convert it to an international agreement which creates an obligation enforceable in international, as distinguished from municipal, law. A breach of the terms of such a peace agreement resulting in resumption of internal armed conflict or creating a threat to peace in the determination of the Security Council may indicate a reversal of the factual situation of peace to be visited with possible legal consequences arising from the new situation of conflict created. Such consequences such as action by the Security Council pursuant to Chapter VII arise from the situation and not from the agreement, nor from the obligation imposed by it. Such action cannot be regarded as a remedy for the breach. A peace agreement which settles an internal armed conflict cannot be ascribed the same status as one which settles an international armed conflict which, essentially, must be between two or more warring States. The Lomé Agreement cannot be characterised as an international instrument. That it does not have that character does not, however, answer the further question whether, as far as grave crimes such as are stated in Articles 2 to 4 of the Statute of the Court are concerned, it offers any promise that is permissible or enforceable in international law.

43. It was argued by Defence counsel that since the Lomé Agreement was ratified by the Parliament of Sierra Leone pursuant to the proviso to sub-section 4 of section 40 of the Constitution, it is a treaty or an agreement in the nature of a treaty. Subsection 4 of section 40 of the Constitution provided that:

> ... any Treaty, Agreement or Convention executed by or under the authority of the President which relates to any matter within the legislative competence of Parliament, or which in any way alters the law of Sierra Leone or imposes any charge on, or authorises any expenditure out of, the Consolidated Fund or any other fund of Sierra Leone, and any declaration of war made by the President shall be subject to ratification by Parliament.

44. The application of that sub-section to the Lomé Agreement does not make the agreement a treaty or an international agreement. There is nothing obnoxious in construing the word "Agreement" in section 40 in its primary and natural sense which may not necessarily imply an international agreement. Besides, what is a treaty or an international agreement is not determined by the classification of a transaction by a State, but by whether the agreement is regarded as such under international law and regulated by international law.

B. Do insurgents have treaty-making capacity?

45. Notwithstanding the absence of unanimity among international lawyers as to the basis of the obligation of insurgents to observe the provisions of Common Article 3 to the Geneva Conventions,[38] there is now no doubt that this article is binding on States and insurgents alike and that insurgents are subject to international humanitarian law. That fact, however, does not by itself invest the RUF with international personality under international law.

46. Common Article 3 of the Geneva Conventions recognises the existence of "Parties to the conflict". The penultimate sentence of Common Article 3 provides that: "The parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention". But the final clause of Common Article 3 also provides that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict." It has been explained that the penultimate sentence "underlines the fact that parties to an internal conflict are bound only to observe Article 3, remaining free to disregard the entirety of the remaining provisions in each of the Convention"[39] and that the final clause indicates that the insurgents may still be made subject to the State's municipal criminal jurisdiction. In an authoritative book on international law the view was expressed that:

> a range of factors needs to be carefully examined before it can be determined whether an entity has international personality and, if so, what right, duties and competences apply in the particular case. Personality is a relative phenomenon varying with the circumstances.[40]

47. It suffices to say, for the purpose of the present case, that no one has suggested that insurgents are bound because they have been vested with personality in international law of such a nature as to make it possible for them to be a party to the Geneva Conventions. Rather, a convincing theory is that they are bound as a matter of international customary law to observe the obligations declared by Common Article 3 which is aimed at the protection of humanity. No doubt, the Sierra Leone Government regarded the RUF as an entity with which it could enter

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[38] *See e.g.* Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 UNTS 135.

[39] L. Moir, *The Law of Internal Armed Conflict*, (Cambridge 2002), pp. 63-64. The author at p. 65 was of the view that the application of Article 3 does not constitute a recognition by the government that the insurgents have any authority, and certainly does not amount to a recognition of belligerency. He noted that "scholars have since argued that, despite the obvious intention of the framers of the Conventions, Article 3 must confer a measure of international legal personality upon the insurgents, at least they become the holders of rights and obligations under the Article."

[40] Shaw, *International Law*, p.176 (note 22 above).

into an agreement. However, there is nothing to show that any other State had granted the RUF recognition as an entity with which it could enter into legal relations or that the Government of Sierra Leone regarded it as an entity other than a faction within Sierra Leone.

