

A MODEL WAR CRIMES COURT: SIERRA LEONE

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I.	OVERVIEW	118
II.	BACKGROUND	119
	A. <i>History/Country Issues</i>	119
	B. <i>The Insurrection</i>	120
III.	Attempts at Peace	122
	A. <i>Abidjan Peace Agreement</i>	122
	B. <i>Economic Community of West African States (ECOWAS)</i> <i>Peace Plan</i>	123
	C. <i>Lome Peace Agreement</i>	124
	D. <i>Ceasefire Agreement dated November 10, 2000</i>	125
IV.	SPECIAL COURT	125
	A. <i>Temporal Jurisdiction</i>	126
	B. <i>Personal Jurisdiction</i>	127
	C. <i>Primacy over National Courts</i>	128
	D. <i>Crimes</i>	130
	E. <i>Amnesty</i>	132
V.	BENEFITS OF THE HYBRID SYSTEM	132
	A. <i>Location of the Court where the Atrocities took Place</i>	132
	B. <i>Use of Domestic Criminal Law in Conjunction with</i> <i>International Law</i>	135
	C. <i>Regional Example</i>	136
	D. <i>Truth and Reconciliation Commission</i>	136
	E. <i>Hybrid Courts Working in Conjunction with the ICC</i>	137
VI.	DETRIMENTS OF THE HYBRID SYSTEM	138
	A. <i>Relies on Funding Commitments from States</i>	138
	B. <i>Retaliation</i>	139
	C. <i>Impartial Judiciary</i>	140
	D. <i>Issues of Corruption</i>	141
VII.	CONCLUSION	141

“Nothing can be right and balanced again until justice is won—the injured party has to have justice. Do you understand that? Nothing can be right, for

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years, for lifetimes, until that first crime is punished. Or else we'd all be animals."¹

I. OVERVIEW

Is it possible that the perpetrators of an atrocity so heinous it was code-named "Spare No Living Thing" could not be brought to justice? The Government of Sierra Leone said no! On June 12, 2000, the President of Sierra Leone sent a letter to the United Nations Secretary General requesting assistance in establishing a special court to try those responsible for the heinous crimes perpetrated against his people and the country. The Special Court for Sierra Leone (the "Special Court") was established on January 16, 2002, when the United Nations and the Government of Sierra Leone agreed to a hybrid structure, or joint effort, for prosecuting those most responsible for the murders, rapes, mutilations, looting and other crimes against humanity that have occurred during the civil war in Sierra Leone.

The Special Court is currently scheduled to open on June 30, 2003.² The hybrid Special Court, the first of its kind, should be the model for pursuing war criminals in countries where the local courts and or governments are unable to do so. Part II of this paper will provide a brief background on the country of Sierra Leone and provide limited examples of the atrocities that occurred during war. Part III will address the numerous attempts at peace and the failure of those attempts. Part IV will provide background information on the establishment of the Special Court, its mandate, and the offenses it will cover. Benefits and detriments of the statutory structure of the Special Court will be outlined. Additionally, there will be some comparisons to the Yugoslavia and Rwanda tribunals, as well as the International Criminal Court ("ICC"). Part V will discuss the benefits of the hybrid system as an institution and why it is an appropriate model for future tribunals. Part VI will address the pitfalls in the hybrid model as an institution and ways to overcome them. The historical background and attempts at peace outlined in Parts II and III created an environment that compelled the government of Sierra Leone to seek assistance from the international community. The Special Court, outlined in Part IV, is a direct result of that request for assistance. While the Special Court is not without its defects, they are clearly outweighed by the benefits of the hybrid system. As such, hybrid courts, like the Special Court, should be a model for future international criminal tribunals.

1. Joyce Carol Oates, *Norman and the Killer*, in JOYCE CAROL OATES, UPON THE SWEEPING FLOOD AND OTHER STORIES, 144-45 (1966).

2. *Sierra Leone: "Special Court is Threat to Peace" – Ex Combatants*, AFRICA NEWS, Nov. 22, 2002.

II. BACKGROUND

A. *History/Country Issues*

In 1652, the first slaves in North America were brought from what would become the Republic of Sierra Leone to the islands off the southern coast of the United States.³ Ironically, Sierra Leone was established as a settlement for freed slaves by Granville Sharpe in 1772, but was later proclaimed a crown colony of Great Britain in 1808.⁴ On April 27, 1961, Sierra Leone became an independent state, although it retained the Queen of England as the constitutional Head of State until April 19, 1971.⁵ On September 27, 1961, Sierra Leone became a member of the United Nations.⁶

In 1967, an army coup ousted the previously elected government and the country came under military rule until 1992.⁷ At this time, Valentine E.M. Strasser was installed as head of state by the Revolutionary United Front ("RUF").⁸ He held office until January of 1996 when he was "ousted by a military coup led by his defense minister, Brigadier Julius Maada Bio."⁹ General elections followed and Ahmad Tejan Kabbah was elected President in February 1996.¹⁰ However, civil war once again erupted in 1997. Kabbah was forced to flee in May 1997, but he was returned to power in March 1998 after intervention by ECOMOG, the Economic Community of Western African States Monitoring Group.¹¹

On May 14, 2002, the people of Sierra Leone held peaceful elections, in which incumbent President Ahmed Tejan Kabbah, of the Sierra Leone People's

3. Background Note: Sierra Leone U.S. Department of State website (January 2002), at <http://www.state.gov/r/pa/ei/bgn/5475.htm> (last visited Oct. 8, 2003).

4. BANKOLE THOMPSON, *THE CONSTITUTIONAL HISTORY AND LAW OF SIERRA LEONE (1961-1995)* 1 (1997).

5. *Id.* at 7-8.

6. List of Member States, United Nations, <http://www.un.org/Overview/unmember.html> (last visited Sept. 28, 2003).

7. DAVID SCHWEIGMAN, *THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE* 143 (2001).

8. *Id.*

9. *Timeline: Sierra Leone*, BBC NEWS, at <http://news.bbc.co.uk/1/hi/world/africa/1065898.stm> (last updated Aug. 6, 2003).

10. *Id.*

11. *Id.*

Party was elected for a second five year term.¹² While numerous parties were represented, the RUF's leader Foday Sankoh, who is currently being held to face trial in front of the Special Court, was prevented from running for the post due to a technicality; he had not registered to vote.¹³

Today, Sierra Leone has a population of approximately five million people.¹⁴ The life expectancy at birth is 36 years for men and 39 years for women, with an infant mortality rate of 170 per 1,000 births.¹⁵ In its 2002 Human Development Report, the United Nations Development Programme ranked Sierra Leone 173rd (lowest) in human development.¹⁶ It is officially the poorest country in the world.

