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Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone

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Abstract

Part I of this Article examines the chronology of the decade-long conflict in Sierra Leone. It provides an illuminating backdrop against which the Special Court may be assessed and highlights particular features that the institutional design of the Special Court would have to accommodate. Part II explores the precedents for the Special Court. Specifically, it considers the establishment of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), and the impetus behind the International Criminal Court, developments that parallel in time the unfolding of Sierra Leone's conflict. Part III subjects particular features of the Special Court to critical assessment, namely its institutional design, the lack of power and resources committed thereto, and the context in which it will operate. It argues that these features represent fundamental flaws and significant hurdles that need to be overcome if the Special Court is to operate effectively or efficiently.

ARTICLES

CURRENT APATHY FOR COMING ANARCHY: BUILDING THE SPECIAL COURT FOR SIERRA LEONE

Nicole Fritz* & Alison Smith**

INTRODUCTION

Much of the recent commentary on the conflict in Sierra Leone has included reference to Robert Kaplan's essay, *The Coming Anarchy*.¹ Kaplan writes that "[t]yranny is nothing new in Sierra Leone or in the rest of West Africa. But it is now part and parcel of an increasing lawlessness that is far more significant than any *coup*, rebel incursion or episodic experiment in democracy."² His bleak portrayal of unending chaos suggests there is very little the world can do but look on. This is exactly what many have accused the United Nations ("U.N.") of doing. While NATO planes dropped bombs in Serbia and Kosovo, albeit without explicit U.N. sanction, Sierra Leone seemed a forsaken place.³

The U.N. did, belatedly, respond to the conflict in Sierra Leone. By no means its only response, but among the most central, is the proposed Special Court for Sierra Leone ("the Special

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1. ROBERT KAPLAN, *THE COMING ANARCHY: SHATTERING THE DREAMS OF THE POST COLD WAR* (2000). See David Pratt, *Sierra Leone: The Forgotten Crisis* (Apr. 23, 1999), available at <http://www.sierra-leone.org/pratt042399.html>. This report was prepared by a member of the Canadian Parliament and Special Envoy to Sierra Leone for the Canadian Minister of Foreign Affairs. See also Steve Coll, *The Other War: The Gratuitous Cruelties Against Civilians in Sierra Leone Last Year Rivalled Those Committed in Kosovo at the Same Time*, WASH. POST MAG., Jan. 9, 2000, at W8, available at [http://www.washingtonpost.com/wp-srv/photo/galleries/sierra leone](http://www.washingtonpost.com/wp-srv/photo/galleries/sierra%20leone); Karen Gallagher, Note, *No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone*, 23 T. JEFFERSON L. REV. 149 (2000).

2. KAPLAN, *supra* note 1, at 4.

3. This Article will not, however, address the disparity in treatment of the two conflicts.

Court”), which will try those who bear the greatest responsibility for the conflict’s atrocities. Tribunal-establishment as a response to conflict attracts skepticism, a viewpoint articulated by Kaplan in another of his essays, when he writes: “[i]nstitutionalizing war-crimes tribunals will have as much effect on future war crimes as Geneva Conventions have had on the Iraqi and Serbian militaries.”⁴ We have some appreciation for this view, but it does not take us very far as it is incapable of being empirically demonstrated or rejected.⁵ Moreover, criminal tribunals as a response to mass atrocities can, *inter alia*, bring a measure of justice and recognition for the victims through the imposition of penal sanctions on wrongdoers and thus do not rely solely on deterrence for their justification. We therefore proceed on the assumption that criminal tribunals are a legitimate response to conflict, albeit not the only response that can or should be employed. Our question is, instead, whether the Special Court represents a legitimate response to the conflict in Sierra Leone at a broadly political level and whether it is being established with a sufficiently solid foundation to enable it to operate effectively.

Part I of this Article examines the chronology of the decade-long conflict in Sierra Leone. It provides an illuminating backdrop against which the Special Court may be assessed and highlights particular features that the institutional design of the Special Court would have to accommodate. Part II explores the precedents for the Special Court. Specifically, it considers the establishment of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”), and the impetus behind the International Criminal Court, developments that parallel in time the unfolding of Sierra Leone’s conflict. Part III subjects particular

4. See KAPLAN, *supra* note 1, at 100.

5. See *Developments in the Law—International Criminal Law: II. The Promises of International Prosecution*, 114 HARV. L. REV. 1957, 1963 (2001). Payam Akhavan disagrees, writing that: “Although still in the early stages of their institutional life, the International Criminal Tribunals for the former Yugoslavia (“ICTY”) and for Rwanda (“ICTR”) provide a unique empirical basis for evaluating the impact of international criminal justice on post-conflict peace building.” *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7 (2001). However, he does acknowledge that “measuring the capacity of punishment to prevent criminal conduct is an elusive undertaking, especially when a society is gripped by widespread habitual violence and an inverted morality has elevated otherwise ‘deviant’ crimes to the highest expression of group loyalty.” *Id.*

features of the Special Court to critical assessment, namely its institutional design, the lack of power and resources committed thereto, and the context in which it will operate. It argues that these features represent fundamental flaws and significant hurdles that need to be overcome if the Special Court is to operate effectively or efficiently.

I. CHRONOLOGY OF THE CONFLICT

In a decade in which atrocities had become almost commonplace, Sierra Leone's conflict was still shocking. Horror registered at the signature amputations, the thousands of children press-ganged into the service of the respective armed factions, and the fact that they at times seemed the cruelest of combatants. Here however, the brutality appeared not intended to achieve any particular political end; the Revolutionary United Front ("RUF"), the government's armed opposition that emerged in 1991, lacked a coherent ideology. Instead, it appeared to the outside world a rag tag band of anarchists bent on destruction. It confirmed the very worst predictions for Africa: an Africa marked by "the withering away of central governments, the rise of tribal and regional domains, the unchecked spread of disease, and the growing pervasiveness of war."⁶

However, if the RUF's terror defied easy categorization, it was not because it lacked reason but because of the enormity in scope and complexity of the problems to which it responded. Sierra Leone has, for several years, ranked last in the United Nations Development Program's Human Development Index,⁷ a position not won merely by the staging of a decade long civil war. Sierra Leone's misery is centuries older. Years of colonialism were replaced by independence in 1961 by an almost uninterrupted succession of despotic leaders who secured their place by military *coup*, and the establishment of a one-party system and widespread patronage, allowing for unrelenting personal enrichment on the part of the ruling elite.⁸ Sierra Leone's vast mineral wealth, particularly its diamonds, has been plundered by its ad-

6. Kaplan, *supra* note 1, at 9.

7. See U.N. DEVEL. PROGRAM, HUMAN DEVELOPMENT REPORT: HUMAN DEVELOPMENT INDEX 1999, available at <http://www.undp.org/hdro/HDI.html>.

8. James Traub, *The Worst Place on Earth*, N.Y. REV. OF BOOKS, June 29, 2000, available at <http://www.nybooks.com/articles/43>.

ministrators, both pre- and post-independence, institutionalizing a culture whereby political power is almost interchangeable with control of the diamond mines. These mines, although not yielding the quality or quantity they once did, continue to provide Sierra Leone's greatest economic resource.⁹

The Sierra Leone people throughout have suffered excruciating levels of poverty. It was therefore no surprise that when opposition came, it aimed to wrest control of the diamond trade from the government. The stage was set for its appearance in the easing of political controls initiated in the late eighties by President Joseph Momoh, former head of the army. A commission established to review the then enforced one-party constitution, ultimately recommended the revival of a multi-party system of governance.¹⁰

At the same time, the Green Book—Muammar Qaddafi's blueprint for Libyan revolution—was made widely available in West Africa, including Sierra Leone, and appeared to give at least a veneer of ideological content to the agendas of those opposed to the government. However, Qaddafi's influence in the region was based far more on the actual support and encouragement he offered certain disaffected elements than on any compelling ideology. He backed Charles Taylor and his National Patriotic Front as they overran Liberia and executed President Samuel Doe. Taylor, in turn, assisted in the overthrow of Burkina Faso's president, Thomas Sankara, by Blaise Compaore.¹¹

Thus, when the RUF emerged in the early 1990's it was buoyed both by local discontent and regional instability. It entered Sierra Leone from Liberia in 1991 and easily took control of the eastern region. Although aided by the governments of Libya and Burkina Faso, it was Charles Taylor of Liberia who came to be their chief ally, offering troops and a safe haven.¹² Taylor's campaigns of terror also provided a model on which the RUF based its own strategy. Their practice of abducting children, forcing boys to fight and girls to perform sexual service, and the amputation of limbs distinguished their campaign as particularly atrocious.¹³

9. *Id.*

10. See Gallagher, *supra* note 1, at 153.

11. See Traub, *supra* note 8; see also Pratt, *supra* note 1.

12. See Traub, *supra* note 8.

13. It should be noted that the Revolutionary United Front ("RUF") was not alone

The government initially retaliated by bolstering its armed forces by recruiting, like the RUF, from among the thousands of poor, uneducated youth. However, the disaffection was so endemic that these forces themselves staged a *coup*, forcing Momoh from power.¹⁴ Over the next four years the RUF continued its fight against successive governments, increasingly gaining control over lucrative diamond fields. The Economic Community of West African States Monitoring Group (“ECOMOG”), led by Nigeria, entered the fray in 1994 by sending in troops to defend the government.¹⁵ By 1995, the rebel assault had not subsided and the government turned to the services of private security companies, already deployed in the country, on contract to a number of mining houses. These private security companies were remarkably effective,¹⁶ in pushing the rebels back and enforcing calm for long enough that multi-party elections could be held in 1996. Ahmad Tejan Kabbah, a former U.N. official and leader of the Sierra Leone People’s Party, was elected president and soon after entered into negotiations with the RUF which resulted, in November 1996, in a peace agreement known as the Abidjan Accord.¹⁷ Kabbah agreed to dispense with the private security companies and to grant amnesty to the RUF and other combatants. The RUF, in turn, agreed to an immediate cease-fire, disarmament, and demobilization.¹⁸

The U.N. Secretary-General recommended sending a small peacekeeping operation to assist the implementation of the Abidjan Accord, but the recommendation was never approved by the Security Council.¹⁹ In the absence of any authoritative force, allegiances, always shaky, quickly blurred. It was said to be impossible to distinguish the army from the rebels: “the word ‘sobel’ was coined to describe soldiers who wore the uniform of

in committing these crimes during the course of the war, but it did commit them on a more systematic, sustained scale than other parties to the conflict.