48. Although a degree of organisation of the insurgents may be a factor in determining whether the factual situation of internal armed conflict existed, the distinction must be borne in mind between the factual question whether the insurgents are sufficiently organised and the question of law, with which the issue in these proceedings is concerned, whether as between them and the legitimate government international law regarded them as having treaty-making capacity. International law does not seem to have vested them with such capacity. The RUF had no treaty-making capacity so as to make the Lomé Agreement an international agreement.

49. The conclusion seems to follow clearly that the Lomé Agreement is neither a treaty nor an agreement in the nature of a treaty. However, it does not need to have that character for it to be capable of creating binding obligations and rights between the parties to the agreement in municipal law. The consequence of its not being a treaty or an agreement in the nature of a treaty is that it does not create an obligation in international law.

50. The validity of Article IX of the Lomé Agreement in the municipal law of Sierra Leone is not of prime importance in these proceedings since the challenge to its validity had not been based on municipal law. It is expedient for this Court to confine itself to the limited questions that arise in regard to Article IX of the Lomé Agreement. These are, ultimately, whether in international law it bars this Court from exercising jurisdiction over the defendants in regard to crimes against humanity allegedly committed by them before the date of the Lomé Agreement, and whether it provides materials that are grounds for this Court to exercise a discretion to stay the proceedings as being an abuse of process.

C. Legal Consequence of Article 10 of the Statute

51. In these proceedings the validity of the constitutive instruments of the Special Court is not in issue. They are the documents that define the competence and jurisdiction of the Court and the provisions with which this Court is bound to comply. The purpose for which the Special Court is established, the nature of the Court as an autonomous, independent institution, and the jurisdiction of the Court have been discussed in paragraphs 12-15 above.

52. The constitutive document of the Special Court (the Agreement) with the Statute of the Court annexed to and forming part of it, is a treaty.

53. Article 1(1) of the Statute of the Special Court spells out the temporal jurisdiction of the Court while Article 10 expressly provides:

> An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of crimes referred to in Articles 2 to 4 of the present Statute shall not be a bar to prosecution.

54. Counsel for Kallon submitted that notwithstanding Article 10, this Court should exercise a discretion to stay the proceedings as being an abuse of process of the Court. The amnesty is thus not pleaded only as a legal bar to prosecution.[41]

55. Counsel for Kallon put his submissions, summarised, thus: The claim by the Prosecution and Redress that Article 10 closes the door on any consideration of the applicability of the Lomé Accord to proceedings before the Special Court should not be accepted. The Special Court of Sierra Leone is a 'hybrid' court, established pursuant to an agreement between the UN and the Government of Sierra Leone. Thus, it could not have been established without the consent and agreement of the Government of Sierra Leone. If the Special Court were a truly international tribunal, established by Security Council Resolution (as in the case of the International Criminal Tribunals for Rwanda and the Former Yugoslavia), it is accepted that the actions of the Government of Sierra Leone and the amnesty would be of no relevance. This was confirmed by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Furundzija*[42] in which it was held that a domestic amnesty law would not prevent prosecution for torture before the ICTY or indeed in any other foreign jurisdiction. *Furundzija* did not consider, and is silent on, the circumstances in which it could be an abuse of process to prosecute torture in a domestic court after an undertaking that no criminal prosecution would ensue. In *Furundzija* the Trial Chamber set out the jurisdictions in which an individual could be prosecuted for torture following an amnesty: (i) international tribunal, (ii) foreign State, or (iii) in their own State under a subsequent regime.[43]

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[41] Kallon Preliminary Motion, paras 15-26.
[42] *Prosecutor v Anto Furundzija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, ("*Furundzija* Trial Judgement"), para. 155.
[43] *Ibid.*

56. Counsel for Kallon went on to argue that in the Lomé Accord, the Government of Sierra Leone clearly undertook to "ensure that no official or judicial action is taken against any member of the RUF/SL".[44] The Defence submitted that this would include acceding to an extradition request which would require 'judicial action' and, moreover, that there can be no doubt that the establishment of a Special Court to prosecute alleged crimes committed in Sierra Leone since 30 November 1996 amounts to both 'official' and 'judicial' action. Thus, according to the Defence, in engaging in negotiations with the UN and then ultimately concluding an agreement with them for the establishment of the Special Court, the Government of Sierra Leone clearly reneged on its undertaking in the Lomé Accord.