B. *The Insurrection*

It is estimated that between 100,000 and 200,000 people (2-4% of the population) lost their lives during the war.¹⁷ An additional 100,000 or more were mutilated.¹⁸ Moreover, countless persons were displaced by the war.¹⁹ There is no single cause for the 10 year war in Sierra Leone, which began on March 23, 1991. The conflict started as a rebel incursion at Sierra Leone's border with Liberia.²⁰ The RUF claimed responsibility for the uprising, declaring it was fighting against the corrupt middle-class in the capital, Freetown.²¹ Additional contributing causes include corruption, monopolization of power, and unequal distribution of wealth. The prominent human rights group, Human Rights Watch stated, the "[d]eep-rooted issues that gave rise to the war [include]

12. *The Jury Is Still Out: A Human Rights Watch Briefing Paper on Sierra Leone, July 11, 2002*, <http://www.hrw.org/backgrounder/africa/sl-bck0711.pdf> (last visited Oct. 9, 2003) [hereinafter *The Jury Is Still Out*].

13. Declan Walsh, *The Vote For Hope in a Country that Once had No Future*, THE INDEPENDENT (LONDON), May 15, 2002.

14. *Sierra Leone*, FINANCIAL TIMES INFORMATION, June 14, 2002.

15. UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, WORLD STATISTICS POCKETBOOK 170 (2000).

16. SAKIKO FUKUDA-PARR, ET AL, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD 41 (Stephanie Flanders & Bruce Ross-Larson eds., Oxford University Press, for United Nations Development Programme 2002), available at <http://hdr.undp.org/reports/global/2002/en/pdf/complete.pdf> (last visited Oct. 8, 2003).

17. *Ex-S. Leone Rebels Demand Sankoh's Unconditional Release*, AGENCE FRANCE PRESSE, Sept. 17, 2002 [hereinafter *Ex-S. Leone Rebels*].

18. *Children on the Frontline*, THE IRISH TIMES, Mar. 2, 2002 [hereinafter *Children*].

19. Human Rights Watch estimates hundreds of thousands of civilians were displaced during the war. See *The Jury is Still Out*, *supra* note 12, at 1.

20. There have been reliable reports that the war, or parts thereof, was supported by Charles Taylor of the National Patriotic Front of Liberia, now President of Liberia. Liberia's involvement in the war is outside the scope of this paper, but may help to understand how the RUF and other factions were able to sustain the insurrection for prolonged periods.

21. *Children*, *supra* note 18.

a culture of impunity, endemic corruption, weak rule of law, crushing poverty, and the inequitable distribution of the country's vast natural resources"²²

The leader of the RUF was an ex-Corporal in the Sierra Leone Army ("SLA"), Foday Sankoh.²³ The goal of the RUF was to overthrow the All People's Congress Party Government, headed by Major-General Joseph Saidu Momoh. While claiming they were liberating the people of Sierra Leone from Government corruption, the RUF began a reign of terror over them. No area of the country was spared.

The rebels became notorious for hacking off limbs, predominantly of women and children. They conscripted children, often through coercion and drugs, to aid in the performance of atrocities. For instance, Musa Daboh was abducted when he was 13. The RUF made cuts in his leg and rubbed cocaine in before sending him into the front line. "Daboh says they were on drugs when they attacked the village [his home town Kabala], going on a firing spree, as humans 'were like chickens.'"²⁴

Rape and murder were widespread. "'They stripped me naked and raped me in front of my husband . . . They told him to laugh in front of the children or he would be shot.' [said Baindu] It didn't matter. They shot him anyway, and their three children."²⁵

There was mass destruction of property and forced labor. Sahr Gbamanja saw the RUF burn his 13-year-old brother to death in their house. "The rebels, he said, tied people together in gangs and forced them to work or carry food and ammunition. Those who refused or were too weak to work had their hands cut off or were butchered."²⁶

These are just a few examples. A United Nations supported forensic team has uncovered more than 75 mass graves, which are expected to be exhumed after the final mapping of the sites takes place.²⁷ Additional information regarding how the bodies were killed should be available after the bodies are exhumed. The exhumation may uncover atrocities that to date are unknown.

22. *The Jury is Still Out*, *supra* note 12, at 1.

23. UNITED NATIONS INSTITUTE FOR DISARMAMENT RESEARCH, BOUND TO COOPERATE: CONFLICT, PEACE AND PEOPLE IN SIERRA LEONE 15 (Anatole Ayissi & Robin-Edward Poulton eds., 2000) [hereinafter BOUND TO COOPERATE].

24. *Children*, *supra* note 18.

25. Declan Walsh, *Picking up the Pieces*, THE IRISH TIMES, Feb. 19, 2002.

26. Richard Dowden, *Justice goes on Trial in Sierra Leone*, THE GUARDIAN (LONDON), Oct. 3, 2002, <http://www.guardian.co.uk/international/story/0,3604,803280,00.html> (last visited Sept. 28, 2003).

27. *UN Team Identifies 75 Mass Graves in Sierra Leone*, PANAFRICAN NEWS AGENCY DAILY NEWSWIRE, June 26, 2002.

III. ATTEMPTS AT PEACE

A. Abidjan Peace Agreement

The Peace Agreement between the Government of the Republic of Sierra Leone and the RUF, signed at Abidjan on 30 November 1996,²⁸ was the first attempt to end the internal conflict in Sierra Leone. This agreement, among other things, called for the immediate cessation of the armed conflict between the parties, the disarmament and demobilization of the insurgents, the restructuring of the military to integrate members of the RUF into Sierra Leone's armed forces, the release of prisoners of war, the transformation of the RUF into a political party, and Article 14 of the agreement provided a blanket amnesty for members of the RUF, stating:

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] in respect of anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this Agreement.²⁹

Although signed by President Kabbah of Sierra Leone and RUF leader, Corporal Foday Sankoh, with the Government of Côte d'Ivoire, the United Nations, the Organization of African Unity and the Commonwealth Organization acting as moral guarantors, peace in Sierra Leone was not lasting. Despite the accord, attacks on the civilian population continued. The Government blamed the RUF for the attacks and the RUF blamed the Government civil defense forces, also known as the Kamajors.³⁰

As a result of the continued conflict, on May 25, 1997, a coup led by Major Johnny Paul Koroma of the Armed Forces Revolutionary Council ("AFRC") ousted the Kabbah government. Rebels from the RUF joined forces with the AFRC junta, which also consisted of members of the SLA.³¹ Although the AFRC claimed the merging of the antagonistic forces of the RUF and the SLA meant peace for Sierra Leone, the AFRC did not have the support of the local

28. Letter Dated 11 December 1996 from the Permanent Representative of Sierra Leone to the United Nations Addressed to the Secretary-General, SCOR, 51st Sess., Annex: Peace Agreement Between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, Signed at Abidjan on Nov. 30, 1996 U.N. Doc. No. S/1996/1034 (1996).