14. See Gallagher, *supra* note 1, at 156. Valentine Strasser, a young army officer, led the *coup* gaining notoriety as the youngest head of State in the world.

15. See Pratt, *supra* note 1.

16. According to accounts from local Sierra Leoneans they were also particularly brutal.

17. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), Nov. 30, 1996 [hereinafter Abidjan Accord], available at <http://www.sierra-leone.org/abidjanaccord.html>.

18. Gallagher, *supra* note 1, at 157.

19. *Report of the Secretary-General on Sierra Leone*, U.N. Doc. S/1997/80 (1997).

the government by day and then robbed, raped, and attacked civilians by night."²⁰

In May 1997, Kabbah was deposed by a government army faction calling itself the Armed Forces Revolutionary Council ("AFRC").²¹ These soldiers made concrete their alliance with the RUF by inviting it to share power.²² As the RUF entered Freetown, mayhem erupted as soldiers and rebels looted with impunity and residents of the capital went on strike and refused to cooperate with the new regime. The situation—a country now poised on the verge of collapse—finally compelled the U.N. to act. A Security Council Resolution referred to the situation in Sierra Leone as "a threat to the peace" and called on the military regime to return power to the democratically elected Kabbah government.²³ The Resolution did not, however, authorize intervention, but rather imposed sanctions on Sierra Leone and mandated ECOMOG to enforce the sanctions and other terms of the Resolution.

In 1998, Kabbah was restored to power when ECOMOG troops, predominantly Nigerian, drove the rebels from Freetown. However, the ECOMOG offensive was unable to reverse the gains made by the RUF outside of the capital.²⁴ By the end of 1998, the RUF controlled well over half the country, and in early 1999 it again launched an attack on Freetown. Commentators have, in the aftermath, attempted to capture the sheer brutality of these two weeks, calling it "a war that was at that moment the world's cruelest, as well as its most invisible."²⁵ While ECOMOG troops, employing a force of almost equal ferocity,²⁶ were eventually able to push the RUF back, an estimated 6000 civilians were left dead, thousands more mutilated and limbless. The RUF's "Operation No Living Thing" also wrought the abduction of an estimated 3,000 children, the rape of thousands of

20. Traub, *supra* note 8.

21. Gallagher, *supra* note 1, at 157.

22. *Id.* The army's opposition to Kabbah is said to have been provoked by his recourse to private militias, because the army had not been offered scholarships abroad, and because they were badly paid. *See id.*; Coll, *supra* note 1; Traub, *supra* note 8.

23. S.C. Res 1270, U.N. SCOR, 4054th mtg., U.N. Doc. S/RES/1270 (1999).

24. *See* Pratt, *supra* note 1.

25. Coll, *supra* note 1.

26. *See id.* Freetown inhabitants report countless violations committed by ECOMOG troops. *Id.*

women, and the destruction of much of Freetown.²⁷

Graphic images broadcast worldwide finally alerted the West to the seriousness of the situation, the inadequacy of the ECOMOG operation, and the untenable position of the government. Although intervening militarily in Kosovo, the United States and the United Kingdom pushed hard for diplomatic settlement in Sierra Leone. President Clinton sent the Reverend Jesse Jackson to broker peace, a move sanctioned by the U.N.²⁸ The resulting Lomé Accord,²⁹ signed in July 1999, offered amnesty to all combatants and provided for RUF inclusion in a new coalition government in exchange for RUF disarmament. Significantly the U.N. Secretary-General's Special Representative ("SGSR") added a reservation to the amnesty provision by interpreting the article as not applying to "international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law."³⁰ The Accord established a timetable for the formation of a neutral peacekeeping force and requested the assistance of the U.N., now prepared to send troops.³¹ In October 1999, the Security Council established the United Nation's Mission in Sierra Leone ("UNAMSIL")³² to assist in carrying out provisions of the agreement. Six thousand peacekeeping troops were initially pledged.

From the start, the RUF failed to comply with the terms of the Lomé Accord. Few of their soldiers entered the disarmament, demobilization, and reintegration camps; human rights

27. *Id.*

28. See Traub, *supra* note 8.

29. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999 [hereinafter Lomé Accord], available at <http://www.sierra-leone.org/lomeaccord.html>.

30. Gallagher, *supra* note 1, at 162. HUM. RTS. WATCH, THE SIERRA LEONE AMNESTY UNDER INTERNATIONAL LAW (Aug. 3, 1999), available at <http://www.hrw.org/campaigns/sierra/int-law2.htm>.

31. Gallagher, *supra* note 1. The U.N. Security Council has traditionally been reluctant to intervene to protect one side in a civil war—a violation of its principle of impartiality. It is far more ready to send troops to ensure compliance with a cease-fire agreement. However, a U.N. Report released last year subjected this principle of impartiality to criticism, arguing that "where one party to a peace agreement clearly and incontrovertibly is violating its terms, continued equal treatment of all parties by the United Nations can in the best case result in ineffectiveness and in the worst may amount to complicity with evil." *Report of the Panel on United Nations Peace Operations*, U.N. Docs. A/55/305 - S/2000/809 (Aug. 21, 2000).

32. See S.C. Res. 1270, *supra* note 23.

abuses continued;³³ and once U.N. troops arrived, they were ambushed. In May 2000 several hundred U.N. peacekeepers were taken hostage, evidencing that the Lomé Accord existed in name only.³⁴ However, UNAMSIL maintained its presence and bolstered its forces, attempting once again to bring the RUF and the Government of Sierra Leone to the negotiating table. The Abaju cease-fire, signed in Nigeria on November 10, 2000, re-committed the parties to the provisions of Lomé, but it too cannot be said to have immediately ushered in a period of peace and stability.³⁵

Many civilians trapped in areas controlled by the RUF attempted to escape by fleeing across the border to Guinea. The RUF responded by launching attacks into Guinea, in pursuit of the fleeing civilians and, it is alleged, hoping to secure control over Guinea's valuable bauxite mines.³⁶ Liberia, already an ally of the RUF, and motivated by desire to suppress forces opposed to the Taylor regime, joined the pursuit.³⁷ In early 2001, the U.N. was calling the unfolding melee the world's worst humanitarian crisis.³⁸

Six months later there is much more reason for cautious optimism about the peace-process.³⁹ Although UNAMSIL has been considerably weakened by a series of internal disputes and the withdrawal of a number of contributing States' forces,⁴⁰ it is relatively numerically strong⁴¹—at present the world's largest

33. Admittedly, these were not solely the province of the RUF.

34. Bruce Zagaris, *U.N. Security Council Votes to Establish War Crimes Tribunal for Sierra Leone*, 16 INT'L ENFORCEMENT L. REP. 10 (2000).

35. See *id.* paras. 3-4 (noting continued disagreement between UNAMSIL and RUF, and reports of alleged attacks on RUF controlled villages).

36. *War Traps 250,000 Refugees, Uproots Residents of Guinea*, DALLAS MORNING NEWS, Feb. 16, 2001, at 13A.

37. See *Guinea is Target of Rebel Movement: Liberian Leader Said to Aid Insurgents*, WASH. TIMES, Feb. 1, 2001, at A12.

38. See *Guinea: U.N. Refugee Office to Resume Aid*, FACTS ON FILE WORLD NEWS DIG., Feb. 20, 2001, at 173B3.

39. See *Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone*, U.N. Doc. S/2001/857, para. 57 (Sept. 7, 2001).

40. See Douglas Farah, *U.N. Deployment Woes Jeopardize Sierra Leone Cease-Fire*, WASH. POST, Feb. 19, 2001, at A29 [hereinafter *U.N. Deployment*]; see also Douglas Farah, *A Separate Peacekeeping: In Sierra Leone, Britain, U.N. Clash over Ultimate Aim*, WASH. POST, Dec. 10, 2000, at A42.

41. See *Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone*, *supra* note 39, para. 18 (stating that as of September 5, 2001 UNAMSIL troop strength had increased to 16,664).

peacekeeping mission. Britain also has a strong military presence in Sierra Leone, where it is primarily involved in training government troops.⁴² The United States sent troops to Nigeria where they similarly undertook training, but of ECOMOG troops.⁴³ While these initiatives have created some tension between UNAMSIL, the United States, and the United Kingdom respectively,⁴⁴ they have bolstered the military presence in the region and intensified pressure on Sierra Leone combatants to disarm.⁴⁵ With disarmament and demobilization centers located throughout the country and the recent entry of UNAMSIL forces into the northern region, the U.N. now maintains a presence throughout Sierra Leone.⁴⁶

Attempts have also been made to address the structural causes fuelling the war. In January 2001, a U.N. panel of experts released a report on the illegal diamond trade in Sierra Leone, accusing President Taylor and the Liberian government of supporting the RUF's attacks in exchange for diamond concessions.⁴⁷ The attendant condemnation and imposition of travel bans appear to have forced President Taylor to sever ties with the RUF.⁴⁸

A number of suspected RUF leaders are in government custody, among them Foday Sankoh, leader of the RUF, who was arrested on May 17, 2000.⁴⁹ The government of Sierra Leone

42. See *U.N. Deployment*, *supra* note 40.

43. Daniel Benjamin, *The Limits of Peacekeeping: The U.S. Quietly Launches a Program to Train Troops in West Africa*, *TIME EUR.*, Jan. 8, 2000, at 37.

44. *Id.*

45. See *Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone*, *supra* note 39, paras. 18, 21 (reporting that UNAMSIL troop strength has increased to 16,664 and that by Sept. 3, 2001 a total of 16,097 combatants had been disarmed: 6,523 from the RUF, 9,399 from the Civil Defense Force, and 175 from the AFRC/ex-Sierra Leone army).

46. See *id.* para. 2 (noting that disarmament has been completed in four districts and that UNAMSIL deployment now covers a considerable part of the country).

