The Fletcher Journal of Human Security

Where Theory Meets Practice

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FOCUS ON INSTITUTIONS: DEFINING AND DELIVERING HUMAN SECURITY

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TABLE OF CONTENTS

Preface

As we write in early 2007, it seems that there is more need than ever for governments, international organizations and NGOs to *deliver* human security. Few international crises are being resolved and more evolve constantly, from civil wars to natural disasters and pandemic diseases. Yet to be able to deliver human security, a working understanding of its mandate and limits is imperative; and unfortunately, there is still a good deal of confusion about the lines of separation and overlap between humanitarian aid, development, security, conflict resolution, and human security. At the Fletcher School, we hear repeatedly that the basis of organizational success is a clearly defined mission and measurable indicators of performance. Further, we learn that good institutions are the key to good governance. So what of the human security mission and its institutions? Has it been successful since its inception or does it suffer from the classic non-profit management dilemma of being led by good intentions but achieving little as it tries to do everything? Have the institutions that should deliver human security been mainly successful or do they need major revisions?

These questions will not be answered in one issue, but we hope our twenty-second issue of PRAXIS will make a worthwhile contribution to the discussion. In this issue, Sabina Alkire discusses a definition of human security that focuses on a core mission of safeguarding human lives from critical and pervasive threats. Then Michael Gonzalez examines dilemmas for relief agencies delivering aid to HIV/AIDS patients in South Africa. Sara Feldman takes on alternatives to camps for long-term refugees and Jeremy Eggleton makes a critical review of the Special Court for Sierra Leone. Finally, in Views from the Field, The Hon. Richard Goldstone talks about his experiences in international human rights law and prosecuting war crimes.

We hope that you enjoy these thought-provoking articles and are motivated to take part in the debate on how to deliver human security. We would like to extend special thanks to Professor Eileen Babbitt, who led the Fletcher Institute of Human Security this year, for her guidance and support. Finally, we also wish to thank our dedicated and hard-working staff of editors and marketers, who have spent countless hours working on this Fletcher institution.

Zeba Khan
Editor-in-Chief

Raya Widenoja
Editor-in-Chief

A Measure of Justice: The Special Court for Sierra Leone and the Development of Domestic and International Criminal Law

Jeremy Eggleton

"When shall we back again? When the hurly burly is done."
—Graffiti left by "Sgt. Bright Star," Jene Village, Kailahun Dist., Sierra Leone

Introduction

In the center of a village in eastern Sierra Leone stands a palaver hut where in normal times the villagers gather. But scratched with charcoal into the concrete beams that hold up the roof is a mess of graffiti left behind by the rebels of the Revolutionary United Front (RUF).[1] During the decade from 1991 to 2001, squads of young men with guns and machetes fanned out daily from huts like this, choking the countryside in a miasma of terror. Nearly half the country's population was displaced, with a peak of 750,000 refugees seeking shelter in neighboring Guinea in 1998-1999, and more than a million internally displaced.[2]

The warring parties took tentative steps towards ending the war with the Lomé Peace Accord, concluded in 1999 by representatives of the RUF and the Sierra Leone Government. Although the terms of that agreement were quickly breached by the RUF and three more years of fighting ebbed and flowed, the Lomé Accord became the roadmap to peace that eventually brought a complete cessation of fighting and a return of civil society.

As in most wars, there were brutal crimes against civilians committed by all parties to the conflict. The RUF/AFRC forces opposed to the government were unquestionably the worst perpetrators, their actions characterized by amputations and immolation;[3] but those allied with the government also had blood on their hands. The Civil Defense Forces ("CDF" or "Kamajor" militias—a traditional hunting society mobilized to fight the RUF) committed numerous atrocities as well. And the

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same Nigerian army whose crack airborne troops parachuted into Freetown to drive out the rebels engaged in diamond smuggling and the obstruction of humanitarian efforts.[4] If there are no clean wars, this one was particularly dirty.

In the wake of this kind of widespread criminal conduct, the question of how to bring justice to a shattered nation was paramount. The Sierra Leone justice system had been corrupt and dysfunctional before the war, and years of conflict had completely gutted it. Months removed from civil war, a judiciary plagued by political manipulation seemed too volatile a forum to try crimes of war.[5] Thus, Sierra Leonean President Tejan Kabbah requested international assistance in a letter to the Secretary General of the United Nations. A joint agreement between the UN and the government of Sierra Leone formed the basis of the first "hybrid" court for war crimes: the Special Court for Sierra Leone (Court).