29. See *id.* at art. XIV, at 6.

30. See BOUND TO COOPERATE, *supra* note 23, at 39.

31. UN Food Agency Warns Shortages in Sierra Leone, AGENCE FRANCE PRESSE, Sept. 17, 1997.

or international communities. As such, the AFRC resorted to terror tactics in order to impose its will.³²

B. Economic Community of West African States (ECOWAS) Peace Plan

The Communiqué issued at Conakry on 23 October 1997, at the conclusion of the meeting between the Ministers of Foreign Affairs of the Committee of Five on Sierra Leone of the Economic Community of West African States and the delegation representing Koromah,³³ laid out a six point peace plan, to be implemented over a six month period. First, it called for the immediate cessation of hostilities throughout Sierra Leone. Second, it called for the disarmament, demobilization and reintegration of combatants supervised by ECOMOG. Third, it called for the monitoring of humanitarian assistance by ECOMOG and the United Nations military observers. Fourth, it called for the return of refugees and displaced persons, with the assistance of the United Nations High Commissioner of Refugees. Fifth, it called for the Kabbah government to be restored as of April 22, 1998, with a procedure for power sharing. Sixth, it called for the reintegration of combatants through job training or educational scholarships. In addition to these points, the Plan included that “unconditional immunities and guarantees from prosecution be extended to all involved in the events of 25 May 1997 with effect from 22 April 1998.”³⁴

This agreement was not implemented due to lack of political will on both sides.³⁵ Although the ECOMOG forces were successful in reinstating President Kabbah, the result was the AFRC retreated into the bush and broke up into disorganized bands of RUF and SLA troops.³⁶ In early January 1999, a combined force of rebel soldiers invaded Freetown. A massive attack on the city, which included the killing of more than two hundred police personnel and their families took place.³⁷ The first three weeks of this battle are considered the most “intensified, systematic and widespread violations of human rights and international humanitarian law against the civilian population.”³⁸

32. See BOUND TO COOPERATE, *supra* note 23, at 164.

33. Letter Dated 28 October 1997 from the Permanent Representative of Nigeria to the United Nations Addressed to the Presidents of the Security Council, U.N. SCOR, 53rd Sess., Annex 2: Economic Community of West African States Six-month Peace Plan for Sierra Leone (Oct. 23, 1997-22 Apr. 1998), U.N. Doc. No. S/1997/824 (1997), available at http://www.usip.org/library/pa/sl/sierra_leone_09231997.html (last visited Oct. 8, 2003).

34. See *id.* para. 8.

35. See BOUND TO COOPERATE, *supra* note 23, at 41.

36. *Id.*

37. See *id.* at 75.

38. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, U.N. SCOR, 55th Sess., para. 26, U.N. Doc S /2000/915 (2000), available at <http://www.hri.ca/fortherecord2000/documentation/security/s-2000-915.htm> (last visited Oct. 8, 2003) [hereinafter *Report*].

The January 1999 mission was code-named “Spare No Living Thing”, and consisted of the murder, rape and mutilation of thousands of civilians.³⁹ Other missions included “Operation Burn House” which was a series of arson attacks and “Operation Pay Yourself” which was a looting mission.⁴⁰

C. Lome Peace Agreement

On July 7, 1999, the Government of Sierra Leone and the RUF entered into another Peace Agreement, the Lome Peace Agreement.⁴¹ The Lome Peace Agreement was much broader in scope than the previous agreements. It addressed such issues as: an immediate cease-fire and monitoring thereof,⁴² incorporation of the RUF into the government and its transformation into a political party, the establishment of various commissions to ensure peace and humanitarian assistance,⁴³ the establishment of a formula for post-conflict peace and security, the transformation of ECOMOG and UNOMSIL’s⁴⁴ mandates, the disarming, demobilization and reintegration of all combatants, the establishment of a Truth and Reconciliation Commission, and the request for international involvement. As with the prior agreements, Article IX of the Lome Peace Agreement contains a broad amnesty, stating:

1. . . . the Government of Sierra Leone shall take appropriate steps to grant Corporal Foday Sankoh *absolute and free pardon*.
2. . . . also grant *absolute and free pardon* and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives . . .
3. To consolidate the peace and promote the cause of national reconciliation . . . shall ensure that no official or judicial action is taken against any member of the [RUF], ex-AFRC, ex-[Sierra Leone Army]

39. Danna Harman, *Sierra Leone: The Path from Pariah to Peace*, THE CHRISTIAN SCIENCE MONITOR, Sept. 18, 2002.

40. Caroline Hawley, *A Country Torn by Conflict*, BBC NEWS, Jan. 12, 1999, http://news.bbc.co.uk/1/hi/special_report/1999/01/99/sierra_leone/251377.stm (last visited Sept. 20, 2003).

41. Peace Agreement, July 7, 1999, Government of the Republic of Sierra Leone-Revolutionary United Front of Sierra Leone (1999), http://www.usip.org/library/pa/sl/sierra_leone_07071999.html (last visited Oct. 11, 2003) [hereinafter Lome Peace Agreement].

42. *Id.* A separate Cease-fire Agreement was signed by the parties on May 18, 1999.

43. This included a Commission for the Management of Strategic Resources, National Reconstruction and Development, which is to control the exploitation of natural resources, including diamonds. *Id.* at art. VII, para. 1. Corporal Foday Sankoh was offered Chairmanship of the Board of this Commission. *Id.* at art. V, para. 2. This is ironic since much of the fighting during the decade of war was perpetrated by Corporal Sankoh ostensibly in part because of diamonds.

44. The United Nations Observer Mission in Sierra Leone (UNOMSIL) was later replaced by the United Nations Mission in Sierra Leone (UNAMSIL).

or [civil defense forces] in respect of anything done by them in pursuit of their objectives . . . since March 1991 . . .⁴⁵

Like before, peace was fleeting as general incursions continued to take place, including an attack on ECOMOG troops, the abduction of UN forces, and 11 British soldiers being taken hostage.⁴⁶ Additionally, in May 2000, Corporal Sankoh ordered his guards to open fire on protestors outside of his house: Twenty people were killed.⁴⁷

D. Ceasefire Agreement dated November 10, 2000

The most recent cease-fire agreement⁴⁸ between the Government of Sierra Leone and the RUF was signed on November 10, 2000.⁴⁹ This agreement called for the halting of hostilities on that date. It also reaffirmed the parties' commitment to the Lome Peace Agreement as the framework for establishing peace in the country.

The war was officially declared over on January 14, 2002, when approximately 45,000 rebels surrendered.⁵⁰ Weapons from these fighters were symbolically destroyed over the prior six-month period. Significantly, the Statute for the Special Court was adopted two days later, on January 16, 2002. No reports of rebel incursions have occurred since this time. With the support of the UN, the Kabbah government could declare the war over with conviction knowing it had the backing of the international community.

IV. SPECIAL COURT

In response to President Kabbah's request of June 12, 2000, Resolution 1315 (2000) was adopted by the Security Council on August 14, 2000.⁵¹ The resolution requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create a special court (the "Special Court"). Pursuant to that resolution, the Secretary General submitted a report to the Security Council (the "Report").⁵² The Report outlined the general premise for

45. Lome Peace Agreement, *supra* note 41, at art. IX, paras. 1-3 (emphasis added).

46. *See Timeline: Sierra Leone*, *supra* note 9.

47. *Ex-S. Leone Rebels*, *supra* note 17.