47. *Security Council Takes Up Report on Diamonds, Arms in Sierra Leone; Expert Panel Says Council Sanctions Broken with Impunity*, U.N. Doc. SC/6997 (2001), available at <http://www.un.org/News/Press/docs/2001/sc6997.doc.htm>.

48. Douglas Farah, *Sierra Leone's Rebel Without a Home: As Sanctions on Liberia Loom, Once Feared 'Mosquito' is Under Pressure to Leave*, *WASH. POST*, Jan. 22, 2001, at A13. Illegal mining continues, however, despite the fact that UNAMSIL, the Government of Sierra Leone, and the RUF have agreed to moratoriums on diamond mining in order to facilitate the disarmament process. See *Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone*, *supra* note 39, para. 3.

49. Gallagher, *supra* note 1, at 167.

has looked to the international community for assistance in prosecuting those responsible for atrocities committed during the war, but not without prompting.⁵⁰ During her visit to Sierra Leone, shortly after the conclusion of the Lomé Accord, U.S. Secretary of State Madeline Albright hinted at the possibility of an international tribunal for Sierra Leone.⁵¹ A year thereafter, President Kabbah sent a letter the U.N. Secretary-General requesting assistance from the U.N. in establishing a criminal tribunal for Sierra Leone.⁵² In August 2000 the Security Council passed Resolution 1315,⁵³ reiterating “that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region,” and mandating the Secretary-General to negotiate an agreement with the government of Sierra Leone for the establishment of an independent Special Court. It further requested the Secretary-General to submit a report on the implementation of the Resolution, including recommendations on a number of key issues identified in the Resolution. This report was presented to the Security Council on October 4, 2000. The Agreement between the U.N. and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone and the Statute for the Special Court for Sierra Leone were annexed to the report.⁵⁴

The Security Council’s request of the Secretary-General, while novel, is not without precedent. In the following section we examine recent developments in the creation of international criminal tribunals that have paved the way for the Special Court for Sierra Leone.

50. See Zagaris, *supra* note 34.

51. Gallagher, *supra* note 1, at 194.

52. *Jim Wurst Rights: U.N. Creates Court to Try Sierra Leone War Crimes*, INTER PRESS SERVICE, Aug. 14, 2001. This was much like the request sent by the Rwandan President to the U.N. Secretary-General in 1994 requesting a criminal tribunal to try those responsible for the country’s genocide.

53. S.C. Res. 1315, U.N. SCOR, 4186th mtg., at 2, U.N. Doc. S/RES/1315 (2000).

54. *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (2000). The draft Statute of the Special Court for Sierra Leone, annexed to the Secretary-General’s report was subsequently revised in February 2001. Although not yet made available by the U.N., it was released by the Government of Sierra Leone. Unless otherwise stated, reference in this Article to the Statute of the Special Court is to the revised draft of February 2001. The Draft Statute of the Special Court of Sierra Leone is available at <http://www.specialcourt.org/documents/index1.htm>.

II. THE SPECIAL COURT: ITS PRECURSORS AND PEDIGREE

The decade-long civil war in Sierra Leone roughly corresponds to a time period in which unparalleled developments in international criminal law were taking place. Like the Special Court, these were spawned by atrocity. If in 1999, Sierra Leone's conflict could be said to be the world's cruelest, many at the beginning of the decade would have claimed that mantle for Bosnia. Two years later that distinction could be said to have fallen to Rwanda. In relation to both conflicts, the U.N. released reports acknowledging its failure to do all that it could.⁵⁵

The contemporaneous attempts made to address these conflicts included the establishment of ad-hoc criminal tribunals for the respective regions. At the time, there seemed to be no appropriate, legitimate, or functioning venue in which to try individuals for crimes committed during these conflicts, although the Nuremberg and Tokyo tribunals, established in the wake of World War II, had provided prototypes on which the international community could build. Moreover, the Genocide Convention's reference to an international penal tribunal signaled that the international community had every intention of furthering this project.⁵⁶ The advent of the Cold War, however, removed any hope of achieving the necessary consensus. But during the post-Cold War political environment in which the conflict in Yugoslavia arose—in fact the Cold War's demise could be said to have precipitated the conflict—the major powers came to recognize a common interest in punishing individuals who commit gross human rights violations.⁵⁷ Thus, by Resolution 827, the Security Council, acting under Chapter VII of the U.N. Charter, unanimously adopted the Statute of the ICTY.⁵⁸

55. *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35. The Fall of Srebrenica*, U.N. GAOR, 54th session, U.N. Doc. A/54/549 (1999) (relating to the Bosnian conflict); *Report of the Independent Inquiry Into the Actions of the United Nations During the 1994 Genocide in Rwanda*, U.N. Doc. S/1999/1257 (1999) (relating to the Rwandan conflict).

56. See Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260(III)A, 78 U.N.T.S. 277, art. 6 (adopted by the U.N. General Assembly on December 9, 1948).

57. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704 (1993), reprinted in VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 22–35 (1995).

58. Statute of the International Tribunal for the Prosecution on Persons Responsi-

This was the same method used to establish the ICTR, although this time, there was not universal consensus within the Security Council.⁵⁹ While Rwanda had initially requested the Tribunal, it came to oppose its establishment and voted against it in the Security Council.⁶⁰ There was some dispute about the legitimacy of the Security Council's invocation of Chapter VII powers to establish these ad-hoc tribunals. Although little controversy surrounded the identification of both conflicts as "threats to the peace," necessary to trigger the extraordinary powers of Chapter VII, some argued that Article 41 authorizing "measures not involving the use of armed force" to restore international peace and security could never have been intended to include the establishment of international criminal tribunals.⁶¹

Nonetheless the establishment of the two ad-hoc tribunals gave renewed impetus to the project for an international criminal court. Commitment to this project had been evidenced sporadically throughout the U.N.'s lifespan, yet it was only in the wake of the ad-hoc tribunals' establishment that sufficient political will and international support set the stage for the General Assembly's Preparatory Committee on the Establishment of the International Criminal Court.⁶² In July 1998, after six weeks of intensive debate and negotiations, the Statute for the International Criminal Court was opened for signature at the Rome Diplomatic Conference. Unlike the ad-hoc tribunals, the Security Council will have no hand in its establishment. Instead the treaty will enter into force once it is ratified by sixty States,⁶³ after

ble for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. SCOR, 3217th mtg., Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

59. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Neighboring states, between January 1, 1994 and December 31, 1994, S.C. Res. 955, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

60. MORRIS & SCHARF, *supra* note 57, at 72.

61. *See id.* at 75-116. The Federal Republic of Yugoslavia sent a letter to the Secretary-General submitting that the Security Council was not entitled to establish an international tribunal as a subsidiary body under Article 29 of the Charter. A similar argument was made by the defense in *Prosecutor v. Duško Tadić*, Case no. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

62. M. Cherif Bassiouni, *Historical Survey: 1919-1998*, in *INTERNATIONAL CRIMINAL LAW* 609-16 (M. Cherif Bassiouni ed., 2d ed. 1999).

63. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9

which the International Criminal Court ("ICC") will become a functioning reality.

The establishment of the ad-hoc tribunals and the efforts to create an ICC reflect an increasingly sensitive international response to the treatment of international conflict. The cessation of hostilities is no longer regarded as, in itself, sufficient. Instead contemporary international legal scholarship emphasizes the importance of institutionalizing processes of accountability whereby justice must be seen and served if a conflict-ridden society is to move beyond its traumatic past.⁶⁴

The ICC, once established, should relieve further need of ad-hoc tribunals. Working as intended, the ICC will be able to prosecute and punish perpetrators as its attention is drawn to sites of atrocity. But the ICC is not yet in operation and may not, once it is, exercise jurisdiction in respect of crimes committed before its Statute took effect.⁶⁵ In addition, the jurisdiction of the ICC is limited either to crimes committed on the territory of States Parties or in cases where the accused is a national of a State Party, namely a State that has ratified or acceded to the Rome Statute.⁶⁶ Therefore, at least for some time, ad-hoc tribunals of the type of the ICTY and ICTR will present themselves as an option for consideration by the international community in the wake of atrocity. Yet while it is an ad hoc tribunal, the Special Court for Sierra Leone is not accurately understood as the same type as the ICTR and ICTY. It is best conceived as a variation on a theme and in the following section we explore the flaws inherent in this particular variation.

III. BREAKING THE PROMISE

The Secretary-General's Report and the Agreement and Statute set out the particular features of the Special Court for

(1998), art. 126, available at www.un.org/law/icc/index.html. As of November 14, 2001, 46 States have ratified the Rome Statute of the International Criminal Court.

64. The literature is enormous. We cite only by example: Madeline Morris, *Symposium: Justice in Cataclysm: Criminal Trial in the Wake of Mass Violence*, 7 DUKE J. COMP. & INT'L L. 319 (1997); M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights*, 59 L. & CONTEMP. PROB. 9 (1996).

65. See Rome Statute of the International Criminal Court, *supra* note 63. Article 11(1) provides: "The Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute."

66. *Id.* art. 12. Under this article, non-State Parties may also accept the jurisdiction of the ICC in respect of a particular situation. *Id.*

Sierra Leone. Many of these are to be implemented for the first time with respect to Sierra Leone.⁶⁷ Chief among these innovative characteristics is the mode of establishment: unlike the ICTY and ICTR, which were established by Resolutions of the Security Council and thus constitute subsidiary organs of the U.N., the Special Court is to be established by agreement between the U.N. and the Government of Sierra Leone. It will therefore be “a treaty-based *sui generis* court of mixed jurisdiction and composition,”⁶⁸ rather than a subsidiary organ of the U.N.

The more extensive involvement afforded Sierra Leone in the case of the Special Court—far more than was offered either the former Yugoslavia or Rwanda in respect of the ad hoc tribunals—heralds a seemingly positive development. As was earlier discussed, current legal scholarship emphasizes the importance of ending impunity of perpetrators—securing their prosecution and punishment—if a fractured society is to move beyond its history of abuse, rebuild itself, and attempt genuine reconciliation.⁶⁹ This surely is an objective for Sierra Leone.⁷⁰ The Special Court offers a promise of rebuilding Sierra Leone’s society by ending the widespread impunity but also offers a promise of rebuilding the society in a much more tangible sense by generating institutional skills and resources crucial to any functioning democracy, which will live on long after the Special Court completes its work. In this respect, the U.N. might be said to have learnt the lessons of Rwanda well.