57. The Defence argued that Article 10 of the Special Court Statute is not a bar to the Court considering whether the Government's actions in establishing the Special Court could render prosecution of those granted an amnesty an abuse of process. In *Prosecutor v. Dusko Tadic,*[45] the ICTY Appeals Chamber rejected the Prosecution's claim that the ICTY lacked authority to review its establishment by the Security Council. The Special Court must be able to do the same. The Defence submitted that as the Court is able to review the lawfulness of its own establishment it may similarly review the applicability of any one provision within its Statute. It may certainly hold that a provision of its Statute should not act as a bar to finding an abuse of process of the court.

58. It was further argued that there was an inconsistent approach to amnesty in that the temporal jurisdiction of the Special Court, pursuant to Article 1(1) of the Statute commenced on 30 November 1996, selected to coincide with the conclusion of the Abidjan Peace Agreement, whereas Article 14 of the Abidjan Agreement granted an amnesty to all members of the RUF from any official or judicial action being taken against them. It was, therefore, contended that it was both arbitrary and illogical of both the UN and the Government of Sierra Leone to appear to honour the terms of one agreement and respect the amnesty granted, but not another.[46]

59. Moreover, the Defence speculated that the Office of the Prosecutor may have offered *de facto* amnesty to certain individuals known by the Prosecution to have committed offences similar to those alleged against Kallon. It was speculated whether such individuals had been offered

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[44] Article IX(3).

[45] *Prosecutor v Dusko Tadić*, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction, 10 August 1995. ("*Tadic* Decision on Jurisdiction").

[46] Kallon Preliminary Motion, paras 11-13.

immunity as a result of cooperation with the Prosecution and after agreement to act as Prosecution witnesses.

60. For his part, counsel for Gbao (intervening) submitted that the Special Court has the jurisdiction to examine its own jurisdiction and, therefore, the power to determine whether it is bound by Article 10 of the Statute. Counsel argued that Article 10 relates to admissibility once jurisdiction is established. He submitted that if the laws of the international community and the law of Sierra Leone indicate that the Court does not have or should not exercise jurisdiction, the Court can make a finding either way, notwithstanding Article 10. The Special Court as a mechanism for maintaining international peace and security as well as national reconciliation, not only has inherent jurisdiction to decline to exercise jurisdiction where there has been an abuse of process of the court, "but also where there has been an abuse of the international legal system".[47] In his submission, the Lomé Agreement created an internationally binding obligation.

IV. THE QUESTION CONSIDERED

61. That this court will normally not claim jurisdiction to exercise a power of review of a treaty or treaty provisions on the ground that it is *unlawful* seems evident, except, perhaps in cases where it can be said that the provisions of Article 53 or Article 64 of the Vienna Convention on the Law of Treaties apply. Article 53 reads:

> A treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64 reads:

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

[47] Gbao Submissions, para 9.

62. This court cannot question the validity of Article 10 of its Statute on the ground that it is unlawful unless it can be shown that, in the terms of Article 53 or Article 64 of the Vienna Convention or of customary international law it is void. That has not been shown in this case. It may be pointed out at this stage that the decision in *Tadic* upon which Kallon's counsel relied as authority for the submission that this Court can pronounce on the lawfulness of its own establishment is not apt. The ICTY is not a treaty-based Tribunal, nor did the *Tadic* case involve the validity of the provisions of a treaty but rather the extent of the powers of the Security Council, an authority established by the UN Charter. Besides, the question may need to be revisited when the occasion arises as to the legal basis of the power of a body purportedly established as a court to make a *binding* declaration that it is not a court, when only a court legally established has jurisdiction to make such declaration that would have a binding force! The position would be different were a court duly established to be called upon to declare the limits of its powers.