48. Ceasefire Agreement, Nov. 10, 2000, Government of Sierra Leone-Revolutionary United Front of Sierra Leone (2000), <http://www.sierra-leone.org/ceasefire1100.html> (last visited Oct. 8, 2003) [hereinafter Ceasefire Agreement].

49. It should be noted that the AFRC is not a party to this ceasefire agreement. *Id.* The last peace agreement signed by the AFRC was the ECOWAS Peace Plan.

50. Michael Chege, *Sierra Leone: The State that Came Back from the Dead*, 25 WASH Q. 147 (Summer 2002).

51. S.C. Res. 1315, U.N. SCOR, 55th Sess. 4186th mtg., U.N. Doc. S/RES/1315 (2000).

52. *See Report*, *supra* note 38.

the statute of the Special Court with commentary from the Secretary General regarding the workings of the Special Court.

The agreement between the United Nations and the Government of Sierra Leone creating the Special Court was adopted on January 16, 2002.⁵³ The Statute of the Special Court for Sierra Leone (the "Statute") establishes the guidelines under which the Special Court will operate.

Significantly, the Special Court is a treaty-based court. It represents the first time that a court has been established between the UN and a local government. The previously established ad hoc tribunals, the International Criminal Tribunal for the Former Yugoslavia ("ITCY") and the International Criminal Tribunal for Rwanda ("ICTR"), were established under Chapter VII of the UN Security Council. The International Criminal Court ("ICC") is also a treaty-based court.⁵⁴

The following sections will discuss the Statute, and where significant note the statute based differences between the Special Court and the ITCY, ITCR, and the ICC.

A. Temporal Jurisdiction

The Special Court's temporal jurisdiction is limited to violations that were committed in Sierra Leone after November 30, 1996. This date was determined after careful consideration of three possible dates by the Secretary General: November 30, 1996, May 25, 1997, and January 6, 1999.⁵⁵ The following issues were taken into consideration: (a) not overburdening the Special Court or the prosecutor; (b) arriving at a date that corresponds with a new phase in the conflict, but is not politically motivated; and (c) ensuring the date encompasses the most serious crimes.⁵⁶ It was determined the March 23, 1991 date would create a heavy burden on the Special Court, and was not considered by the Secretary General.⁵⁷ The May 25, 1997 date was thought to have political connotations that may imply that the prosecutions were aimed at punishing the coup d'etat. To ensure the prosecutions encompassed the many crimes that

53. Letter Dated 6 March 2002 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, 56th Sess., Attachment: Statute of the Special Court for Sierra Leone, at 29, U.N. Doc. S/2002/246 (2002), available at <http://www.specialcourt.org/documents/Statute.html> (last visited Oct. 8, 2003) [hereinafter Statute].

54. The ICC entered into force on July 2, 2002 and is open to ratification by all States.

55. See Report, *supra* note 38, para. 26.

56. See *id.* para. 25.

57. As the Special Court only intends to try a limited number of cases and only try those "who bear the greatest responsibility", this date appears to be the most appropriate. *Id.* ¶ 1. There is no reason why the key perpetrators of violations should not be held accountable for crimes committed from the period of May 23, 1991 to November 30, 1996, particularly, given the Secretary General comments regarding amnesty, which are outlined later in this paper. See *id.* para. 22-4.

were committed in the rural areas and countryside, the January 9, 1999 date was also not deemed appropriate.

The November 30, 1996 date represents a significant limitation, as it effectively absolves the crimes that occurred from the beginning of the war, March 23, 1991. Such limitation risks undermining the objective of the Special Court “. . . to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law . . .”⁵⁸ Admittedly, the worst atrocities of the war took place in January 1999, however, there are reports of extra-judicial executions, deliberate and arbitrary killing, torture, rape and mutilation dating back to the beginning of the war.⁵⁹ The prosecutor could use his discretion to meet all of the concerns of the Secretary-General, without denying justice to victims during the early part of the war.

B. Personal Jurisdiction

Pursuant to Article 7 of the Statute, the Special Court has personal jurisdiction only over individuals 15 years or older at the time the alleged crime was committed.

As with temporal jurisdiction, the Report outlines several options for personal jurisdiction: (a) a minimum age of 18 for prosecution; (b) a minimum age of 18 for prosecution, with children between the ages of 15 and 18 recounting their stories to a Truth and Reconciliation Commission or similar mechanism; or (c) have those 15 to 18 go through the judicial process but without punishment. The Government of Sierra Leone strongly urged judicial accountability for child combatants responsible for crimes falling within the Special Court’s jurisdiction.⁶⁰ There were equal concerns, particularly from non-governmental organizations, that judicial accountability might hinder the rehabilitation of the child combatants. The Report reviewed internationally recognized standards for juvenile justice, in particular the Convention on the Rights of the Child, and gave weight to the moral-educational message that would be given to both the present and future generations of the children of Sierra Leone. It was determined that personal jurisdiction should include persons between the ages of 15 and 18, but that they would not be subject to incarceration.⁶¹

The Special Court is authorized to order any of the following for children under the age of 18 found guilty of crimes outlined in the Statute: “care

58. See Statute, *supra* note 53, at art. I, para. 1, at 29.

59. The Preeminent human rights organizations Amnesty International and Human Rights Watch publish reports for Sierra Leone which are available online at www.amnesty.org and www.hrw.org, respectively.

60. See Report, *supra* note 38, para. 35.

61. See *id.* para. 32-38.

guidance and supervision orders, community service orders, counseling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.”⁶² However, the Prosecutor for the Special Court has stated that he will not prosecute children over the age of fifteen because they do not bear the “greatest responsibility.”⁶³

As with temporal jurisdiction, this is a significant limitation on the Special Court’s mandate, as there were a plethora of child combatants involved in the conflict. However, given the circumstances and special needs of child combatants, this limitation is legitimate especially since the Statute provides for rehabilitation of the children involved in the war. “[C]hild combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn.”⁶⁴ Children, as young as 5, were combatants in the conflict. These children were coerced to fight for fear they would be killed. A 12 year old child combatant said, “[w]hen I was killing, I felt like it wasn’t me doing these things. I had to because the rebels threatened to kill me.”⁶⁵ These child combatants represent the future of Sierra Leone. Limiting personal jurisdiction in this situation, in line with international standards, and providing rehabilitation, is appropriate. A benefit of the hybrid court model is that these types of situations can be taken into account because jurisdiction is not bound by a global mandate.

C. Primacy over National Courts

Article 8 of the Statute states, “[t]he Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.”⁶⁶ However, the Special Court is given primacy over the national courts and therefore has the power to request that a national court of Sierra Leone defer proceedings in a particular case and transfer a defendant to the Special Court for prosecution. For Example, on July 10, 2002, the prosecution requested the transfer of Foday Sankoh, who was being held for violations of domestic laws.⁶⁷

62. See Statute, *supra* note 53, at art. VII, para. 2, at 33.

63. *Sierra Leone: Special Prosecutor Meets Local Chiefs*, AFRICA NEWS, Nov. 22, 2002.