There, the Rwandese government took the initiative in proposing the establishment of an international tribunal, and participated fully in the deliberations on the Statute but ultimately voted against Security Council Resolution 955, authorizing the

67. Many of these novel features will, however, be replicated in the provisions for the Special Court proposed for Cambodia. See Nina Jorgensen, *The New, More Attractive Face of International Courts*, *CARBERRA TIMES*, Jan. 19, 2001, at A9.

68. See *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 54, para. 9; Konstantinos D. Magliveras, *The Special Court for Sierra Leone: A New Type of Regional Criminal Court for the International Community?*, 17 *INT’L ENFORCEMENT L. REP.* 2 (2001).

69. See Bassiouni, *supra* note 62.

70. S.C. Res. 1315, *supra* note 53 (recognizing that “in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace”).

Tribunal's establishment.⁷¹ Its dissent was triggered in part by its demand that the seat of the Tribunal be situated inside Rwanda to "teach the Rwandese people a lesson, to fight against the impunity to which it had become accustomed . . . and to promote national reconciliation."⁷² A location inside Rwanda was also advocated on the basis that "establishing the seat of the Tribunal on Rwandese soil would promote the harmonization of international and national jurisprudence."⁷³ Commentators such as Neil Kritz have argued that this critique has particular resonance for Rwandese society where, because "a substantial percentage of the population cannot benefit from newspaper or television coverage of the trials, the process of justice should be accessible and visible."⁷⁴ In addition, Tribunal sittings within the country would have served as an important model of due process for domestic efforts and more effectively communicated the idea that "international and domestic trials are complementary parts of an integrated, wholistic and multifaceted approach to justice."⁷⁵

These concerns present themselves with equal force in deliberations concerning Sierra Leone and international attempts at securing justice. The Statute for the Special Court reflects efforts to meet these concerns. Indeed the U.N. could be said to have taken to heart the caveat that if international tribunals are to be effective "more attention needs to be given to both the physical accessibility of proceedings and the dissemination of objective information to the local population."⁷⁶ In his report, the Secretary-General both advocates a broad public information and education campaign as integral to the Special Court's activities⁷⁷ and proposes several potential premises for its seat in the

71. Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 504-05 (1996).

72. *Id.* at 508 (citing U.N. Doc. S/PV.3453, at 16 (1994)).

73. *Id.*

74. Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 L. & CONT. PROBS. 127, 131 (1996).

75. *Id.* at 132.

76. *Id.*

77. *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 54. "If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its education message conveyed to Sierra Leoneans of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities." *Id.* para. 7. It should be noted that as of September 2001, no educational or publicity campaigns had been undertaken by the U.N. in respect of the Special Court, although

Sierra Leone capital, Freetown.⁷⁸

Some have asked whether the money for the Rwandan Tribunal would have been better spent on the rebuilding and training of the Rwandan legal system: the genocide in Rwanda left the judicial system virtually destroyed—approximately ninety-five percent of the country's lawyers and judges were killed, exiled, or imprisoned.⁷⁹ The fighting in Sierra Leone has unsurprisingly compounded the pre-existing problems of poverty and the consequent corruption within the Sierra Leone legal system, leaving its judicial institutions in a similar state of collapse. However, the Special Court—a cooperative endeavor between the U.N. and Sierra Leone, with special provisions made for Sierra Leonean judges, prosecutors, and administrative support staff, applying international humanitarian law and Sierra Leonean law, and benefiting from internationally contributed personnel, equipment, and resources—appears likely to inject new life into Sierra Leone's domestic legal system. Knowledge gained, skills acquired, and personnel empowered may act as catalysts for the establishment of new institutions, structures, and culture that will better safeguard the rule of law and will outlive the existence of the Special Court. Therefore, Sierra Leone's Special Court appears to represent the "best scenario" in which the international community provides "appropriate assistance to enable a society emerging from mass abuse to deal with the issues of justice and accountability itself."⁸⁰ Viewed outside of the parameters of international tribunals, the Special Court initiative might be said to neatly fall within the currently favored U.N. discourse of capacity-building, said to denote the process by which individuals, groups, organizations, institutions, and societies increase their abilities to: 1) perform core functions, solve problems, define and achieve objectives; and 2) understand and deal with their development needs in a broad context and in a sustainable

some efforts have been made to promote the Truth and Reconciliation Commission. The only Special Court sensitization efforts carried out have been initiated by No Peace Without Justice.

78. *Id.* para. 60. However, all the potential sites were rejected on financial or security grounds. It should be noted that the Security Council requested that the Secretary-General address the possibility of an alternative host State, should it be necessary to convene the Special Court outside its seat in Sierra Leone, for security or other compelling reasons. *Id.* para. 50.

79. Kritz, *supra* note 74, at 135.

80. *Id.* at 148.

manner.⁸¹

However, appearances can be deceptive and emphasis on the Special Court's capacity-building potential is ultimately disingenuous. The Special Court's institutional design, the resources committed thereto, are so flawed and insufficient as to severely hamper its potential. Moreover, all too often the context in which it is to operate has been ignored making it even more unlikely that it will deliver on its promise. The following sections examine the difficulties created by the institutional design of the Special Court, the lack of powers and resources with which it is to be invested (these relate to a decontextualized Special Court), and finally the challenges thrown up by the context in which the Special Court must operate. Often these factors do not work in isolation but serve to exacerbate the effect of the others. Nonetheless in a quest for clarity, we have attempted where possible, to treat these factors as discrete sets within which specific difficulties may be examined.

A. *Critiques of a Decontextualized Special Court*

In this section, issues relating to the subject-matter, temporal, and personal jurisdiction of the Special Court are discussed, before we address the financial mechanisms and absence of Chapter VII powers afforded the Special Court. These difficulties would present themselves wherever a tribunal of this type were to operate, effectively crippling its potential. However, they are made that much worse in Sierra Leone which suffers chronic underdevelopment.

1. Subject Matter Jurisdiction of the Special Court

Like the two ad-hoc tribunals, the Special Court's subject-matter jurisdiction covers crimes under international humanitarian law considered to have had the status of customary international law at the time the alleged crimes were committed.⁸² Accordingly, the Court will avoid challenges to its legality, particu-

81. U.N. Development Programme, Management Development and Governance Division, *Capacity Development: Technical Advisory Paper 2*, at 5-6, at <http://www.magnet.undp.org/cdrb/Techpap2.html>.

82. *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 54, para. 12. These comprise crimes against humanity (art. 2); violations of article 3 common to the Geneva Conventions and of Additional Protocol II (art. 3), and other serious violations of international humanitarian law (art. 4). *Id.* para. 21.

larly the principle of *nullum crimen sine lege* and the prohibition on retroactive criminal legislation.⁸³ The Statute does not, however, incorporate the entirety of customary international humanitarian law. Instead, the drafters have tailored the Court's subject matter jurisdiction to accord with their perception of the conflict and the atrocities committed during this period. For example, the Statute omits the crime of genocide from the Special Court's jurisdiction because there has been no allegation that victims of atrocities in Sierra Leone were targeted on the basis of belonging to a national, ethnic, racial, or religious group,⁸⁴ as they were in the conflicts in the former Yugoslavia and in Rwanda. The Statute, although including violations of Article 3 Common to the Geneva Conventions and Additional Protocol II, also fails to provide for the more extensive protections of the Geneva Conventions, specifically the Grave Breaches provisions.⁸⁵ These more extensive protections avail during periods of international armed conflict but not during times of non-international armed conflict and their omission signals that the conflict in Sierra Leone has, in effect, been predetermined as one of a non-international armed character. That predetermination is shortsighted—both factually, given Liberia and Burkina Faso's involvement, and theoretically, given the recognition that distinctions between international and non-international conflicts are difficult to make in contemporary conflict situations which often evidence aspects of both.⁸⁶ Additionally, lesser protections for victims of internal armed conflict are increasingly difficult to justify.⁸⁷ Had the more extensive provi-

83. *Id.*

84. Protect civilians from the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 56.

85. They were included in the ICTY Statute (ICTY Statute, *supra* note 58); however, they were omitted from the ICTR Statute (ICTR Statute, *supra* note 59).

86. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L. L. 239, 261 (2000).

87. The ICTY appeals chamber has held:

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

sions been included, the judges of the Special Court could then have made characterizations of the conflict according to the facts of individual cases.⁸⁸

If the Statute is notable for what it omits under subject-matter jurisdiction, it is perhaps more extraordinary for what it includes: provisions of Sierra Leone domestic law. Article 5 of the Statute enables the Special Court to prosecute persons for offences "relating to the abuse of girls under the prevention of Cruelty to Children Act, 1926," and offences "relating to the wanton destruction of property under the Malicious Damage Act, 1861." The Secretary-General justified the decision to create a Special Court of mixed jurisdiction on the basis that certain crimes or aspects of crimes committed during the conflict were better regulated by Sierra Leonean law than by international law.⁸⁹ This is not necessarily so: both the abuse of girls and malicious damage to property arguably fall within the ambit of international crimes included in the Statute.⁹⁰ It might be argued that the crimes under Sierra Leone law offer greater protection to a greater number of people, since they neither require proof of the existence of an armed conflict nor a widespread or systematic attack.⁹¹ However, the elements of these crimes raise significant evidentiary difficulties⁹² and present the specter of a com-

Prosecutor v. Tadic, Case no. IT-94-1-A72, Appeal on Jurisdiction, para. 97 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996).

88. NO PEACE WITHOUT JUSTICE, SO, WHAT IS THE SPECIAL COURT AND WHAT DOES IT INTEND TO ACHIEVE IN THE END? REPORT FROM THE SPECIAL COURT TRAINING SEMINARS 11 (2001).

89. *Report of the Secretary-General on the Establishment of a Special Court in Sierra Leone*, *supra* note 54, para. 19.