The structure of the Court was conceived in response to heavy criticism of the ad hoc International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY).[6] The Special Court was to be in-country, with significant numbers of Sierra Leonean staff; and it would apply a mélange of international and Sierra Leonean law. The approach offered much promise, but much uncertainty as well. As James Cockayne writes, "[t]he aim [was] to marry the best of two worlds—the expertise of the international community with the legitimacy of local actors; but the risk is to intermix the worst of both—the externality of the international actors and the weakness of local institutions which produced the violence in question."[7]

The Court has largely borne out these positive expectations. Although no convictions have been secured, the Court moved quickly from charter to action, and is conducting trials with comparative efficiency.[8] Former Liberian President Charles Taylor's arrest was a major victory. At this time, Johnny Paul Koroma is the only chief architect of the Sierra Leonean war who remains at-large.[9] In the face of this measured success, there have been a handful of criticisms. This paper seeks to add to the literature on transitional justice by examining the strategic decision of the Chief Prosecutor not to issue an indictment under Sierra Leonean law, and this decision's ramifications for the rule of law internationally and within Sierra Leone.

Dual Substantive Law Structure of the Court

The genius of the Special Court lay in its hybrid nature. The Sierra Leonean government would appoint a significant minority of the chief staff, including judges, prosecutors, defense and administrative employees. Its location in Freetown would allow the legal teams superior access to evidence, and subject its proceedings to democratic scrutiny by the victimized population. Its work would complement the work of the Sierra Leone Truth and Reconciliation Commission to provide both a definitive historical record of the atrocities and punishment for those most responsible.[10] In short, the architects of the Court made an effort to adhere to James Cockayne's admonition that [f]uture tribunals must realize that a sense of separation from the affected population is inevitable for foreign interventions generally, perhaps even more so for Courts, with their distinctly legal culture and space, and that steps must be taken

The genius of the Special Court lay in its hybrid nature.

simply to connect with that stakeholder group...[11] Yet these innovations, insofar as they represent simple common sense and a willingness to learn lessons from the difficulties of the ICTR and the ICTY, are not (or should not be) so remarkable. Far more intriguing was the notion that the Court would employ both international and domestic law in pursuit of justice.[12]

Articles 2-4 of the Statute of the Special Court set forth the subject matter jurisdiction of the Court as to customary international crimes.[13] Article 5 asserts the authority of the Court under Sierra Leonean law.[14] It reads:

The Special Court shall have power to prosecute persons who have committed the following crimes under Sierra Leonean Law:

(a) Offenses 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.

Individual criminal responsibility for these crimes will be determined in accordance with Article 6 of the statute, which lays out the customary international criminal law doctrine of command responsibility for the international crimes set forth in Articles 2-4; it states that individual criminal responsibility for Article 5 crimes will be in accordance with Sierra Leonean law.[15] Other mixed legal elements include trial procedure,[16] sentencing,[17] and appellate procedure.[18]

The inclusion of domestic law was an attempt to ground the Court firmly in the local context.

The inclusion of domestic law was an attempt to ground the Court firmly in the local context. The United Nations and the Sierra Leonean government both agreed that certain crimes, or aspects of crimes, are better regulated by Sierra Leonean law. Including these statutes localized the Court in a way that best served the needs of the Sierra Leonean victims of the war.[19] As Daniel Macaluso argues, "It is important to keep in mind that every aspect of the Court serves as a reflection of the horrors committed in Sierra Leone."[20] The government of Sierra Leone may have had the widespread criticisms of the ICTY's treatment of sex crimes[21] in mind when it made this decision; and it may have considered the international treatment of arson inadequate given the centrality of the act in its own war.[22] In any case, the inclusion of domestic law would assure that no one fell through the cracks. As Nancy Stafford noted, "Access to domestic laws permits the Special Court to seek justice for all of the victims, regardless of the crime."

In addition to these advantages, the inclusion of local crimes presents prosecutors with a weapon not subject to two of the chief hurdles of proving criminal responsibility under international law: proving either the existence of an armed conflict or a widespread or systematic attack.[23] In terms of the application of law in the prosecutorial process, therefore, the hybridization of applicable law creates a model for how a future war crimes tribunal might adapt itself to the special circumstances of a conflict.[24] In addition to these immediate prosecutorial advantages, the use of local law would be one means of creating a concrete legacy for the domestic judiciary. As part of the broader goal of reestablishing the rule of law, this was one of the professed goals of the Court at its creation.[25] For many reasons, therefore, the inclusion of domestic law in the charter of the Court was highlighted as one of its most unique innovations, and something that set it apart from the ad hoc tribunals.[26]

The use of local law would be one means of creating a concrete legacy for the domestic judiciary.