63. It was argued by counsel for Kallon that by agreeing to Article 10 of the Statute, the Government of Sierra Leone had reneged on the undertaking in Article IX(2) of the Lomé Agreement.[48] In interpreting the Lomé Agreement it must be presumed, on the basis of effectiveness, that the Government of Sierra Leone undertook only that which was within its power to perform. In this sense "official and judicial action" mentioned in Article IX(2) of the Lomé Agreement must relate to official and judicial action of Sierra Leone and not, as in this case, of the international community. No reasonable tribunal will hold that the Government of Sierra Leone has reneged on its undertaking by agreeing to Article 10 of the Statute which is consistent with the developing norm of international law and with the declaration of the representative of the Secretary-General on the execution of the Lomé Agreement. Besides, even if it can be said that the Government of Sierra Leone had reneged on its undertaking, it would not be valid ground for declaring the invalidity of Article 10. The grounds on which a party to a treaty can challenge its validity, apart from the ground that it is unlawful, are a manifest violation of a rule of internal law of fundamental importance, error, fraud, and corruption and coercion. These grounds operate as vitiating the consent of the party impugning the validity of the treaty and must be raised by the party who claims that its consent had been vitiated. No such grounds have been raised in this case in which the consent of Sierra Leone to the treaty was itself the grievance of the accused.

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[48] Oral submissions.

64. It is evident that no ground on which the validity of Article 10 of the Statute can be impugned has been established. In the result, the line of reasoning pursued by counsel for the defendants and the intervening defendant, pursued to its logical conclusion, would lead to an absurd conclusion that although Article 10 is valid, since no ground on which its validity can be impugned has been established, this court, nevertheless, is not bound to comply with its provisions, but should, regardless of and contrary to its provisions, hold that by reason of the undertaking of the Government of Sierra Leone to grant an amnesty to the defendants, it has no jurisdiction to try the defendants for crimes committed before the date of the Agreement, or that it could exercise a discretion to stay proceedings on the ground that they amount to an abuse of process of the Court.

65. What rightly falls for consideration is not whether the undertaking in the Lomé Agreement made by the Government of Sierra Leone to grant an amnesty is binding on the Government of Sierra Leone, but whether such undertaking could be effective in depriving this Court of the jurisdiction conferred on it by the treaty establishing it, and, if it could not be so effective, whether its existence is a ground for staying the proceedings by reason of the doctrine of abuse of process.

V. THE LIMITS OF AMNESTY

66. *Black's Law Dictionary* defines 'amnesty' in the following terms:

> A sovereign act of oblivion for past acts, granted by a government to all persons (or to certain persons) who have been guilty of crime or delict, generally political offences, - treason, sedition, rebellion, - and often conditioned upon their return to obedience and duty within a prescribed time.[49]

It is also stated that:

> Amnesty is the abolition and forgetfulness of the offence; pardon is forgiveness. (*Knote v. U.S.* 95 U.S. 149, 152.) The first is usually addressed to crimes against the sovereignty of the nation, to political offences, the second condones infractions of the peace of the nation. (*Burdick v. United States*, 236 U.S. 79, 35 S. Ct. 267, 271, 59 L.Ed).[50]

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[49] *Black's Law Dictionary* (5th Ed., 1983), p. 76.
[50] *Ibid.*

67. The grant of amnesty or pardon is undoubtedly an exercise of sovereign power which, essentially, is closely linked, as far as crime is concerned, to the criminal jurisdiction of the State exercising such sovereign power. Where jurisdiction is universal,[51] a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.

68. A crime against international law has been defined as "an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act would probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state."[52] In *re List and Others*, the US Military Tribunal at Nuremberg defined an international crime as: "such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances."[53] However, not every activity that is seen as an international crime is susceptible to universal jurisdiction.[54]

69. The question is whether the crimes within the competence of the Court are crimes susceptible to universal jurisdiction. The crimes mentioned in Articles 2-4 of the Statute are international crimes and crimes against humanity. Indeed, no suggestion to the contrary has been made by counsel. One of the most recent decisions confirming the character of such crimes is the *Tadić* Jurisdiction Decision.[55] The crimes under Sierra Leonean law mentioned in Article 5 do not fall into the category of such crimes and are not mentioned in Article 10.