90. Article 2, inscribing crimes against humanity, prohibits "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence." It also prohibits "persecution on political, racial, ethnic or religious grounds" and "other inhumane acts." Article 3, inscribing violations of article 3 common to the Geneva Conventions and of Additional Protocol II, prohibits "acts of terrorism" and "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."

91. However, the prosecutorial prescription that only "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law" stand trial before the Special Court, makes it extremely unlikely that persons accused only of isolated crimes—acts which do not form part of a widespread and systematic attack—will be prosecuted before the Special Court.

92. For example, the abuse of girls provisions would require proof of the child's age, be it 13 or 14. In a country where births are more often not registered or recorded than they are, this requirement of proof of age could pose problems that are difficult, if not impossible, to overcome.

plex dual start-date for the Special Court—an issue addressed in detail in a later section. There is the further practical problem that prosecution of crimes under article 5 would demand reliance on Sierra Leone jurisprudence, which is largely unavailable. To ensure consistency in application of these laws, judges on the Special Court would need to have reference to court decisions issued by Sierra Leone domestic courts, but publication of Sierra Leone court decisions ceased in the 1970s.⁹³ Taking all of this into account, it appears that any additional protection offered under domestic law is more than offset by the problems it raises.

2. Temporal Jurisdiction

As hostilities had not ceased at the time of the Statute's first drafting, the temporal jurisdiction of the Special Court was left open-ended and in this manner resembles the ICTY which also has open-ended temporal jurisdiction because it too continued to be plagued by conflict at the time of its creation.⁹⁴ Yet while the Statute makes provisions for future conflict, it does not accommodate all the conflict that has gone before. In its current formulation, the Statute dates the beginning of the Special Court's temporal jurisdiction from November 30, 1996, the conclusion of the first comprehensive peace agreement between the Government of Sierra Leone and the RUF, known as the Abidjan Peace Agreement.⁹⁵ The temporal jurisdiction does not, there-

93. Verified by our discussions with legal practitioners in Sierra Leone. Since the 1970s, court decisions are only written in longhand by the judges who decide the cases and are stored in loose piles in the basement of the courthouse. Many of these decisions were destroyed by fire and thus lost completely during the attacks on Freetown.

94. Article 1 of the Statute of the ICTY provides that the Tribunal "shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." ICTY Statute, *supra* note 58. Article 1 of the Statute of the ICTR provides jurisdiction in respect of "serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between January 1, 1994 and December 31, 1994 . . ." ICTR Statute, *supra* note 59. A finite period of jurisdiction was afforded on the basis that hostilities between the Tutsis and Hutus had come to a halt. There have, however, been subsequent outbreaks of hostilities between the groups and the Statute would have been better conceptualized had the drafters understood this possibility and provided for a more expansive jurisdiction.

95. Abidjan Accord, *supra* note 17; *Report of the Secretary-General on the Establishment of a Special Court in Sierra Leone*, *supra* note 54, paras. 26-27.

fore, encompass the decade-long conflict in its entirety but only the past five years.

The restricted jurisdiction was triggered by considerations that the prosecutor should not be overburdened nor the Court overloaded. It was also intended that the start date of the Special Court's jurisdiction not be politically tendentious and that it encompass the most serious crimes committed by persons of all political and military groups in all geographical areas of the country.⁹⁶ The November 1996 start-date is said in the Secretary-General's Report to meet these concerns.⁹⁷

However, on August 20, 2001 the Government of Sierra Leone sent a letter to the Legal Counsel of the U.N. in which it requested that the temporal jurisdiction of the Court be extended to cover the period since March 1991, when the conflict first started.⁹⁸ Reformulation of the Statute's temporal jurisdiction, in keeping with the request, would allow for the creation of a much more credible Special Court.⁹⁹ Not only would it allow the Prosecutor to focus more effectively on "those who bear the greatest responsibility" for violations committed throughout the conflict, rather than only those violations which have occurred during the last five years, it will also facilitate greater public support for the Special Court. The perception in Sierra Leone is that the current draft unjustly favors Freetown over the provinces, as the November 1996 date corresponds to the time when

96. *Report of the Secretary-General on the Establishment of a Special Court in Sierra Leone*, *supra* note 54, paras. 21-22.

97. *Id.* paras. 26-27. Two other dates were in contention. May 25, 1997, the date of the *coup d'état* staged by the Armed Forces Revolutionary Council against Kabbah's democratically elected government, and believed to have ushered in more serious violations of international humanitarian law, was rejected on the ground that it would imply that punishment was sought for participation in the *coup*. The alternate date, Jan. 6, 1999, marking the launch of the RUF's most recent attempt to capture Freetown and the peak of the campaign of systematic and widespread crimes against the civilian population, was also rejected as it would exclude all crimes committed before that period in the rural and provincial areas. *Id.* para. 27.

98. *Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone*, *supra* note 39, para. 48.

99. Freetown newspapers, for example, have consistently attacked the issue on numerous occasions. In addition, it was criticized in every one of the 21 Special Court Training Seminars conducted by No Peace Without Justice, which were held in Freetown, Bo, Kenema, and Mile 91. These seminars attracted a total of 602 participants, including civil society and human rights organizations, lawyers, Paramount Chiefs, police, teachers, combatants, and ex-combatants: not a single voice was raised in support of retaining the start-date at 1996.

the capital first became a target of attack. For the provinces, the conflict has generally been one long, continuous experience from the beginning of the 1990s, whereas Freetown witnessed intermittent episodes of violence from the mid-1990s on. An amendment to the Statute setting the temporal jurisdiction's start-date from the beginning of the conflict would address the criticisms of many in Sierra Leone who view the limitation as arbitrary and unjust. It would keep faith with the tenets of international humanitarian law which do not apply from some retrospectively set date, arbitrarily fixed mid-way through the conflict, but from the time the hostilities began. It would also perceptibly foster a more cooperative and complementary relationship with the National Truth and Reconciliation Commission ("TRC"), which has a temporal jurisdiction dating from the beginning of the conflict.

Another factor to be considered when examining the Special Court's temporal jurisdiction is the amnesty granted under the Lomé Peace Agreement of July 7, 1999. The Secretary-General denied that this would act as any bar to the determination of the start-date of the Special Court's jurisdiction: reasoning that 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."¹⁰⁰ In addition, he reiterated the disclaimer issued by his Special Representative for Sierra Leone at the time of the signing of the Lomé Peace Agreement to the effect that "the amnesty provisions contained in Article IX of the Agreement ('absolute and free pardon') shall not apply to international crimes and other serious violations of international humanitarian law."¹⁰¹

However, the Statute acknowledges that amnesties will be valid in respect of the included provisions of Sierra Leone law.¹⁰²

100. *Report of the Secretary-General on the Establishment of a Special Court in Sierra Leone*, *supra* note 54, paras. 22, 24.

101. *Id.* para. 23.

102. Draft Statute of the Special Court for Sierra Leone, *supra* note 54, art. 10. Article 10 provides:

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

Id. The omission of Article 5, which inscribes the provisions of Sierra Leone law, indicates that amnesties granted in respect of these crimes will be a bar to prosecution.

This makes for a situation in which the Special Court may hear violations of international humanitarian law committed since November 30, 1996, but only hear violations of the Sierra Leone provisions committed from the date of the signing of the Lomé Peace Agreement—July 7, 1999. In effect, this creates a dual start-date for the Special Court's temporal jurisdiction, which could raise serious questions about the legitimacy of the court in the eyes of the Sierra Leone public.

3. Personal Jurisdiction of the Special Court

The Statute for the Special Court provides that persons prosecuted shall be those "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."¹⁰³ The terminology has been retained in subsequent drafts of the Statute, despite the Secretary-General's recommendation that the phrase "persons most responsible"—thought to widen the pool of potential defendants—be employed.¹⁰⁴

Persons who bear the greatest responsibility for violations shall "includ[e] those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."¹⁰⁵ The terminology is disturbingly open-ended. Various agreements have been attempted over the past five years—since the Kabbah-led government was elected to power—and even more before that. However, the U.N. only deployed a peacekeeping mission in Sierra Leone subsequent to the Lomé Peace Agreement, allowing for the argument that the peace process to which the Statute refers is that attempted after Lomé. Although unlikely, it is a possible and disconcerting interpretation further limiting the scope of the Special Court's focus and the restriction of its temporal jurisdiction to the period after 1996.

Following from the Secretary-General's Report on the Estab-

103. Draft Statute of the Special Court of Sierra Leone, *supra* note 54, art. 1(1) (noting that this Feb. 2001 version of the Statute has not been released by the U.N. and that only the Sierra Leonean government's draft is available).

104. *Report of the Secretary-General on the Establishment of a Special Court in Sierra Leone*, *supra* note 54, para. 29.

105. Draft Statute of the Special Court of Sierra Leone, *supra* note 54, art. 1(1).

lishment of a Special Court in Sierra Leone¹⁰⁶ and the fact that personal jurisdiction shall include and thereby not be limited to leaders, it may be surmised that the determination of the accused will be made by reference to both their command authority as well as the gravity and scale of the crimes. Appreciation that the Prosecutor must consider these two factors might auger for deference for the exercise of prosecutorial discretion. Yet, the stipulation that the Special Court prosecute those “who bear the greatest responsibility for serious violations” in contradistinction to the terminology employed in the ICTY and ICTR Statutes¹⁰⁷—“the power to prosecute persons responsible for serious violations”—makes the job of Prosecutor of the Special Court that much more difficult and vulnerable to damaging criticism. For example, it might be said that the Prosecutor is incapable of determining the persons who bear the greatest responsibility without undertaking an analysis of, at least, most of the violations committed during the conflict. However, an analysis of this type is almost impossible, particularly given the limited resources afforded the Special Court.

