered by an amnesty.⁵⁶ Despite the existence of amnesty laws in Argentina covering the crimes, *Italian* authorities arrested a former Argentine general accused of enforced disappearance of a French woman based on an international arrest warrant issued by a *French* judge and *Italian* courts have tried former Argentine generals for other crimes under international law.⁵⁷ The *Mexican* Supreme Court in June 2003 rejected a claim by a former Argentine naval officer that he should not be extradited to Spain to stand trial on charges of terrorism and genocide for the alleged torture and extrajudicial executions of detainees.⁵⁸ In *Spain*, the *Audencia Nacional* unanimously held in November 1998 in two separate cases that it could exercise jurisdiction over former Argentine and Chilean military leaders and officers charged with torture and other crimes even though these crimes were covered

⁵⁴ Brigitte Stern, *International Decisions: In re Pinochet - Tribunal de grande instance (Paris)*, 93 Am. J. Int'l L. 696, 699 (1999) (describing the rationale of the order in the case, which is not publicly available). However, in a recent case, a French court held that allegations of war crimes, including torture, involving a French general in Algeria could not be investigated because they were covered by a French amnesty law of 31 July 1968. *Fanck Johannès, Aoussarès : ouverture d'une enquête pour "apologie de crimes de guerre"*, *Le Monde*, 17 mai 2001. This decision was upheld on appeal. *FIDH, Guerre d'Algérie/Affaire Aoussarès*, 18 juin 2003.

⁵⁵ *Ely Ould Dah, Ordonnance, Tribunal de grande instance de Montpellier, N1 du parquet : 99/14445, N1 Instruction : 4/99/48, 25 mai 2001, ' 4* . For the decision on cassation, see *Cour de cassation, Chambre criminel, Crim. 23 oct. 2002 : Bull. Crim n° 195* (available at: <http://www.universaljurisdiction.info/index>).

⁵⁶ For the background on other criminal investigations in Germany concerning crimes committed during the Argentine military government covered by national amnesties, see Amnesty International, *Argentina: Cases of "disappeared" facing judicial closure in Germany*, AI Index: AMR 13/03/00, April 2000.

⁵⁷ For information about these cases, see Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation – Chapter Two: The history of universal jurisdiction*, AI Index: IOR 53/004/2001, September 2001 (available at: <http://amnesty.org>).

⁵⁸ *Cavallo case sets precedent*, BBC News, 29 June 2003 (available at: <http://news.bbc.co.uk/1/hi/world/americas/3030030.stm>).

by national amnesties.⁵⁹ Some *peace agreements* have ruled out amnesties for violations of crimes under international law.⁶⁰

D. Prohibition for specific crimes

As outlined below, this prohibition applies to war crimes, crimes against humanity, genocide, torture, extrajudicial executions, enforced disappearances and other grave violations of human rights.

War crimes. National amnesties and pardons which prevent the emergence of the truth and accountability for war crimes in international and non-international armed conflict are inconsistent with the duty to bring to justice those responsible for such crimes. Each state party to the Geneva Conventions of 1949 undertakes “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” of the Conventions.⁶¹ Each state party is also under an obligation to bring such persons to justice in its own courts, to extradite them to another state party willing and able to do so or to transfer them to an international criminal court.⁶² These obligations are

⁵⁹ These decisions are available under the following titles (not the titles of the decisions themselves): *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo coetidos durante la dictadura argentina* (Ruling of the National Audience on Jurisdiction of Spanish Justice to Pursue Crimes of Genocide in Argentina), Madrid, 4 November 1998 (available at: <http://derechos.org/nizkor/arg/espana/audi.html>); *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo coetidos durante la dictadura chilena* (Ruling of the National Audience on Jurisdiction of Spanish Justice to Pursue Crimes of Genocide in Chile), Madrid, 5 November 1998 (available at: <http://derechos.org/nizkor/chile/jucio/audi.html>).

⁶⁰ See, for example, General Framework Agreement of Peace in Bosnia and Herzegovina, 14 December 1995, Annex 7, Art. VI, 35, Int. Leg. Mat. 75, 118 (1996) (Dayton/Paris Peace Agreement) (“Any returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law . . . or a common crime unrelated to the conflict, shall upon return enjoy an amnesty.”).

⁶¹ First Geneva Convention, Art. 49, para. 1; Second Geneva Convention, Art. 50, para. 1; Third Geneva Convention, Art. 129, para. 1; Fourth Geneva Convention, Art. 146, para. 1.