70. One consequence of the nature of grave international crimes against humanity is that States can, under international law, exercise universal jurisdiction over such crimes. In *Attorney General of the Government of Israel v. Eichmann* the Supreme Court of Israel declared:

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[51] Under the universality principle, each and every state has jurisdiction to try particular offences. See Shaw, *International Law*, p. 592 (note 22 above).
[52] International Law in the Twentieth Century: Essay by Quincy Wright, p. 623, 641.
[53] See Kittichaisare, *International Criminal Law*, (Oxford, 2001), p.3.
[54] "The fact that a particular activity may be seen as an international crime does not itself establish universal jurisdiction and state practice does not appear to have moved beyond war crime, crimes against peace and crimes against humanity in terms of permitting the exercise of such jurisdiction." See Shaw, *International Law*, p.597 (note 22 above).
[55] See *supra* note 45.

> The abhorrent crimes defined in this Law are not crimes under Israeli law alone. These crimes which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.[56]

Also, in *Congo v Belgium*[57] it was held by the International Court of Justice that certain international tribunals have jurisdiction over crimes under international law. This viewpoint was similarly held by the ICTY in *Furundzija*.[58]

71. After reviewing international practice in regard to the effectiveness or otherwise of amnesty granted by a State and the inconsistencies in state practice as regards the prohibition of amnesty for crimes against humanity, Cassese conceptualised the status of international practice thus:

> There is not yet any general obligation for States to refrain from amnesty laws on these crimes. Consequently, if a State passes any such law, it does not breach a customary rule. Nonetheless if a court of another State having in custody persons accused of international crimes decide to prosecute them although in their national State they would benefit from an amnesty law, such court would not thereby act contrary to general international law, in particular to the principle of respect for the sovereignty of other States.[59]

The opinion stated above is gratefully adopted. It is, therefore, not difficult to agree with the submission made on behalf of Redress that the amnesty granted by Sierra Leone cannot cover crimes under international law that are the subject of universal jurisdiction. In the first place, it stands to reason that a state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*.[60]

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[56] *Attorney-General of the Government of Israel v. Eichman*, (1961) 36 ILR 5, 12.

[57] *Case concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002, para. 61.

[58] *Furundzija* Trial Judgement, para 14.

[59] A. Cassese, *International Criminal Law* (Oxford, 2003), 315.

[60] See *Barcelona Traction, Light and Power Co Case (Belgium v Spain)* [1970] ICJ Reports 3; See also Moir, *The Law of Internal Armed Conflict*, 57, "It has been suggested that three groups of [peremptory] norms exist: those protecting the foundations

72. In view of the conclusions that have been arrived at in paragraph 69, it is clear that the question whether amnesty is unlawful under international law becomes relevant only in considering the question whether Article IX of the Lomé Agreement can constitute a legal bar to prosecution of the defendants by another State or by an international tribunal. There being no such bar, the remaining question is whether the undertaking contained in Article IX is good ground for holding that the prosecution of the defendants is an abuse of process of the Court.

73. It is not difficult to agree with the submissions made by the *amici curiae*, Professor Orentlicher and Redress that, given the existence of a treaty obligation to prosecute or extradite an offender, the grant of amnesty in respect of such crimes as are specified in Articles 2 to 4 of the Statute of the Court is not only incompatible with, but is in breach of an obligation of a State towards the international community as a whole.[61] Nothing in the submissions made by the Defence and the interveners detracts from that conclusion. The case of *Azapo v. President of the Republic of South Africa*[62] is purely one dealt with under the domestic laws of South Africa. It was not a case in which the jurisdiction of another State or of an international court to prosecute the offenders is denied. The decisive issues which have arisen in the case before us did not arise in that case.

74. It may well be noted that the President of Sierra Leone did acknowledge that "there are gaps in Sierra Leonean law as it does not encompass such heinous crimes as those against humanity and some of the gross human rights abuses committed"[63] and also that the intention of the amnesty granted was to put prosecution of such offences outside the jurisdiction of national courts.

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of law, peace and humanity; those rules of co-operation protecting fundamental common interests; and those protecting humanity to the extent of human dignity, personal and racial equality, life and personal freedom." See also I. Brownlie, *Principles of International Law*, (6th Ed., 2003) where prohibition of crimes against humanity is included as an example of a *ius cogens* norm, p. 489.