The aspect of the Special Court that has, perhaps, provoked the most public debate is its position vis-à-vis those accused below the age of eighteen at the time of the alleged commission of the crimes. The position accurately reflected is that the Special Court shall have no jurisdiction over persons under the age of fifteen at the time of the alleged commission of the crime.¹⁰⁸ However, persons between the ages of fifteen and eighteen at the time of alleged commission of the crime may be brought before the Special Court, although the Prosecutor is directed to resort to alternative truth and reconciliation mechanisms, where appropriate.¹⁰⁹ If convicted, juvenile offenders may not be sentenced to imprisonment; instead the Special Court may order a variety of correctional care.¹¹⁰

The position represents a break with the Rome Statute for the International Criminal Court which provides that the “Court shall have no jurisdiction over any person who was under the age

106. *Report of the Secretary-General on the Establishment of a Special Court in Sierra Leone*, *supra* note 54, at para. 29.

107. *See* ICTY Statute, *supra* note 58, art. 1; ICTR Statute, *supra* note 59, art. 1.

108. Draft Statute of the Special Court of Sierra Leone, *supra* note 54, art. 7(1).

109. *Id.* art. 15(5).

110. *Id.* art. 7(2).

of 18 at the time of the alleged commission of a crime"¹¹¹ and has provoked protest from child protection agencies.¹¹² Unfairly, the Government of Sierra Leone has been said to have insisted on the Special Court's power to prosecute juvenile offenders. However, the provision, in fact, originated from the U.N. Office of Legal Affairs. Upon receipt of the draft Statute containing that provision from the Office of Legal Affairs, Sierra Leone sought to change the jurisdiction to cover only persons older than seventeen, the age at which persons take on full adult criminal responsibility in Sierra Leone. At the urging of U.N. officials both in New York and Freetown, the Government of Sierra Leone came to adopt the position initially advanced by the U.N. and thereafter agreed to a revised Article 7 of the draft Statute of the Special Court for Sierra Leone.¹¹³ The Statute now allows for prosecution of those between the ages of fifteen and eighteen at the time of the alleged commission of the crime, but at least does not foresee a whole trial chamber specifically designated to hear such trials as the U.N. initially proposed.¹¹⁴

The outcry elicited in response to these provisions has deflected attention from arguably more serious deficiencies in the Statute, given that the prescription of prosecuting "those who bear the greatest responsibility" makes it extremely unlikely that any juvenile offender will be prosecuted before the Special Court.

4. No Grant of Chapter VII Powers

For all the difficulties created for the Special Court by what it is given in the Statute, its greatest difficulties may stem from what it has not been given. Most glaringly, it has not been given

111. Rome Statute, *supra* note 63, art. 26.

112. See *Report of the Secretary-General on the Establishment of a Special Court in Sierra Leone*, *supra* note 54, para. 35. "The international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objection to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved." *Id.* para. 35.

113. This information is known to No Peace Without Justice because of its position assisting the Sierra Leone Mission to the U.N. in New York and the Government of Sierra Leone in Freetown.

114. See *Report of the Secretary-General on the Establishment of a Special Court in Sierra Leone*, *supra* note 54, art. 7(3)(b) (noting that this section includes an initial version of the Draft Statute).

Security Council Chapter VII powers. Although the Special Court is to have concurrent jurisdiction with and primacy over Sierra Leone courts, and thus appears to be endowed with powers similar to those enjoyed by the ICTR and ICTY, its primacy is limited to the national courts of Sierra Leone and does not extend to courts of third-party States. This limitation results from the absence of Chapter VII powers afforded the Special Court. In contrast, the ad-hoc tribunals enjoy primacy and concurrent jurisdiction in respect of all national courts.¹¹⁵ Their establishment by Security Council Chapter VII Resolution secures this pre-eminent position as all States are obliged to comply with Security Council decisions adopted under Chapter VII.¹¹⁶ The Special Court lacks the power to request the surrender of an accused from any other State and to induce its compliance because it has not similarly been vested with Chapter VII powers.

In his report, the Secretary-General himself draws attention to the significant omission that will result should the Special Court not be granted these powers.¹¹⁷ He suggests that the Security Council "may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court."¹¹⁸

At the time of writing, the Security Council has not accepted this recommendation. One reason for its unwillingness to heed the Secretary-General's suggestion that it endow the Special Court with Chapter VII powers might be that this would strengthen legal arguments that the Special Court is an organ of the U.N., afforded Security Council powers, and so entitled to an

115. See ICTY Statute, *supra* note 58, art. 9; see also ICTR Statute, *supra* note 59, art. 8.

116. See U.N. CHARTER chap. VII, art. 48. Article 48 constitutes an affirmation in the context of Chapter VII Security Council powers with respect to threats to the peace, breaches of the peace, and acts of aggression and of Member States' obligations to accept and effect binding decisions by the Security Council. Article 48 provides that "the action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all Members of the United Nations, or by some of them, as the Security Council may determine." *Id.* Article 103 states that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligation under the present Charter shall prevail." *Id.* chap. XVI, art. 103.

117. *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 54, para. 10.

118. *Id.*

assessed share of the U.N.'s ordinary budget.¹¹⁹

Yet, without the power to induce the surrender of those "bearing the greatest responsibility for serious violations" the Special Court must be considered a particularly deficient response to the conflict that has swept through the country. Central to this conflict has been the part played by regional actors. Liberia and Burkina Faso have both lent considerable support to the RUF, providing bases from which to launch attacks, as well as providing ammunition, training, and money. Perpetrators might seek refuge within these territories, safe from the reach of the Special Court. Guinea, the site of recent attacks may also be used for this purpose.

The attacks across Guinea's borders evidence another significant weakness of the Special Court's proposed method of establishment. The Special Court's territorial jurisdiction only encompasses the territory of Sierra Leone and so ignores the reality of modern-day conflicts that are not neatly contained within the territorial confines of one particular State, but spill over national borders and generate more conflict. A comprehensive response to the war in Sierra Leone would entail the construction of a judicial mechanism afforded reach over all parts of the conflict—a power not granted the Special Court but which easily could have been given. In fact, the Security Council has attempted to accommodate the realities of these types of conflicts in the past and its omission in the case of Sierra Leone is made all the more objectionable by the fact that it appreciated this particular feature of the genocide in Rwanda and accordingly vested the Tribunal with an extended territorial jurisdiction. Article 1 of the Statute of the International Tribunal for Rwanda provides that:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the

119. See Thalif Deen, *Sierra Leone Tribunal May Run into Funding Problems*, INTER PRESS SERVICE, Jan. 4, 2001 (commenting on the Security Council's rejection of the recommendation by the U.N. Secretary-General that the Special Court be financed through mandatory fees levied on all 189 Member states).

provisions of the present Statute.¹²⁰

The precedent of this provision makes the inadequacy of the powers afforded the Special Court all the more apparent.

5. Funding the Special Court

As a treaty-based organ, the Special Court is not anchored within the existing U.N. administrative system and will not receive an assessed share of the budget as do the ICTY and ICTR. Instead, the Security Council has been adamant from the outset that the Special Court will be financed through voluntary contributions.¹²¹ The U.N. Secretary-General questioned this arrangement in his report, arguing that:

While the Special Court differs from the two Tribunals in its nature and legal status, the similarity in the kind of crimes committed, the temporal, territorial and personal scope of jurisdiction, the number of accused, the organizational structure of the Court and the Rules of Procedure and Evidence suggest a similar scope and duration of operation and a similar need for a viable and sustainable financial mechanism.¹²²

Voluntary contributions proposed for the Special Court cannot ensure the continuous and secure sources of funding needed to appoint judges, the prosecution, registry and administrative staff and purchase the necessary equipment. For this reason, the Secretary-General argues that the risks associated with voluntary contributions are great “in terms of both moral responsibility and loss of credibility of the Organization, and its exposure to legal liability.”¹²³ He emphatically states that the Special Court “based on voluntary contributions would be neither viable nor sustainable.”¹²⁴ He proposes two alternatives, including, financing through assessed contributions which would entail transforming the treaty-based court into a “United

120. ICTR Statute, *supra* note 59, art. 1.

121. See S.C. Res. 1315, *supra* note 53 (requesting the Secretary-General to include recommendations on the “amount of voluntary contributions, as appropriate, of funds, equipment and services to the Special Court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations”).

122. *Report of the Secretary-General on the Establishment of a Special Court in Sierra Leone*, *supra* note 54, para. 69.

123. *Id.* para. 70.

124. *Id.*

Nations organ governed in its financial and administrative activities by the relevant United Nations financial and staff regulations and rules,"¹²⁵ or reliance on the existing Sierra Leonean court system where judges, prosecutors, investigators, and administrative staff would be contributed by interested States.¹²⁶

It is hard to imagine a note of warning issued more urgently and ominously than a public declaration by the Secretary-General in respect of a U.N.-sponsored institution. Yet the Security Council has refused to reconsider its choice of funding by means of voluntary contribution. It was decided, as a compromise after it became clear that assessed contributions were not an option, that implementation of the Agreement will only commence once contributions sufficient to finance the establishment of the Court and its first twelve months of operations are in hand, and the amount equal to the anticipated expenses for the following twenty-four months has been pledged.¹²⁷

Even given this formulation, voluntary contributions remain a precarious means of funding a judicial institution: they have already resulted in a drastic reduction of the Special Court's budget, which was inadequate to begin. The Secretary-General provided an initial estimate of the start-up costs for the Special Court of U.S.\$22 million, based "on the United Nations scale of salaries for a one-year period, the personnel requirements along with the corresponding equipment and vehicles."¹²⁸ The revised estimated total expenses for the Special Court were U.S.\$114.6 million—based on a projected three year working cycle—with U.S.\$30 million allocated for the establishment and first year's operations. These initial figures are difficult to reconcile with the Secretary-General's observation that the similarity of the demands on the ad-hoc tribunals to those placed on the Special Court suggest similar expenses incurred: "the experience gained in the operation of the two ad hoc International Tribunals provides an indication of the scope, costs and long-term du-

125. *Id.* para. 71.

126. A variation on the latter type of proposal has been employed in Kosovo and East Timor. Carlotta Gall, *U.N.'s Chief in Kosovo Plans a Special Court: Foreign Judges in Ethnic and War Cases*, INT'L HERALD TRIB., June 24, 2000.

127. *Letter of the Secretary-General to the Security Council*, U.N. Doc. S/2001/40 (Jan. 12, 2001).