⁶² First Geneva Convention, Art. 49, para. 2; Second Geneva Convention, Art. 50, para. 2; Third Geneva Convention, Art. 129, para. 2; Fourth Geneva Convention, Art. 146, para. 2. The ICRC Commentary makes clear that the drafters of the Geneva Conventions envisaged that states could satisfy their duty to bring to justice those responsible for grave breaches by transferring suspects to an international criminal tribunal: “[T]here is nothing in the paragraph (First Geneva Convention, Art. 49, para. 2) to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting

absolute and no state may excuse another state from fulfilling them.⁶³ Moreover, states parties are required to repress *all* breaches of the Geneva Conventions, including those taking place in non-international armed conflict, not just grave breaches.⁶⁴ This is part of the fundamental undertaking by each state party in common Article 1 of the Geneva Conventions “to respect and to ensure respect for the present Convention in all circumstances”. A national amnesty or pardon for breaches of the Conventions or the Protocols which are crimes under international law would violate this undertaking.⁶⁵

Parties. On this point the Diplomatic Conference declined expressly to take any decision which might hamper future developments of international law”. ICRC, *I Commentary on the Geneva Conventions of 12 August 1949* (1952), p. 366.

⁶³ The common article provides: “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches”. First Geneva Convention, Art. 51; Second Geneva Convention, Art. 52; Third Geneva Convention, Art. 131; Fourth Geneva Convention, Art. 148. The official commentary by the ICRC makes clear that this common provision removes any doubt that the duty to prosecute and punish the authors of grave breaches is “absolute”. ICRC, *I Commentary on the Geneva Conventions of 12 August 1949*, 373 (1952).

⁶⁴ Under an article common to all four conventions, each state party is obliged to “take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches”. First Geneva Convention, Art. 49, para. 3; Second Geneva Convention, Art. 50, para. 3; Third Geneva Convention, Art. 129, para. 3; Fourth Geneva Convention, Art. 146, para. 3. States are expected to enact legislation providing for punishment of such breaches, with appropriate penalties, to be imposed after judicial or administrative proceedings. ICRC, *I Commentary on the Geneva Conventions of 12 August 1949*, 368 (1952).

⁶⁵ Article 6 (5) of Protocol II provides that “[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”. However, as Amnesty International has repeatedly pointed out to negotiators of peace agreements, such as the one in Sierra Leone in 1999 (*see* Amnesty International, *Sierra Leone: Ending impunity - an opportunity not to be missed*, July 2000 (AI Index: AFR 51/60/00)), it is clear that this provision was intended to apply to political crimes, such as treason, or ordinary crimes, but not to serious violations of humanitarian law.

Commentators subsequently have confirmed this interpretation. According to Naomi Roht-Arriaza, “the placement of the article at the end of a section on penal prosecutions and the language on internees and detainees suggests the drafters were primarily interested in reintegrating insurgents into national life”. Roht-Arriaza, *Combating Impunity*, *supra*, n. 55, 91. Douglass Cassel has commented that “Article 6 (5) seeks merely to encourage amnesty for combat activities otherwise subject to prosecution as violations of the criminal laws of the states in which they take place. It is not meant to support amnesties for violations of international humanitarian law.” Cassel, *Lessons from the Americas*, *supra*, n. 55, 212.

An authoritative interpretation by the ICRC communicated in 1995 to the Prosecutor of the Yugoslavia and Rwanda Tribunals in 1995 and reiterated on 15 April 1997 states:

There is increasing recognition by scholars, intergovernmental organization experts and national courts that states have a duty to prosecute or extradite persons responsible for *crimes against humanity*.⁶⁶

Genocide. National amnesties and pardons which prevent the emergence of the truth and accountability for genocide are inconsistent with the duty to punish persons who have committed this crime. Every state party to the Genocide Convention undertakes "to prevent and to punish" genocide.⁶⁷ Article III of that convention provides that genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide "shall be punishable". Under Article V, states parties undertake to enact the necessary legislation, including effective penalties, for these crimes.⁶⁸ Article VI requires states parties to bring those responsible for genocide to justice themselves or to transfer them to an international criminal court.⁶⁹ There are no exceptions.

"Article 6 (5) of Protocol II is the only and very limited equivalent in the law of non-international armed conflict of what is known in the law of international armed conflict as 'combatant immunity', *i.e.*, the fact that a combatant may not be punished for acts of hostility, including killing enemy combatants, as long as he respected international humanitarian law, and that he has to be repatriated at the end of active hostilities. In non-international armed conflicts, no such principle exists, and those who fight may be punished, under national legislation, for the mere fact of having fought, even if they respected international humanitarian law. The '*travaux préparatoires*' of 6 (5) indicate that this provision aims at encouraging amnesty, *i.e.*, a sort of release at the end of hostilities. It does not aim at an amnesty for those having violated international humanitarian law."

Letter from Dr. Toni Pfanner, Head of the Legal Division, ICRC Headquarters, Geneva, to Douglass Cassel, quoted in *Lessons from the Americas*, *supra*, n. 55, 212.

The Inter-American Commission on Human Rights has also taken the position that Article 6 (5) of Protocol II does not permit amnesties for violations of international humanitarian law. Inter-Amer. Comm'n Hum. Rts, Third Report on the Human Rights Situation in Colombia, OAS Doc. OEA/Ser.L/V/II.102 Doct. 9 rev.1, 26 February 1999, para. 345.

