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OF AMNESTY, PENDULUMS, AND PEREMPTORY NORMS

William Schabas[*]

For much of the first four decades of its history as an independent State, Sierra Leone was in a situation of great turmoil if not full-blown civil war. The final years of the century were characterized by a conflict of unspeakable brutality. But the country has now been at peace for about twenty years. The beginning of this modern period was marked by various initiatives of what is usually referred to as transitional justice, devoted to accountability for past atrocities and building a strong rule of law framework that would diminish the likelihood of recurrence.

Who can take the credit for this incredible accomplishment? Does Sierra Leone furnish proof that an international criminal tribunal targeted at a very small number of leading individuals ("those who bear the greatest responsibility,"[1] to use the words of the Statute of the Special Court for Sierra Leone) makes a decisive contribution to permanent peace? Or do some or even most of the kudos belong to the Truth and Reconciliation Commission, with its broad approach that included analysis of such issues as economic and social rights, women's equality and capital and corporal punishments? Or is the real explanation to be found in the terms of the 1999 Lomé Agreement? The price it paid for an end to the conflict was a broad amnesty. But maybe the amnesty was the key to a peaceful future, diminished only in its totality by the dozen or so prosecutions of the Special Court? Or is it all of these factors, or none of them?

The story is surely apocryphal, like most good ones. But it is said that when Charles de Gaulle asked Chou Enlai whether he thought the French Revolution had been a success, the Chinese premier replied, "It's too early to tell." Perhaps that is also the case with assessments of the effectiveness of the post-conflict mechanisms in Sierra Leone.

Charles Jalloh, a prodigious scholar and one of Sierra Leone's most brilliant sons, has produced this thoughtful volume on the legacy of the Special Court for Sierra Leone. Of course, it also deals with aspects of the work of the Sierra Leone Truth and Reconciliation Commission and provisions of the Lomé Peace Agreement, as both of these were considered in important judgments of the Special Court.

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[1] Statute of the Special Court for Sierra Leone, art. 1, Jan. 16, 2002, 2178 U.N.T.S. 145.

In the chapter he devotes to the amnesty issue, Professor Jalloh reflects on some of the weaknesses in the Court's ruling. It has often seemed to me that amnesty is a bit like a pendulum. At one end of the cycle is the notorious provision in Additional Protocol II to the Geneva Conventions, adopted in 1977, and pretty much sanctifying the practice of amnesty at the close of non-international armed conflicts. In the years that followed, after some quite repulsive "self-amnesties" were granted in Latin America, the pendulum began to swing. The judgment of the Appeals Chamber of the Special Court was probably at the other extreme, at the opposite end of the cycle.

The Special Court's judgment used the sort of ambiguous language that seems to work when firm evidence doesn't exist. Rather than say there is a rule prohibiting amnesty, it said that one was "crystallizing." My favorite is another one of its formulations, cited at page 300 of Professor Jalloh's book, whereby the Appeals Chamber speaks of amnesty being "contrary to the direction in which customary international law is developing."[2] Politicians may be animated by the direction of travel, but courts? Do they really take decisions based on intuition about what law may become?

The problem, of course, is that some things never do crystallize. This is as true of chemistry as it is of international law. And pendulums swing in both directions. The amnesty pendulum has not continued to move in the direction that the Special Court anticipated. Rather, it seems to be returning to equilibrium.

In 2012, in the *El Mozote* case, a majority of judges of the Inter-American Court of Human Rights subscribed to the concurring opinion of Judge Diego Garcia-Sayán. He took a nuanced approach to transitional justice, one where criminal prosecution might be stayed in favor of other mechanisms, and where amnesty might be acceptable to the extent that it facilitated an end to armed conflict.[3] In 2018, the Special Rapporteur on crimes against humanity of the International Law Commission, of which Charles Jalloh is a distinguished member, produced a balanced analysis of the amnesty issue that argued against a rule of outright prohibition. Most recently, in March 2020, the Appeals Chamber of the International Criminal Court was somewhat dismissive of a Pre-Trial Chamber ruling on amnesty that had cited, amongst other authorities, the ruling of the Special Court of Sierra Leone. The Appeals Chamber made a point of characterizing the Pre-Trial Chamber's pronouncement as obiter dictum and concluded: "For present purposes, it suffices to say only that international law is still in the

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2 CHARLES C. JALLOH, THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE 300 (2020) (quoting Prosecutor v. Kallon, Case No. SCLS-2004-15-AR72 (E), SCSL-2004–16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty ¶ 84 (Mar. 13, 2004)).

3 Massacres of El Mozote and nearby places v. El Salvador, Judgment (Merits, reparations, and costs) of 25 October 2012, Series C, No. 252, Concurring Opinion of Judge Diego Garcia-Sayán, ¶ 9.

developmental stage on the question of acceptability of amnesties."[4] Not crystallizing. And with no claim to know the direction of travel.

Professor Jalloh has quite astutely focused on the reference to *jus cogens* in the amnesty decision. The Appeals Chamber made the highly original claim that "the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*."[5] Within the International Law Commission, Professor Jalloh made several very constructive proposals to the shortlist of peremptory norms that it prepared and published in its 2019 report. For example, he drew attention to the importance of gender discrimination, although it seems more conservative members prevailed, and it did not make the final cut. Nowhere did he, or for that matter any other member, suggest that "the obligation to protect human dignity" should be included. It is a notion so vague as to render meaningless the whole concept of *jus cogens* norms. The Appeals Chamber's far-fetched assertion was designed to sweep away everything in its path, treating peremptory norms like customary law on steroids. As Professor Jalloh wisely notes, much of the Court's discussion including the gratuitous reference to *jus cogens* "was unnecessary as it seems doubtful that current state practice, which admittedly seems to be changing, supports an expansive or absolutist positions on conditional or qualified amnesties."[6]

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4 Prosecutor v. Gaddafi ICC-01/11-01/11 ¶ 91, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April 2019, 9 March 2020.

5 JALLOH, *supra* note 2, at 289.

6 *Id.* (quoting Prosecutor v. Kallon, Case No. SCLS-2004-15-AR72 (E), SCSL-2004–16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty ¶ 71 (Mar. 13, 2004)).