64. See Report, *supra* note 38, para. 32.

65. AMNESTY INTERNATIONAL, SIERRA LEONE CHILDHOOD – A CASUALTY OF CONFLICT 4 (2002), [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR510692000ENGLISH/\\$File/AFR5106900.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR510692000ENGLISH/$File/AFR5106900.pdf) (last visited Sept. 20, 2003).

66. See Statute, *supra* note 53, at art. I, para. 1, at 29.

67. *Ex-S. Leone Rebels*, *supra* note 17.

Concurrent jurisdiction is also found in the statutes for the ICTY⁶⁸ and ICTR,⁶⁹ which both have primacy over all national courts. However, because they were established under the Chapter VII powers of the Security Council, the ICTY and ICTR also have the power to assert primacy over the national courts of third States and to order the surrender of an accused within their territory. This power has not been extended to the Special Court. That factor should not impede the Special Court. If a person located outside of Sierra Leone is indicted by the Special Court, an international arrest warrant could be issued by the Special Court. Given the stature of the Special Court, it is presumed that most countries would comply. If a country did not comply, or if the person being sought is the head of state, as may be the case with Charles Taylor from Liberia,⁷⁰ the Special Court could request the UN Security Council intervene on its behalf. In fact, if a warrant cannot be executed locally, or a country refuses to execute a warrant, the Special Court has the authority to go directly to the Security Council for intervention.⁷¹

In contrast, the ICC statute provides that national courts will have primacy over the international tribunal, unless the State is unwilling or unable to prosecute the crimes.⁷² If the State were unable to adequately prosecute an accused, the ICC can assert its primacy over the national courts. Like the Special Court, the ICC is a treaty based body, and as such can only exercise jurisdiction in accordance with its statute.⁷³ Presumably, if the accused fell outside the jurisdiction of the ICC, the same procedure outlined above for requesting the aid of

68. See Amended Statute of the International Tribunal for Yugoslavia, (as amended May 25, 1993), art. IX, <http://www.un.org/icty/basic/statut/stat2000.htm> (last visited Oct. 15, 2003) [hereinafter ICTY Statute].

69. See Statute of the International Tribunal for Rwanda Article VIII, <http://www.ictt.org/wwwroot/ENGLISH/basicdocs/statute.html#statute> (last visited Sept. 20, 2003) [hereinafter ICTR Statute].

70. Taylor reportedly admitted to his support for the RUF in a November 12, 2002 Washington Post interview. See *Liberia: The Liberian Government Finally Admits Support to RUF*, AFRICA NEWS, Nov. 27, 2002.

71. Charles Cobb Jr., *Sierra Leone's Special Court: Will It Hinder or Help?*, AFRICA NEWS, Nov. 21, 2002.

72. See *Rome Statute of the International Criminal Court*, GAOR, 43rd Sess., art. XVII, para. 1, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999, 1012 (1998) [hereinafter ICC Statute].

. . . the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless that State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; . . .

Id.

73. Article 12 of the ICC Statute provides for court to have jurisdiction if (a) the State where accused committed the crime is a party to the statute; (b) the accused is a national of a State that is a party to the statute, or (c) if the UN Security Council refers a matter. See *id.* at art. XII, para. 2, at 1010.

the UN Security Council, would be used if a country was unable or unwilling to comply with an arrest warrant.

D. Crimes

Articles 2 through 5 of the Statute outline the crimes that the Special Court has the jurisdiction to prosecute. These include: (i) Crimes Against Humanity,⁷⁴ (ii) Violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977,⁷⁵ (iii) Other serious violations of international humanitarian law,⁷⁶ and (iv) Specific crimes under Sierra Leonean Law.⁷⁷

74. Crimes against humanity are defined thusly:

[t]he Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

- a. Murder;
- b. Extermination;
- c. Enslavement;
- d. Deportation;
- e. Imprisonment;
- f. Torture;
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
- h. Persecution on political, racial ethnic or religious grounds;
- i. Other inhumane acts.

See Statute, supra note 53, at art. II, at 30.

75. Additional Protocol II thereto of 8 June 1977 provides that

[t]hese violations shall include:

- a. Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- b. Collective punishments;
- c. Taking of hostages;
- d. Acts of terrorism;
- e. Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- f. Pillage;
- g. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- h. Threats to commit any of the foregoing acts.

See Statute, supra note 53, at 30-31.

76. Article IV provides that

[t]he Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

- a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities:

It was determined that the crime of genocide could not be included under the jurisdiction of the Special Court, as it is in the other criminal tribunals. There was no evidence that the “massive, large-scale killing in Sierra Leone was perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group.”⁷⁸

Chief Investigator, Alan White, has placed a special emphasis on gender related crimes stating:

And let me mention one of the things that makes this special tribunal unique. Gender crimes will be emphasized as a war crime and will be pursued from the onset. It will not be an afterthought. We are making gender crimes a top priority of our investigation and prosecution because rape, and sexual assault used as a tool of war needs to be prosecuted.⁷⁹

Although rape falls under the mandates of the ICTY and ICTR and has been included in prosecutions by these tribunals, this is the first time such a forceful statement has been made regarding the intent to specifically address the issue of gender crimes on a large scale basis.

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- b. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - c. Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

See Statute, *supra* note 53, at art. IV, at 31.

77. Article V includes

the following crimes under Sierra Leonean law:

- a. Offences relating to the abuse of girls under the prevention of Cruelty to Children Act, 1926 (Cap.31):
 - i. Abusing a girl under 13 years of age, contrary to section 6;
 - ii. Abusing a girl between 13 and 14 years of age, contrary to section 7;
 - iii. Abduction of a girl for immoral purposes, contrary to section 12.
- b. Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:
 - i. Setting fire to dwelling - houses, any person being therein, contrary to section 2;
 - ii. Setting fire to public buildings, contrary to sections 5 and 6;
 - iii. Setting fire to other buildings, contrary to section 6.

See Statute, *supra* note 53, at art. V, at 31-32.

78. See Report, *supra* note 38, para. 13.

79. Cobb, *supra* note 71.

E. Amnesty

There appear to be conflicting opinions regarding the amnesty provision in the Lome Peace Agreement. If the provision is effective, no crimes prior to July 7, 1999 could be prosecuted. However, the UN Secretary-General has stated:

While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.⁸⁰

Moreover, the UN representative was instructed to append a disclaimer to his signature to the Lome Peace Agreement stating that, "the amnesty provision contained in article IX of the Agreement . . . shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."⁸¹

As the UN representative was not a party to the Lome Peace Agreement, it is unclear what legal status, if any, his disclaimer would have. Additionally, since the RUF breached the Lome Peace Agreement, one may consider the amnesty clause no longer binding. The issue of whether customary international law has supplanted the amnesty provision in certain areas, while of significant concern, is beyond the scope of this paper. The fact is the Special Court will be trying perpetrators, if their crimes occurred after November 30, 1996. Article 10 of the Statute states that any "amnesty granted to any person falling within the jurisdiction of the Special Court in respect of crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."⁸²

V. BENEFITS OF THE HYBRID SYSTEM

A. Location of the Court where the Atrocities took Place

The Special Court will be located in Sierra Leone, the country where the crimes took place; in contrast to the ICTY and ICTR which are located in The Hague, Netherlands⁸³ and Arusha, Tanzania, respectively.