In light of this, it is surprising that despite the inclusion of domestic crimes in the Prosecutor's quiver, none of the indictments handed down by the Office of the Chief Prosecutor (OCP) used the Statute's Article 5 domestic law provisions to charge any of the accused. The indictments for all parties set forth violations under Articles 2-4, which allege, respectively, Crimes Against Humanity, Violations of Article 3 and Protocol II, and Other Serious Violations of International Humanitarian Law.

Analysis of the Decision Not to Indict Under Domestic Law

The Prosecutor's discretionary decision not to indict under domestic law could have been motivated by any number of factors, including the scope of international law, evidentiary considerations, a complicated amnesty problem, and the timeline of the war itself.

Although some commentators have joined the architects in advocating the benefits of including domestic law crimes, others have argued that the abuse of girls and malicious damage to property arguably fall within the ambit of international crimes included in Articles 2-4 of the Statute.[27] Moreover, although domestic crimes might offer prosecutorial advantages, they also pose their own evidentiary challenges. Crimes under Article 5, for instance, would require a court to discern the age of a girl in a country where literacy rates are low, culture does not emphasize the birthday, and birth records, if they were ever available, were likely lost or destroyed during the war.[28]

Additionally, the establishment of criminal responsibility for domestic crimes would be determined in accordance with domestic procedure and precedent. Any appeals based on substantive questions of law or procedural matters would raise the question of whether the Special Court had the authority to make appellate determinations based on Sierra Leonean law, and what recourse the accused would have to the Sierra Leone Supreme Court in the event he lost his appeal. Under the Statute, the "judges of the Appeals Chamber...shall be guided by the decisions of the Appeals Chamber of the [ICTY and ICTR]. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone."[29]

Yet finding recourse in the decisions of the Supreme Court of Sierra Leone presents a basic logistical problem. The last printed law reports from Sierra Leone were published in the early 1970s and unpublished materials are practically useless.[30] The lack of discernible precedent is a fatal flaw in the Sierra Leonean judicial system; it confers an unhealthy power of discretion upon the magistrates and judges. Thus, even if the Special Court were to cope with the lack of precedent by certifying a given appeals question to the Sierra Leone Supreme Court, the Special Court may be leaving the door open to the very questions of bias that motivated the government to seek an international court in the first place. Under these circumstances, it seems neither irrational nor unreasonable to restrict the indictment.

Almost certainly, the far greater concern of the OCP when it decided not to indict under Article 5 was the amnesty provision contained in Article IX of the Lomé Accord. This provision has spawned a literature unto itself.[31] The relevant provisions of Article IX are as follows:

> 2. After the signing of the present agreement, the government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present agreement.
>
> 3. To consolidate the peace and promote the cause of national reconciliation, the government of SL 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...[32]

The amnesty provision was criticized by the international human rights community at the time.[33] But others have cautioned that adhering too strictly to abstract notions of human rights might condemn those who are suffering to ceaseless warfare.[34] Indeed, in that context, the UN Secretary General has noted 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..."[35]

Adhering too strictly to abstract notions of human rights might condemn those who are suffering to ceaseless warfare.

The history of the amnesty following the signing of the Lomé Accord is delicate; it presented a legal conundrum for the Court, and a political one for Sierra Leone. In the first place, despite the fact that the UN cosigned the Accord as a "moral guarantor," the Special Representative who signed on behalf of the Secretary General clearly was not ready to adopt the Secretary General's generalized approval of amnesty agreements. He appended a signing statement disavowing the amnesty insofar as it concerned international crimes, writing, "The United Nations holds the understanding that the amnesty provisions of this agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."[36] The government of Sierra Leone was initially frustrated with

this UN reservation.[37] And although breaches of the peace by the RUF subsequent to the agreement gave the government an opening to structure the Statute with a nullification clause,[38] the government has not officially abrogated the amnesty.

The amnesty and its impact on the trial have been much debated. Questions were raised about what crimes it applied to, what dates it was operative for, and whether the RUF resumption of hostilities post-signing nullified it. Some commentators offered legal interpretations of the amnesty that would allow the government or the Court to work around it. For instance, the language of the amnesty absolves combatants of responsibility for "anything done by them in pursuit of their objectives." One approach would be to argue that violence perpetrated against civilians is, *ipso facto*, not in pursuit of their objective and that, therefore, the amnesty is not applicable to those acts.[39] Perhaps a more compelling legal argument is that the Sierra Leone Constitution does not permit amnesties *ex ante*. The Constitution states, "The President may... grant any person convicted of any offence against the laws of Sierra Leone a pardon, either free or subject to lawful conditions..."[40] Yet this language is manifestly not prospective: the combatants at the time of the amnesty had not been convicted and so the pardon was a nullity. Anthony O'Rourke prefers either of these doctrinal approaches to the more political approach of renouncing the amnesty as a *quid pro quo* for the RUF's post-Accord resumption of hostilities. Under this argument, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 entitles the government to invoke the breach as ground for terminating the agreement or suspending its operation in whole or in part.[41]

Dancing too cleverly around the pardon risks the de-legitimization of a tool that the Sierra Leone government found essential to bringing about peace for its citizens—to the detriment of suffering civilians in future wars.