[61] Indeed in 1999, the UN Commission on Human Rights made what can be regarded as a statement of universal jurisdiction in the following terms: "[I]n any armed conflict, including an armed conflict not of an international character, the taking of hostages, wilful killing and torture or inhuman treatment of persons taking no active part in hostilities constitutes a grave breach of international humanitarian law, and that all countries are under obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches and bring such persons regardless of their nationality, before their own courts." See *Situation of Human Rights in Sierra Leone*, U.N. Commission on Human Rights, 54th Session, U.N. Doc. E/CN. 4/RES/1999/1 (1999). See also, Babafemi Akinrinade, 'International Humanitarian Law and the Conflict in Sierra Leone', 15 *Notre Dame Journal of Law, Ethics and Public Policy*, 391-454 (Fall 2001) at pp. 442-443.

[62] *Azapo v. President of the Republic of South Africa* (4) SA 653 (1996).

[63] See Letter dated 9 August 2000, (note 16 above).

VI. ABUSE OF PROCESS

75. The question of abuse of process arose because it was submitted on behalf of Kallon that it would be an abuse of process of the Special Court to permit the prosecution of Kallon for alleged crimes pre-dating the Lomé Agreement. This was an alternative position taken by the defendants should the Court hold that the amnesty granted by the Lomé Agreement did not bar prosecution of the defendants and the interveners. It was argued that notwithstanding the fact that there may be jurisdiction to prosecute the defendants and the interveners, the Court should exercise discretion to stay proceedings on the ground that the prosecution itself was in abuse of process of the court.

76. The discretion to stay proceedings brought in abuse of the process of the Court in appropriate cases is undoubted. It is a jurisdiction that derives from what was described in the *Tadic* Jurisdiction Decision as "the 'incidental' or 'inherent' jurisdiction which derives automatically from the exercise of the judicial function."[64] The question in this case is not whether the Court has such discretionary power but whether it is exercisable in this case.

77. Counsel on behalf of Kallon argues that it is, and he puts his argument in this manner: It is settled law that any Court has an inherent power to stay criminal proceedings. In *Barayagwiza* the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) expressly acknowledged that "the abuse of process doctrine may be relied upon in two distinct situations: (1) where delay has made a fair trial of the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct."[65] In deciding to stay the proceedings against Barayagwiza, who was charged with inter alia genocide and crimes against humanity, the Appeals Chamber held:

> The Tribunal - an institution whose primary purpose is to ensure that justice is done - must not place its imprimatur on such violations. To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals - including those charged with unthinkable crimes - would be among

[64] *Tadić* Jurisdiction Decision, para 18.
[65] *Jean-Bosco Barayagwiza v The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999, para 77.

> the most serious of consequences of allowing the Appellant to stand trial in the face of such violations of his rights.[66]

Thus, according to the Defence, the abuse of process doctrine is applicable to international crimes and is applied to serious crimes in domestic courts. The Defence argues that domestic courts have jurisdiction to try crimes akin to those alleged in this case and if an abuse of process occurred during domestic proceedings for such crimes it would be unthinkable for a court to apply different principles to the case simply on account of the seriousness of the allegations. According to the Defence, the abuse of process doctrine clearly applies to so called 'international crimes' for which there is a duty to 'extradite or prosecute' in domestic courts.

78. The Prosecution's response is that prosecution by the Court would not be an abuse of the process of the Court because it could not be an abuse of process to comply with the express provisions of Article 10 of the Statute, particularly, in the circumstances that "(a) Article IX is of no effect in international law; (b) has been repealed as a matter of *national* law to the extent that it could apply to crimes under Articles 2 - 4 of the Special Court's Statute and (c) on its correct interpretation does not even apply to crimes under Articles 2 - 4 of the Special Court's Statute."[67]

79. At the root of the doctrine of abuse of process is fairness. The fairness that is involved is not fairness in the process of adjudication itself but fairness in the use of the machinery of justice. The consideration is not only about unfairness to the party complaining but also whether to permit such use of the machinery of justice will bring the administration of justice into disrepute. In A. G. *of Trinidad and Tobago v Phillip*[68] the Privy Council said, rightly:

> The common law has now developed a formidable safeguard to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so. It could well be an abuse of process to seek to prosecute those who have relied on an offer of promise of a pardon and complied with the conditions subject to which that offer or promise was made. If there were not circumstances justifying the state in not fulfilling the terms of its offer or promise, then the courts could well intervene to prevent injustices: see *Reg. v. Mines and Green* [1983] 33 S.A.S.R. 211.