128. *Report of the Secretary-General on the Establishment of a Special Court in Sierra Leone*, *supra* note 54, para. 58.

ration of the judicial activities of an international jurisdiction of this kind.”¹²⁹

For 2001 the ICTY was awarded a budget of U.S. \$108,487,700¹³⁰ and the ICTR a budget of U.S.\$93,974,800¹³¹ and neither of these two institutions are without financial difficulty.¹³² The Special Court’s initial U.S.\$22 million seems paltry in comparison: already less than a quarter of that given the ad-hoc tribunals. Yet the Special Court is not even to receive this comparatively small amount. Informal consultations indicated that the U.N. could not hope to secure anywhere near the amount it had estimated from Member States. Therefore, on June 14, 2001, a revised budget was presented to the Group of Interested States,¹³³ putting the costs of the first three years of operation at U.S.\$57 million, with U.S.\$16.8 million for the first year.¹³⁴ As of July 6, 2001, the Secretariat received indications of contributions for the Special Court’s first year of operation at U.S.\$15 million—a shortfall of approximately U.S.\$1.8 million—and pledges for the following twenty-four months at approximately U.S.\$20.4 million—a shortfall of approximately U.S.\$19.6 million for the second and third years combined.¹³⁵

Assuming that these funds are secured and implementation of the Agreement commences, it is nonetheless difficult to imag-

129. *Id.* para. 69 (emphasis added).

130. Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, G.A. Res. 55/255, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/225 (2001).

131. Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, G.A. Res. 55/266, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/226 (2001).

132. See *Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia*, available at <http://www.un.org/icty/pressreal/RAP000620e.htm>; see also Statement by the President of the ICTR to the U.N. General Assembly (2000), available at <http://www.ictcr.org/>.

133. The Group of Interested States is a self-selected group of U.N. Member States who are taking an active interest in the establishment of the Special Court. They are primarily those who have indicated their willingness to contribute funds for the Court.

134. Letter from the Secretariat, S/2001/693 (July 12, 2001), available at <http://www.un.org/Docs/sc/letters/2001/693e.pdf> (referring to an amended budget and a June 14, 2001 letter from the Secretariat to Member States regarding revised budget estimates). These numbers include contributions received up until July 6, 2001.

135. *Id.*

ine how the Special Court will evolve as a viable, effective judicial institution with so diminished a budget. This realization is made all the more obvious when one considers that the Special Court will have to shoulder not only the costs carried by the ad-hoc tribunals on their much larger budgets, but also the costs of a separate Appeals Chamber composed of five judges, while the ad hoc tribunals share an Appeals Tribunal.

B. *The Special Court Placed in Context*

The previous assessments examined possible difficulties for the Special Court that largely inhere in the institutional design of the Special Court itself. The following section looks at complicated aspects of the Special Court that will flow from its operation in the particular context of Sierra Leone.

1. The Special Court and the Truth and Reconciliation Commission

Article XXVI of the Lomé Accord provides for the establishment of a TRC to “address impunity, break the cycle of violence, provide a forum for both the victims and the perpetrators of human rights violations to tell their story, get a clear picture of the past to facilitate genuine healing and reconciliation.”¹³⁶ The Commission is to investigate human rights violations committed since the beginning of the Sierra Leonean conflict in 1991. Although the Commission has not yet begun its operations due to bureaucratic delays in Geneva and elsewhere, the Sierra Leonean government has already enacted legislation for its establishment.¹³⁷

It is unclear at present how the Special Court and TRC will function together; whether they will overlap or follow on from each other. The Report of the Secretary-General acknowledges that at some future point “relationship and cooperation arrange-

136. Lomé Accord, *supra* note 29.

137. See The Truth and Reconciliation Commission Act 2000, available at <http://www.sierra-leone.org/trc.html> (2001) [hereinafter TRC]. The TRC is to be composed of seven commissioners, four of whom will be citizens of Sierra Leone. The remaining three will be foreigners. All will be appointed by the President of Sierra Leone. It is to be operational for a period of one year although it will have an additional three-month preparatory period and may be extended for six-month periods after the initial 12 months have passed. It will investigate human rights violations from the outbreak of the conflict in 1991 to the signing of the Lomé Accord. *Id.*

ments would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles in particular.”¹³⁸ The current draft of the Statute requires that, in the prosecution of juveniles, the Prosecutor, where appropriate, resorts to alternative truth and reconciliation mechanisms, to the extent of their availability. Given that prescription and the fact that the Sierra Leone TRC legislation predates both the Secretary-General’s Report and the Security Council Resolution on the Special Court, it is questionable why the relationship between the two institutions was not addressed at the time of the institutional design of the Special Court. While the Security Council noted the “steps taken by the Government of Sierra Leone in creating a national truth and reconciliation process, as required by Article XXVI of the Lomé Peace Agreement (S/1999/777) to contribute to the promotion of the rule of law,” it failed to request that the Secretary-General take this into account in the creation of the Special Court.

This omission is not, perhaps, as shortsighted as it may first appear. The failure to include an explicit reference to the TRC either in the Statute or the Agreement for the Special Court implicitly recognizes and underscores the independent nature of both institutions. Thus the formulation of cooperative arrangements has, it could be argued, properly been left to the institutions that will be required to implement those arrangements and that will have the necessary specific expertise to resolve potentially thorny details.

Nonetheless, confusion around these two institutions has allowed the perception to be created in Sierra Leone that a choice must or might be made between one or the other rather than understanding each as complementary. The dynamics are complicated and ensuring some form of transitional justice in Sierra Leone will involve a careful balancing of these institutions, not only by local actors but also by the international community. At present and over the course of the next few months, disarmament and demobilization will take center-stage. Successful conclusion of this process may politically involve downplaying the Special Court or TRC at certain points.

138. *Report of the Secretary-General on the Establishment of a Special Court in Sierra Leone*, *supra* note 54, para. 8.

On the other hand, it is important that both the Special Court and TRC be understood as forming part of a larger whole. This bigger picture is supplied by the global context and by appreciating accountability as fundamental to lasting peace in Sierra Leone. Only by understanding the two institutions as complementary will the Sierra Leone process represent a development for international accountability mechanisms and not a regression. For example, the Sierra Leone TRC, viewed in isolation, is a step back from the South African TRC process, which has not escaped challenge for awarding amnesties to persons responsible for crimes against humanity.¹³⁹ In South Africa, however, there was incentive for perpetrators to come forward and disclose their crimes in order to receive amnesty. Otherwise, they faced the prospect of prosecution. It has been said simplistically, but somewhat accurately, that South Africans exchanged prosecutions for truth. This cannot be said even simplistically about the TRC process in Sierra Leone. To the extent that amnesty was given, it was given at Lomé, thereby removing a particularly strong incentive for the appearance of perpetrators before the TRC.

The transitional justice process in Sierra Leone need not be understood as deficient if greater emphasis is placed on the way in which the two institutions might operate together: the TRC allowing for the recounting of personal experience and the construction of historical narrative which is essential when one considers that Sierra Leone's conflict has too often, too simply, been dismissed as anarchic. This process of truth-telling and narrative construction is, however, to be overlain by Special Court prosecutions which (although in flawed fashion, given the limited numbers it is to prosecute) signals that those responsible for crimes against humanity and war crimes will not receive immunity.

As yet the U.N. has not attempted to present the two institutions as complementary,¹⁴⁰ allowing for the expression of concerns that information given to the TRC will be used to secure

139. *See* Azanian Peoples Organization (AZAPO) and Another v. President of the RSA and Others 1996 (8) BCLR 1015 (CC) (noting that the families of slain political activists, Steve Biko and Griffiths Mxenge challenged the TRC legislation on the basis that an award of amnesty for crimes against humanity violated South Africa's international law obligations).

140. To the extent it has undertaken any educational campaigns, the U.N. has

convictions before the Special Court and so inspiring fears of intimidation and more violence.

2. Amnesty Provisions in the Lomé Accord

The Secretary-General's Special Representative for Sierra Leone appended his signature to the Lomé Peace Agreement with the disclaimer that "the amnesty provision contained in article IX of the Agreement ('absolute and free pardon') shall not apply to international crimes and other serious violations of international humanitarian law."¹⁴¹ Indeed, the Special Court is premised on this idea, namely that people who are suspected of having committed crimes under international law must be held accountable for their actions, amnesty or no amnesty. This is reflected in article 10 of the Statute itself, which provides that "[a]n amnesty granted to any person falling within the jurisdiction of the Special Court in respect of [crimes under international law] shall not be a bar to prosecution."¹⁴²

The representative of the government of Sierra Leone, however, made no disclaimer in respect of the amnesty provisions upon signing the Lomé Peace Agreement. In fact, the Agreement was premised on the Government's offer of absolute and free pardon to all combatants and collaborators in exchange for the RUF's undertaking to cease hostilities.¹⁴³ Under Sierra Le-

sought to increase awareness about the TRC. *Tenth Report of the Secretary-General on the U.N. Mission to Sierra Leone*, U.N. Doc. S/2001/627, para. 59.

141. Lomé Accord, *supra* note 29, para. 23.

142. *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 54, para. 24; *see also* The Draft Statute of the Special Court of Sierra Leone, *supra* note 54, art. 10.

143. Lomé Accord, *supra* note 29, art. IX. The full text of Article IX reads as follows:

- (1) In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.
- (2) After the signing of the present Agreement, the Government of Sierra Leone shall 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 organizations, since March 1991 up to the time of the signing of the present Agreement. In addition, legislative and other

one law, a pardon offers constitutional protection against prosecution, which can only be derogated from to the extent necessary for dealing with situations of public emergency.¹⁴⁴ In addition to the granting of absolute and free pardon, the Government agreed that no judicial or official action would be taken against any of the combatants in respect of anything done by them in furtherance of their objectives from March 1991 to July 1999. Had these terms not been included, or had only partial immunity been offered, the Lomé talks would have been doomed to failure.