⁶⁶See, for example, M. Cherif Bassiouni, *Crimes against Humanity in International Law* 492, 500-501 (Dordrecht: Martinus Nijhoff Publishers 1992); Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 *Leiden J. Int'l L.* 5, 8 (1994); Orentlicher, *supra*, n. 55, 2585, 2593; Joinet Principles, Arts 25 and 18; Van Boven-Bassiouni Principles, Principles 4 and 25 (f); *Simon and Del Cerro Case*, *supra*, n. 74.

⁶⁷ Genocide Convention, Art. I.

⁶⁸ *Id.*, Art. V ("The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.").

Torture. The Convention against Torture imposes an absolute duty on each state party when a person suspected of torture, attempt to torture, complicity in torture or participation in torture is found in its territory, if it does not extradite the suspect, to submit the case to its competent authorities for the purpose of prosecution⁷⁰. It does not provide for any exceptions to this absolute duty. The Committee against Torture has criticized amnesties in several countries, including *Azerbaijan, Croatia, Kyrgyzstan* and *Peru*, and recommended that they not apply to torture.⁷¹ Similarly, the Human Rights Committee has criticized the use of amnesties for torture.⁷²

⁶⁹ *Id.*, Art. VI (“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”).

⁷⁰ Convention against Torture, Art. 7 (1). That provision requires every state party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 [an act of torture] is found shall in the cases contemplated in article 5 [providing for territorial, active and passive personality and universal jurisdiction], if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution”. There are no exceptions.

⁷¹ Conclusions and recommendations of the Committee against Torture concerning the initial report of Azerbaijan, U.N. Doc. A/55/44, 17 November 1999, para. 68 (3) (expressing concern about “[t]he use of amnesty laws that might extend to the crime of torture” and para. 69 (c) (recommending that, “[i]n order to ensure that perpetrators of torture do not enjoy impunity, the State party . . . ensure that amnesty laws exclude torture from their reach”); Conclusions and recommendations concerning the second periodic report of Croatia, U.N. Doc. A/54/44, 17 November 1998, para. (expressing concern that “the Amnesty Act adopted in 1996 is applicable to a number of offences characterized as acts of torture or other cruel, inhuman or degrading treatment or punishment within the meaning of the Convention”); Conclusions and recommendations of the Committee against Torture concerning the initial report of Kyrgyzstan, U.N. Doc. A/55/44, 18 November 1999, para. 74 (e) (expressing concern about “[t]he use of amnesty laws that might extend to torture in some cases”) and para. 75 (c) (recommending that, “[i]n order to ensure that the perpetrators of torture and ill-treatment do not enjoy impunity, the State party . . . ensure that amnesty laws exclude torture from their reach”); Conclusions and recommendations of the Committee against Torture concerning the third periodic report of Peru, U.N. Doc. A/55/44, 15 November 1999, para. 59 (g) (expressing concern about “[t]he use of, in particular, the amnesty laws which preclude prosecution of alleged torturers who must, according to articles 4, 5 and 12 of the Convention, be investigated and prosecuted where appropriate”) and para. 61 (d) (recommending that “[a]mnesty laws should exclude torture from their reach”).

⁷² The Human Rights Committee has stated, with regard to torture, that “amnesties are generally incompatible” with the duty of states parties under Articles 2 (3) (guaranteeing the right to a remedy) and Article 7 of the ICCPR (prohibiting torture), but it did not suggest any circumstances when an amnesty prior to a final judgment by a court for a breach of the non-derogable prohibition of torture would be compatible with Article 7. General Comment No. 20, U.N. Doc. No. CCPR/C/21/Rev.1/Add.3, 7 April 1992, para. 4.

Extrajudicial executions. The UN General Assembly stated more than a decade ago that governments had a duty to bring persons suspected of extrajudicial executions to justice.⁷³ It did not spell out any exceptions.

Enforced disappearance of persons. The UN General Assembly expressly declared in 1992 that no one shall benefit from any amnesty or similar measure of impunity for enforced disappearances.⁷⁴ There are no exceptions.

Violence against women. The 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women provides that states have duties to investigate and punish those who are responsible for violence against women.⁷⁵ It contains no provisions permitting amnesties or similar measures of impunity.

Conclusion

National amnesties, pardons and similar national measures of impunity for war crimes, crimes against humanity, genocide, torture, extrajudicial executions and enforced disappearances, such as the amnesty provisions in Article IX of the Sierra Leone peace accord signed at Lomé in July 1999, have no place in an international system of justice and are prohibited under international law.

⁷³ Principle 18 of the UN Principles on the Effective Prevention and Punishment of Extra-legal, Arbitrary and Summary Executions provides: "Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed."

⁷⁴ Article 18 (1) of the UN Declaration on the Protection of All Persons from Enforced Disappearance, U.N. G.A. Res. 47/133, 18 December 1992, provides that persons who are alleged to have committed forced disappearances "shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction".

⁷⁵ Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, OAS Doc. OEA/ser.L.V/II.92, Doc.31 rev.3 (1996), adopted 9 June 1994, entered into force 1995, Art. 7 (recognizing duties to pursue policies to punish and diligently to investigate and impose penalties for violence against women).