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[66] *Ibid*, para 112.
[67] Prosecution Response to the Kallon Preliminary Motion, para. 15, emphasis in the original.
[68] G. *of Trinidad and Tobago v Phillip* 1 A.C.396 at 417 (1995).

80. Where there is an express provision of a statute that a tribunal shall not take into consideration a fact or an event as ground for declining to exercise its jurisdiction (other than a fact or event that affects the fairness of the trial itself as to constitute a violation of the right to fair hearing), such tribunal will be acting unlawfully if it circumvents the express provision of the statute under the guise of an inherent discretionary power. Article 10 of the Statute which provides that amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution is an express limitation on an exercise of the discretion of the Court to bar proceedings solely on the strength of such amnesty.

81. It must be stated, though no one has so suggested, that there was no bad faith in the inclusion of Article 10 in the Statute. There was the clear statement in the preamble to Resolution 1315 (2000) of the Security Council that "[t]he 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". There was also the statement earlier referred to by the President of Sierra Leone that the amnesty was intended to be effective only in regard to the national courts.

82. The submission by the Prosecution that there is a "crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law" is amply supported by materials placed before this Court. The opinion of both *amici curiae* that it has crystallised may not be entirely correct, but that is no reason why this court in forming its own opinion should ignore the strength of their argument and the weight of materials they place before the Court. It is accepted that such a norm is developing under international law. Counsel for Kallon submitted that there is, as yet, no universal acceptance that amnesties are unlawful under international law, but, as amply pointed out by Professor Orentlicher, there are several treaties requiring prosecution for such crimes. These include the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[69] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[70] and the four Geneva

[69] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UN General Assembly on 9 December 1948, 78 UNTS 277.
[70] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 4 February 1985, (1984) ILM 1027.

conventions.[71] There are also quite a number of resolutions of the UN General Assembly and the Security Council reaffirming a state obligation to prosecute or bring to justice. Redress has appended to its written submissions materials which include relevant conclusions of the Committee against torture, findings of the Human Rights Commission, and relevant judgments of the Inter-American Court.

83. Professor Orentlicher cautiously concluded that "to the extent that the amnesty encompasses crimes against humanity, serious war crimes, torture and other gross violations of human rights its validity is highly doubtful".[72] She was, however, emphatic in her opinion that the amnesty contravenes the United Nation's commitment to combating impunity for atrocious international crimes.

84. Even if the opinion is held that Sierra Leone may not have breached customary law in granting an amnesty, this court is entitled in the exercise of its discretionary power, to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity.

85. Upon its establishment the Special Court assumed an independent existence and is not an agency of either of the parties which executed the Agreement establishing the Court. It is described as 'hybrid' or of 'mixed jurisdiction' because of the nature of the laws it is empowered to apply. Its description as hybrid should not be understood as denoting that it is part of two or more legal systems. Prosecutions are not made in the name of Sierra Leone which plays no part in initiating or terminating prosecution and has no control whatsoever over the Prosecutor who exercises an independent judgement in his prosecutorial decision. The understanding of the United Nations in signing the Lomé Agreement is that the amnesty granted therein will not extend to such crimes covered by Articles 2 to 4 of the Statute of the Court. The understanding of Sierra Leone from the statement made on the inauguration of the Truth Commission was that the amnesty affected only prosecutions before national courts. All these are consistent with the provisions of Article 10 of the Statute and the universal jurisdiction of other states by virtue of the nature of the crime to

[71] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention Relative to the Treatment of Prisoners of War; Convention Relative to the Protection of Civilians in Time of War. Geneva, 12 August 1949.
[72] Orentlicher *amicus* brief, p. 24.