But the problem with all these arguments, whether finely legalistic or more political in nature, is that "the strength of the blanket amnesty of the Lomé Peace Agreement is hard to defy. The language of the pardon leaves no room for interpretation."[42] Dancing too cleverly around the pardon risks the de-legitimization of a tool that the Sierra Leone government found essential to bringing about peace for its citizens—to the detriment of suffering civilians in future wars. It can be argued that fear of punishment and adjudication were motivating factors in the rebel advance on Freetown in January 1999,[43] and after that experience, the government clearly felt the tradeoff was worthwhile. The government took a political decision that traded peace for impunity, and an international dismissal of the amnesty sends the signal that (a) sovereign decisions of some governments are less meritorious than those of others and (b) combatants should not count on amnesties in the future. In both cases, the abstractions of international human rights are sacrificed for the tangible security interests of victims of warfare.

The Court tackled the issue of amnesty head-on. Two of the accused perpetrators filed motions to dismiss their cases based on lack of jurisdiction, abuse of process or defects in indictment.[44] William Schabas has elegantly analyzed the Court's ruling on the motion by pointing out that a very basic legal solution lay before the Court.[45] The Court could have held that the President of Sierra Leone's power of amnesty, pardon and relief, granted to him by the Sierra Leone Constitution, was limited to crimes arising under that Constitution. Accordingly, just as a state governor in the U.S. cannot pardon a federal crime, the President of Sierra Leone could not pardon an international crime. This would have resolved the issue unambiguously as a simple matter of jurisdiction, whose legal and political logic would be comprehensible even to non-lawyers. The Sierra Leonean government would have been able to say that they respected the terms of the Peace Accord, while the international community could say that justice will be done.

The Court, however, went a good deal further. It held not merely that Sierra Leone had no jurisdiction to grant amnesty for international crimes, but that doing so would have breached Sierra Leone's "obligation *erga omnes*" to protect human dignity.[46] The Prosecutor argued that there was a developing norm in international law that no government can "grant amnesty for serious violations of crimes under international law."[47] The Court accepted this argument and rejected the jurisdictional motion on the grounds that a grant of amnesty by the Sierra Leonean government was "contrary to the direction in which customary international law is developing."[48] As I will argue *infra*, this constitutes an advancement of international law without regard to its effects on sovereignty, or the effective adjudication of war crimes by domestic bodies.

It held not merely that Sierra Leone had no jurisdiction to grant amnesty for international crimes, but that doing so would have breached Sierra Leone's "obligation erga omnes" to protect human dignity.

In any case, the result of this ruling was that the amnesty did not hold for international crimes and that they could be prosecuted as of the date of temporal jurisdiction fixed in the Statute, November 30, 1996.[49] No treatment was made of domestic crimes. Most commentators presume that this creates two temporal jurisdictions for the Court, November 1996 for international crimes, and July 1999 for domestic crimes.[50]

As a matter of trial strategy, therefore, the Prosecutor could have reasonably concluded that the question of temporal jurisdiction created too many complications. Beyond the time-consuming appeals that would have arisen, had he gone ahead with a domestic law charge, moreover, there may have been good reason to forbear even with respect to a charge based on post-1999 conduct. Fighting diminished in Sierra Leone after the Lomé Accord was signed, and so the richness of evidentiary material post-1999 might have been a consideration. For instance, it is noteworthy that analogous charges under international law were dated prior to July

1999.[51] Political factors may have played a role as well. Despite the fact that the CDF leaders face criminal charges before the Special Court, they are viewed positively in Sierra Leone by virtue of the fact that they were the only effective domestic resistance to the ravages of the RUF.[52] Although RUF conduct in post-accord hostilities was not demonstrably different from pre-accord conduct, CDF conduct appeared to grow worse. There was a marked upsurge in sexual violence perpetrated by the CDF after the 1999 peace accord.[53]

In sum, although he has not articulated in any court-related document exactly why he chose not to do so,[54] the Prosecutor had a number of valid justifications for not proceeding with any domestic law indictments. *Prima facie* evidentiary questions such as determining victims' ages, as well as evidentiary questions relating to the temporal jurisdiction may have been considered. The reasonable potential for a substantive and procedural morass with respect to domestic law crimes was a likely consideration. Most importantly, the enormous roadblock of amnesty probably weighed heavily in the Prosecutor's calculus. And yet, none of these categorically precluded the Prosecutor from issuing charges under domestic law and coping with any resulting problems. The matter remained one of discretion. The next section will examine the ways in which the Prosecutor's position, particularly with respect to the choice not to indict under domestic law, has furthered the development of international human rights law and international criminal adjudication.