80. See Report, *supra* note 38, para. 22.

81. See *id.* para. 23.

82. See Statute, *supra* note 53, at art. X, at 34.

83. The ICC will also sit in The Hague.

Holding the court in Sierra Leone will reap immeasurable benefits. First, it will enable the Special Court greater and timelier access to witnesses and evidence. Because the Special Court will be based in Freetown, the prosecutor will have direct access to many of the victims and alleged perpetrators. It will also be easier to visit sites where atrocities took place for hands-on fact-finding and evidence gathering without the need for lengthy delays in the trials. Victims may also feel more comfortable testifying in their own country under familiar surroundings.

Second, it will help to strengthen the legal system in Sierra Leone. Based on the British system, the legal system in Sierra Leone is comprised of a Supreme Court, an Appeals Court and a High Court.⁸⁴ Pierre Bourin, Justice of the Court, stated, “[t]he main objective of the court is to reestablish the rule of law in this country and then show to the people of Sierra Leone that justice can be done in this country.”⁸⁵ The judicial system has been decimated by 10 years of war.⁸⁶ As the Government will have significant involvement in the establishment and administration of the Special Court, the experience will set concrete examples of how the courts in Sierra Leone should be run in the future. It will also help to cement the rule of law, including that of international law, into the judiciary. Robin Vincent, Registrar of the Special Court noted:

. . . it will become not only a Special Court for the period that it is here, but beyond that we see it as being part of a legacy that hopefully the international community will leave behind in Freetown. It is important that we make sure that the structure is built properly . . . and that it would stand the test of time.⁸⁷

While Mr. Vincent was primarily speaking about the physical structure of the Special Court, his words are equally applicable to the imprint the Special Court should leave on the judicial structure of Sierra Leone, by laying the foundation for an effective system of criminal justice.

Third, the local population will have greater access to the proceedings of the Special Court if they are local. Local journalist will be able to provide

84. *Sierra Leone: Country Profile*, Africa Review World of Information, Quest Economic Database, Sept. 26, 2002, http://us.politinfo.com/Inforation/Country_Profiles/country_profile_177.html (last visited Sept. 20, 2003).

85. *The National: Recovery* (CBC television broadcast, Dec. 26, 2002).

86. Although certainly other firms may exist, Martindale Hubble reported one law firm, Basma & Macaulay, in Sierra Leone, with four lawyers. The author met one of the lawyers who was residing in the United States, leaving three lawyers at that firm. For more information, see <http://www.martindale.com> (last visited Sept. 20, 2003, at which time the site listed two firms). Moreover, Human Rights Watch reported that only 10 judges remain in the country. See <http://www.hrw.org> (last visited Oct. 11, 2003).

87. Press Briefing, Patrick Coker, Acting UNAMSIL Spokesperson, (Near Verbatim) (Oct. 11, 2002), available at <http://www.un.org/Depts/dpko/unamsil/DB/DB111002.pdf> (last visited Oct. 11, 2003).

updates in native languages,⁸⁸ in periodicals read by the local population. This is not only important for the successes of the Special Court, but also for the failures. The entire population of Sierra Leone is a victim of the war. If the Special Court is not assisting in the healing of the nation, the people of Sierra Leone are present to “judge” the proceedings and ensure the Special Court does not deviate from its mandate or get bogged down in political issues or mismanagement. This can be done most effectively when the victims are in the proximity of the court. The UN Secretary-General stated:

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 educative 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.⁸⁹

Unfortunately, at this time there is no clear plan for keeping the people outside of Freetown informed. Robin Vincent, Registrar of the Special Court, has suggested using a network of NGOs, district coordinators, Paramount chiefs and leaflet/fact sheets to tell people about the Special Court.⁹⁰ Broadcasting the trials over the radio has also been suggested. UNAMSIL was successful using traditional ways of communication to inform the local people about its mission, including: “town criers, comedians, theatre groups, women mobilisers, sports, and drama.”⁹¹ These methods certainly could be used for communicating the trials to the local people. Regardless of the method used, having the Special Court in Sierra Leone will keep the community in touch with its progress, as well as any failures, and will allow the victims personal access to justice.

Lastly, since the Special Court will only be able to prosecute a small number of the perpetrators, those “who bear the greatest responsibility for serious violations”,⁹² having the Special Court in Sierra Leone should encourage the local population to seek redress from the national courts for crimes not addressed by the Special Court.⁹³ Watching justice occur at the Special Court

88. While English is the official language of Sierra Leone, Bassa, Bom, Bullom So, Fuuta Jalon, Gola, Kisi (alternatively, Kissi), Klao, Kono, Krim, Krio, Kuranko, Limba, Loko, Mandingo, Mende, Sherbro, Susu, Themne, Vai and Yalunka are also spoken. See, Languages of Sierra Leone, Ethnologue.com, www.ethnologue.com/show_country.asp?name=Sierra+Leone (last visited Oct. 8, 2003).

89. See Report, *supra* note 38, para. 7.

90. See generally *id.* para. 48.

91. *Sierra Leone: I Consider My New Appointment as a Challenge*, (interview with Patrick Coker, acting UNAMSIL spokesperson), CONCORD TIMES, Nov. 11, 2002.

92. See Statute, *supra* note 53, at art. I, para. 1, at 29.

93. As previously noted, it is unclear what effect the amnesty provision in the Lome Peace Agreement will have on the ability to prosecute those accused of crimes prior to July 7, 1999. However,

will serve as an impetus for the people, the government and the judiciary to continue the “healing” of the country after the Special Courts mandate expires.

The people of Sierra Leone need justice for the 10 years of atrocities that devastated their country. The most effective way for the people to reconcile with the past and start building a future is to see justice being done. Having the Special Court located in a third country deprives the local communities - the victims—of being a part of the judicial process.

Yugoslavia’s tribunal is in the Hague. There is not a real sense of justice or feeling of justice by the victims because they don’t see it, unless you have the opportunity to go from the Yugoslavia area to the Hague. Same thing with Rwanda; the trials are in Arusha, Tanzania. It is not easy to get there. People don’t see it.⁹⁴

B. *Use of Domestic Criminal Law in Conjunction with International Law*

The Statute includes sexual crimes and certain crimes against property,⁹⁵ both of which were widespread during the conflict. Every war is fought differently. Therefore “cookie cutter” justice is not always the best answer. The common crimes in the ICC, ICTY and ICTR (crimes against humanity, genocide, and grave breaches of article 3 of the Geneva Convention) are sufficient as a starting point, but will not always be adequate to address all atrocities that occurred.