Despite these assurances, the Government not only agreed to the inclusion of article 10 in the Statute of the Special Court, it actively sought means by which criminal prosecutions could be brought against the very people it purported to pardon. This apparently contradictory behavior allows for a number of legal challenges. Those opposed to the amnesty may challenge the constitutionality of article IX of Lomé, on the basis that no constitutional power exists by which to grant any individual immunity before a criminal trial has been concluded. The Constitution vests the prerogative of mercy in the President, who accordingly has the power "to grant any person convicted of any offence against the laws of Sierra Leone a pardon, either free or subject to lawful conditions."¹⁴⁵ It does not purport to endow the President or anyone else with the ability either to grant a pardon before conviction or to guarantee anyone that criminal prosecutions will not be brought against them. Consequently, it might be argued that article IX of Lomé and any subsequent implementing legislation is unconstitutional and thus invalid, at least to the extent of its inconsistency with the Constitution.

Those seeking to safeguard the amnesty, on the other hand,

measures necessary to guarantee immunity to former combatants, exiles and other persons currently outside the country for reasons related to armed conflict shall be adopted using the full exercise of their civil and political rights, with a view to their reintegration within a framework of legality.

Id.

144. SIERRA LEONE CONST., §§ 23(9)-(10), available at <http://www.sierra-leone.org/constitution.html>. While a state of emergency has existed in Sierra Leone since 1999, it is unclear whether any measure allowing the prosecution of "pardoned" individuals would be reasonably justifiable for the purposes of dealing with that emergency.

145. *Id.* § 63(1)(a).

may argue that the Sierra Leone Government has acted contrary to its obligations under Lomé. They might do so by reasoning that the very act of negotiating and concluding an agreement to prosecute people for atrocities committed during the conflict, in essence the Agreement on the Special Court, can be characterized as an "official action," contrary to article IX(3) of Lomé which prescribes any "official or judicial action" on the part of the Government against any of the combatants.¹⁴⁶

The Government has not endorsed the unconstitutionality argument. It need not do so in order to ensure that those accused of atrocities are brought to justice. Instead, it might maintain that the Lomé Peace Agreement was first breached by the RUF, thereby rendering the Agreement void and releasing the Government from its obligations. Further, it might argue that the amnesty granted "in respect of anything done by them in pursuit of their objectives"¹⁴⁷ was intended only to comport with the international humanitarian principle that combatants in civil wars should not be penalized simply for having taken part in hostilities¹⁴⁸ and that it was never intended to cover violations of international humanitarian law.¹⁴⁹ An additional support is provided by the principle of *aut dedere aut judicare*, namely that every State is under a legal, non-derogable obligation to either prosecute or extradite people suspected of having committed these types of crimes. This pre-existing obligation would render Article IX of the Lomé Peace Agreement and any subsequent implementing legislation void, as the Government had no capacity to contract out of its international legal obligations.

All this might seem to have very little significance for the U.N., since once the Agreement is signed the question of whether Sierra Leone has breached its domestic law will not affect the validity of that agreement.¹⁵⁰ However, the Special Court represents a joint endeavor, therefore its success depends

146. See Lomé Accord, *supra* note 29, art. IX.

147. See *id.*

148. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 6(5), *reprinted in* 16 I.L.M. 1442.

149. Indeed, the Presidential prerogative of mercy is limited to granting pardon for offences committed against the laws of Sierra Leone, not to crimes under any other jurisdiction.

150. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, art. 46. The Pro-

upon the Government's ability to make good its obligations and direct its enforcement power to the apprehension, detention, and trial of the accused and the sentencing and punishment of those convicted. Given this, the U.N. cannot ignore the situation. At the very least it must help the Government comprehensively address this issue. If establishment of the Special Court proceeds and this proves to be a stumbling block to its effective operation, the U.N. will ultimately be held responsible and the failure will throw into question the future practice of Tribunal-creation.

IV. INNOVATIVE JUDICIAL MECHANISMS IN A COUNTRY OF MORE PRESSING NEEDS

The establishment of an innovative, sophisticated judicial mechanism in a country said to be the least developed in the world raises a number of difficulties.¹⁵¹ The ten-year war is largely a manifestation of the dire economic conditions faced by people in the region. Addressing these conditions and ending the war by investing funds in the disarmament process seem more obvious priorities for the immediate future. This sentiment is often expressed in Sierra Leone: the media, for instance, often argues that the money for the Special Court could be better used for other objectives. But even if we ignore the

visions of internal law of a State and rules of an international organization regarding competence to conclude treaties state that:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.
3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

Id.

151. "At the end of 2000, the net present value of the country's external debt was equivalent to 707% of GDP, while external debt service due equaled 48% of exports and about 70% of government revenues." *Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone*, *supra* note 39, para. 54.

argument that there can be no real ending of conflict without addressing the cycle of impunity that exists in Sierra Leone, the fact remains that the money is not available to be spent on other goals. There is no general pool of money allocated to Sierra Leone that is depleted by committing funds to the Special Court. The choice, therefore, is not between spending the money on the Special Court or directing it to other objectives; it is between having funds for the Special Court or not having funds at all.

Nonetheless, the economic conditions in Sierra Leone pose real challenges to the successful operation of the Special Court. While the Court will be based in Sierra Leone and is, therefore, theoretically more accessible to the people there than the ad-hoc tribunals are for the people of those regions respectively, lack of infrastructure makes it unlikely that the Special Court will be genuinely accessible. High rates of illiteracy compound the problem. Justifications offered accountability mechanisms such as the Special Court—that they deter would-be war criminals, end the culture of impunity, offer the victims acknowledgement of their suffering—all depend for their veracity of the workings of these institutions being observed and understood. Where this cannot be guaranteed, as in Sierra Leone, articulation of these justifications leaves room for doubt.

It must also be appreciated that these difficulties—lack of infrastructure, illiteracy, and the sheer number of people affected—will hamper the actual workings of the Special Court, particularly the work of the Prosecutor's Office, which will need to build cases, solicit and collect evidence and testimonies.

However, the U.N. is attentive to the challenges posed for the peace process by the overwhelming economic needs of Sierra Leoneans. Its attempts at instantiating post-conflict judicial processes are only one part of a multi-faceted approach, involving military, economic, and political initiatives, by which peace is put in place. It must balance these factors as best it can. And yet, Sierra Leoneans and human rights advocates are right to demand a meaningful, sustained form of transitional justice for Sierra Leone—one that serves as no handmaiden for any of the other peace process initiatives. Accordingly, economic, military, and political initiatives must not be allowed to directly undercut the foundation for the Special Court.

Sadly this situation occurs when the Secretary-General urges

assistance for the RUF “to transform itself into a genuine political party that can participate in the coming elections” and appeals to “countries in the West African sub-region, as well as donor countries, to extend technical and other appropriate assistance to the RUF in this regard.” The appeal is triggered by his concern that demobilized combatants “not directly benefiting from disarmament could resort to activities that might undermine not only the peace process in Sierra Leone but also the stability of the subregion.”¹⁵²

Criminal trials in the wake of mass atrocity are valuable, not least because they individualize guilt and militate against demonization of whole groups, however they are also important because they safeguard against political rehabilitation. Akhavan writes specifically in relation to Rwanda that criminal indictments and prosecutions “thwarted any political rehabilitation and military reorganization of Hutu extremism.”¹⁵³ Yet this is exactly what the Secretary-General requests in respect of the RUF. Admittedly the Special Court is not intended to target the RUF, but if predictions can be made, it is that many of those deemed to “bear the greatest responsibility” for atrocities committed during the conflict will be drawn from the upper echelons of the RUF hierarchy. They are, as yet, unindicted and thus inseparable from the RUF, making it difficult to treat the RUF as legitimate without the risk of shoring up their leadership and advancing their personal ambitions (including evasion of the Special Court). The Secretary-General’s appeal now, at a time when the U.N. purports to seek the establishment of the Special Court, risks discrediting the U.N., by appearing malleable, and undercutting support for the Special Court, by requiring that those who might be prosecuted be treated as legitimate.

These circumstances—individually, but more powerfully in combination—suggest that the climate in Sierra Leone is not hospitable to the workings of the Special Court. The U.N.’s readiness to establish this experimental judicial process without consideration for the legal and political landscape in which it will operate, its failure to attempt to make that landscape more

152. *Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone*, *supra* note 39, para. 59. It is interesting to note that the same report records that a far greater number of CDF soldiers have been disarmed and demobilized than RUF soldiers. Yet no special measures are urged for them lest they threaten peace.

153. Akhavan, *supra* note 5, at 23.

amenable and, most seriously, its active contribution to an un-supportive environment, must trigger the gravest concern.

CONCLUSION

In many respects the Special Court appears to represent “boutique justice:” an overrated, overly expensive means of doing what courts in Sierra Leone are quite capable of doing themselves, perhaps not better but certainly faster. Yet, in one important respect the Special Court offers an advantage the domestic courts cannot: as a U.N.-sponsored institution it offers more legitimacy than the Government ever could acting alone—contributing to a more stable, enduring peace. Even those who complain of the cost of the Court can appreciate and subscribe to this argument.

The publicity accorded negotiations between the Government of Sierra Leone and the U.N. on the Special Court and the many statements made in Sierra Leone concerning the need for this institution have raised a legitimate expectation that the Court will be established and it will do its work well. However, the flaws in the substantive mandate and institutional design of the Court throw into question the international community’s capacity to deliver on its promises and its commitment to addressing the conflict in Sierra Leone.

There is no more pressing reason to ensure that the Special Court does, indeed, do its work well than the people of Sierra Leone themselves. Their suffering during ten years of brutal war has for too long gone neglected. Yet there is another important reason: post-conflict judicial mechanisms are relatively new phenomena. They constitute an essential, if still experimental, part of an increasingly elaborate and sophisticated toolbox with which the international community addresses conflict. Should one of these individual institutions fail at this formative stage, as the Special Court may do spectacularly, all post-conflict judicial mechanisms may come to be viewed as irrelevant. Robert Kaplan’s argument that institutionalizing war crimes tribunals will not reduce the commission of these types of crimes will always be easy to answer. That tribunals of Sierra Leone’s type—under-funded, ill-equipped, and disorganized from the time of its inception—constitute the most artificial, apathetic attempts to address conflict will always be the more difficult argument to refute.