While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law.⁹⁶

As previously noted, genocide was not considered as a crime under the Statute due to the nature of the war. However, because mass abuses occurred to both children and property, it was deemed appropriate to expand from the “traditional” tribunal crimes to include these domestic crimes. Just because future atrocities do not fit neatly within the traditional mold of what constitutes a war crime, does not mean that the crimes should not be punished by tribunals. Access to domestic laws permits the Special Court to seek justice for all of the victims, regardless of the crime. Future hybrid courts would be able to use the

prosecution for crimes committed since that date, which are not heard by the Special Court, can be brought in the domestic courts.

94. Cobb, *supra* note 71 (quoting Alan White).

95. See Statute, *supra* note 53, at art. V., at 31-32.

96. See Report, *supra* note 38, para. 19.

relevant aspects of their domestic laws to ensure the prosecutions cover all atrocities that were committed during their particular conflict.

C. Regional Example

Sierra Leone is located in a hot bed of civil unrest. Liberia, Guinea, Burkina Faso and other countries in Western Africa have had tumultuous pasts. Obtaining sustained peace and the return to the rule of law in Sierra Leone would set an exceptional example for both the people and the governments of other West African nations. Equally important is the fact that the prosecution of key war criminals would send a clear message to rebels in neighboring areas that the international community will no longer permit impunity. While this is true for the ICTY and ICTR also, the message is not as visible when the trials take place hundreds or thousands of miles away. Moreover, there have been clear indications that rebel units have served in different regional militias. If these rebels see their commanders and comrades being prosecuted locally, they may hesitate before engaging in hostilities in a neighboring state.

D. Truth and Reconciliation Commission

Although not part of the Statute, the Lome Peace Agreement mandated the establishment of a Truth and Reconciliation Commission ("TRC"). The TRC working in conjunction with the Special Court will be instrumental in providing a forum for victims and perpetrators to heal the wounds of Sierra Leone. The Special Court will help end the culture of impunity and provide accountability for past abuses, while the TRC will create a historical record, to ensure that the mistakes of the past are not repeated. The Prosecutor for the Special Court, David Crane, has said that he would not use evidence adduced at the TRC for the indictment of alleged perpetrators of crimes.⁹⁷ This will encourage all parties to go before the TRC and tell their story without fear of reprisal, and preserve the cleansing and restorative aspects of the TRC. Although there is no amnesty if you come before the TRC, the pledge not to use evidence from the TRC appears to be analogous to "use immunity" under US law, where a witness' compelled testimony and its fruits cannot be used for criminal prosecution of the witness. If however, the witness can be indicted through information not related to the testimony that they were compelled to give, the prosecution can continue. This system will allow the mandates of both bodies to be met, while continuing to encourage the people to tell their stories.

Although the hybrid court system is effective without the TRC, the TRC is an important tangential body for the Special Court. Together these two

97. David Crane, *Sierra Leone; Special Court will not use TRC's Evidence*, CONCORD TIMES, Sept. 30, 2002.

institutions can address most of the judicial and rehabilitative needs of Sierra Leone, particularly given the number of child combatants previously discussed.

E. Hybrid Courts Working in Conjunction with the ICC

The ICC became a reality when the Rome Statute entered into force on July 1, 2002. Currently, 84 countries⁹⁸ have ratified the Rome Statute, including Sierra Leone.⁹⁹ This represents less than half of all nations and does not include three of the five permanent members of the UN Security Council or some countries in which significant human rights abuses and crimes against humanity have occurred in the past. While some countries are objecting to trials by an independent international tribunal, they may be more amenable to a joint initiative between the international and national courts, such as the Special Court. This will allow all war criminals to be held accountable for their crimes.

Article 3 of the ICC Statute provides for the court to be established in The Hague, but permits the court "to sit elsewhere, whenever it considers it desirable."¹⁰⁰ Since a hybrid court has already been established in Sierra Leone, the ICC may want to use this as a seat for prosecutions that take place in Western Africa. This would aid in maintaining peace and stability in Freetown and continue to reinforce the importance of the judiciary and in upholding the rule of law. It would also bring international prestige to Sierra Leone, which could boost its economy. Future hybrid courts could serve this same function in other regions.

As previously discussed, there are certain benefits to establishing a criminal tribunal in the nation where the atrocities occurred. Even if a country has ratified the ICC, there may be issues related to the particular conflict that took place that would warrant a separate in-country tribunal. This could either be a full tribunal within the country, or a smaller version where some crimes are

98. Ratifying countries include: Andorra, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Cambodia, Canada, Central African Republic, Colombia, Costa Rica, Croatia, Cyprus, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Ecuador, Estonia, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Honduras, Hungary, Iceland, Ireland, Italy, Jordan, Latvia, Lesotho, Liechtenstein, Luxembourg, Malawi, Mali, Marshall Islands, Mauritius, Mongolia, Namibia, Nauru, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Romania, Samoa, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Timor-Leste, Trinidad and Tobago, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Venezuela, Yugoslavia, and Zambia. See ICC Statute, *supra* note 72, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (last visited Sept. 23, 2003).

99. *Id.* at art. III, para. 3, at 1003.

100. See *id.* at art. III; see ICC Statute, *supra* note 72.

prosecuted within the country and some at the ICC. There appears to be no reason why the ICC could not establish a hybrid type tribunal in a country under Article 3. Allieu Ibrahim Kanu, the representative from Sierra Leone to the ICC Legal Committee stated, “[t]he crimes covered by the [ICC] would augment and solidify the work of the tribunals and similar institutions, such as the special court established in [Sierra Leone] . . . contributing to the establishment of a just international legal order . . . [and] the rule of international law.”¹⁰¹ Hybrid tribunals can effectively work side by side with the ICC providing the best of both worlds: personal justice within the victimized country and the backing of a UN organ.

VI. DETRIMENTS OF THE HYBRID SYSTEM

A. Relies on Funding Commitments from States

In the Secretary General’s Report on the Special Court, he noted the only realistic financing mechanism would be through assessed contributions, realizing that this would for all practical purposes transform the Special Court from a treaty-based court to a UN organ.¹⁰² Voluntary contribution was not deemed desirable because of the risk of insufficient or continued availability of funds. However, the final agreement was for individual countries to contribute. The Secretary General’s recommendation was well founded as the original budget of \$114 million has already been slashed, due to lack of contributions, to \$60 million for the three years and will be financed by only 15 to 20 countries.¹⁰³

Even if the Special Court is eventually fully funded, there may be donor fatigue for future hybrid courts, particularly with the ICC coming into force. This would send a negative signal to other countries that may be considering establishing UN assisted tribunals. There are some things the UN could consider to address this issue. First, United Nations members that are not a party to the ICC could be required to make set payments annually into a fund for future country specific tribunals outside the ambit of the ICC. Second, private benefactors, who wish to support the spread of justice and furthering victim’s rights could be permitted to donate to future tribunals. If this money was placed in a trust or a similar mechanism for disbursement by the UN, as it

101. *International Criminal Court Has Safeguards Against Misuse, Legal Committee Is told: Concerns of Doubters Can Be Addressed; Most Delegates Express Support; United States, Dissenting, Cites Problems of Jurisdiction, Due Process, Lack of Security Council Oversight – Part 2 of 2*, M2 Presswire, Oct. 15, 2002.

102. See Report, *supra* note 38, para. 71.

103. Christopher Wren, *Sierra Leone War Crimes Court to Begin Deliberations in Fall*, NEW YORK TIMES, Mar. 21, 2002.

deemed necessary, any concerns regarding outside pressure from a particular source to target or harass a specific individual would be allayed. Third, countries could be solicited for services in-kind, instead of strictly monetary contributions to help defray the cost of additional tribunals. This could take the form of lawyers and judges remaining on a country's payroll but being loaned to a tribunal, or a country could donate needed legal resources or other furnishings that a court may need. Last, and probably least likely to occur, there could be a resolution to expand the UN budget to address these tribunals as they come up, or to fund them directly from the current budget. Given the difficulty in financing the Special Court, this appears to be the least desirable alternative. However, if the Special Court is successful, particularly when combined with the healing process of the TRC, it may be possible to pass such a resolution in the future. To some degree funding for future tribunals will depend on how efficient the current tribunals are in the future and how successful the ICC will be in bringing war criminals to justice.

Donor fatigue is a factor with the ICTY and ICTR also. Although countries are not individually donating, they are being assessed through the UN. After experiencing long delays and limited prosecution by the ICTY and ICTR, the international community should welcome a tribunal with a limited mandate that will be able to hand-off any outstanding indictments or evidence for indictments when its term has expired. Tribunals modeled after the Special Court should help to limit donor fatigue and produce greater results from the funds committed.

B. Retaliation

There is a certain amount of concern that if the rebel commanders are tried for their crimes, their supporters may be angered and retaliate sending the country back into war. This is of particular concern once the UNAMSIL peace-keeping force is withdrawn. For some time now foreign forces have been training the police and the armed service in proper conduct and integrating former combatants into formal military service. The local police and military should be sufficiently trained to deal with any uprisings that occur once the international forces leave. It will be incumbent upon the United Nation to ensure UNAMSIL forces are not prematurely withdrawn from the region. Moreover, the international community is keeping a close eye on Sierra Leone particularly since this is the first time post World War II, that a war crimes tribunal is being held in the country where the crimes were committed. An immediate response should come from the international community if any retaliatory measures are taken.

If the Special Court is successful in prosecuting the most powerful combatant commanders, it will deter future incursions, not serve as an impetus

for them. The perpetrators of future war crimes will meet the same fate as those who were responsible for the atrocities of the past. Contrary to the claims of possible retaliation, prosecuting the key perpetrators will reduce the potential for any future incursions.

Moreover, this is an issue related to prosecution and not the structure of the hybrid court system. Presumably retaliation, if it were to occur, would be planned regardless of where the perpetrators were prosecuted.

C. Impartial Judiciary

The eight judges for the Special Court were sworn in on December 2, 2002. Five, from varying countries outside Sierra Leone, were appointed by the UN Secretary General and three by the Sierra Leone government. Some claim that the inclusion of judges from Sierra Leone renders the proceedings unfair. Issa Sesay, interim Chairperson of the RUF stated, “[i]f the Court is to be neutral then no Sierra Leonean judge should be included because they may have their prejudices.”¹⁰⁴

The mix of national and international legal experts is germane to the continuing development of the judiciary in Sierra Leone. International judges from Britain, Canada, Austria, Nigeria, Gambia and Cameroon will be impartial and provide the necessary impediment to any prejudices the local judges may have. At the same time, the international judges will be reaffirming the rule of law and helping the local judges to reestablish a working judicial system in the country.

Article 13 of the Statute requires impartial and independent judges.¹⁰⁵ The Trial Chamber will consist of one local judge and two international judges and the Appellate Chamber will consist of two local judges and three international judges.¹⁰⁶ Article 18 of the Statute requires judgments be delivered in public and be rendered by a majority of the judges. International judges represent the majority in both chambers and therefore will be able to safeguard against any issues of impartiality. Significantly, public judgments subject to external scrutiny, will serve as an additional check on impartiality.

104. Lansana Fofana, *War Tribunal to Start Operation Soon*, INTER PRESS SERVICE, Dec. 19, 2002.

105. See Statute, *supra* note 53, at art. XIII, para. 1, at 36.

The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

106. See Statute, *supra* note 53, at art. XII, para. 1, at 35.

D. Issues of Corruption

It is generally agreed that one major contributing factor to the war in Sierra Leone was corruption within the government. It is not, nor should it be, within the mandate of the Special Court to deal with this issue. However, if issues of corruption are not address, the chance for lasting peace diminishes. If the domestic courts are able to apply the lessons of accountability and rule of law garnered from the Special Court, those engaging in corrupt activities can be brought to justice, giving Sierra Leone a greater survival rate. This can only be effective because the Special Court is being held in Sierra Leone and providing hands-on experience to the future purveyors of justice.

The Government has also established an Anti-Corruption Commission and states that it will maintain a zero tolerance for corruption.¹⁰⁷

VII. CONCLUSION

The combined initiative of the United Nations and the government of Sierra Leone is ground breaking. Not only will it end the cycle of impunity in Sierra Leone, after 10 years of ravaging internal conflict, it will set an example for the people, the nation, and the region. Accountability and reconciliation are the cornerstone to peace and stability in Sierra Leone. The hybrid court will provide the accountability and the TRC will provide the reconciliation. There is no reason that future tribunals based on the hybrid model should not be established, either free standing or in conjunction with the International Criminal Court. On the contrary, such tribunals should be encouraged by the international community.

The numerous attempts at peace, followed by the break down thereof, indicate sever weaknesses in the past governments of Sierra Leone. The hybrid court provides an international component to the political structure that affords the government the backing to support lasting peace. With the court seated in Sierra Leone, the eye of the international community remains focused on the country, providing additional political support.

The victims of the war in Sierra Leone saw devastating tragedy. One can only imagine what operations "Spare No Living Thing," "Burn House" and "Pay Yourself" included. Impunity has been allowed to continue for too long. Justice will be done by the Special Court. The victims will see justice being done and will be able to rebuild their lives and their country. A primary reason for this is the fact that the court will be located in Sierra Leone but will have the backing of the international community. The perpetrators of these heinous crimes can and will be called to account for their actions.

107. AAGM: *Presidential Address*, STANDARD TIMES (SIERRA LEONE), July 20, 2002.

There are many countries that face the same problems as Sierra Leone. They too could reap the significant benefits of an institution like the Special Court: seeing justice, a key pillar of any democracy, done first hand; reestablishing the rule of law and creating a solid criminal justice system; and applying domestic, as well as international, laws to ensure that no crime escapes punishment. These are key attributes that set the Special Court above the prior models for *ad-hoc* tribunals. Moreover, the benefits of the hybrid court as an example to the West African region could be substantial. While there are some potential detriments, these are not insurmountable with the support of the international community. The hybrid model of the Special Court should be the standard for future war crimes tribunals.

“Healing is a matter of time, but it is sometimes also a matter of opportunity.”

~ Hippocrates