The enormous roadblock of amnesty probably weighed heavily in the Prosecutor's calculus.

Advances in International Criminal Law Arising from the Special Court for Sierra Leone

One of the great paradoxes of international criminal law literature is that the vast majority of it is speculative as to whether a given action, choice, legal maneuver or doctrinal development is a good thing. The literature is full of recommendations about what "may" happen, what "could" result, what the impact "should" be, and so forth. In large part, this is because the commentators are trying to weave something of substance out of gossamer. The fact is that there have only been a handful of international criminal tribunals, and none since Nuremberg have actually completed their mandate.[55] It is difficult to formulate a coherent jurisprudence with so few empirical sources—particularly when attempting to evaluate the public policy benefits of a given model. That said, the wild world of literature on the subject reflects the inherent dynamism of a field of law in its infancy. In what Thierry Cruvellier has labeled the "flourishing marketplace of different legal responses to conflict and mass murder,"[56] the Special Court has contributed a number of doctrinal advances.

For instance, the indictment on charges of recruiting child soldiers was a first for international law, since the real advance in understanding arises from the Court's holding, which clarifies the basis for the charge in international jurisprudence.[57] The Court also ruled that Charles Taylor, a head of state, is subject to its jurisdiction.[58] The Court allowed the Prosecutor to consolidate the indictments of the leaders of the three major fighting factions for purposes of efficiency.[59] The Prosecutor's use of

"notice pleading"[60] was another novel development designed to speed the process.[61] As noted above, the Court made an extremely broad and revolutionary ruling on the amnesty question. And, the Court allowed the Prosecutor to submit an amended indictment on the question of sexual violence, so that the particular nature of the violence perpetrated against women in the Sierra Leone conflict could be precisely addressed.[62] The last two innovations are of particular note, because they signify broadening developments in international law that also impact the treatment of political and legal issues in the domestic sphere.

The innovation of the new charge of forced marriage as an "Other Inhumane Act" under the rubric of Crimes Against Humanity is interesting in light of the deliberate decision not to prosecute under Sierra Leonean Law. Article 5's authorization to file charges under the Prevention of Cruelty to Children Act was added to the Statute by the Sierra Leonean Parliament for a reason. It is axiomatic in common law statutory construction that every provision is in a statute for a purpose.[63] While this maxim applies to the question of statutory construction before a court, which is not the issue here, it is no abuse of common sense to say that the Parliament would not have included this provision if it did not believe that it was necessary.

The international criminal jurisprudence on the definition of rape is divided between a liberal view designed to encompass the realities of an environment where there has been a total breakdown of civil order, and a conservative view that adheres more closely to domestic criminal norms.

The three provisions for sex-crime charges in the Prevention of Cruelty to Children Act provide for three different sentences, targeting three different scenarios, each with different retributive goals that reflect the society's values with respect to adolescent female sexuality. Abusing a girl under thirteen is a felony punishable by up to fifteen years in prison; abusing a girl aged thirteen to fourteen is a misdemeanor punishable by up to two years in prison; abducting a girl under the age of sixteen for the purposes of carnal knowledge, without the consent of the parents, is also a misdemeanor punishable by up to two years in prison.[64] Significantly, these are strict liability crimes. Although determining the age of the victim would have been an issue, and assuming that the temporal jurisdiction problem was circumvented, had the Prosecutor chosen to employ these charges, the issues of intent and consent would not have been in play. The international criminal jurisprudence on the definition of rape is divided between a liberal view designed to encompass the realities of an environment where there has been a total breakdown of civil order, and a conservative view that adheres more closely to domestic criminal norms.[65] The conservative view, espoused by the ICTY and the International Criminal Court, remains controversial, and the government of Sierra Leone may have been unsatisfied with the treatment of rape under

that paradigm.[66] This uncertainty may have been a major reason why the Parliament sought to include these crimes in the Statute.[67]

The Prosecutor could argue that the likelihood of prosecuting the accused on such individualized charges sets too high an evidentiary standard: the investigators would have to find proof that *these* accused actually engaged in this conduct. But, although it must be conceded that all three charges are highly individualized, at least the third—abduction without parental consent—could lend itself to a credible charge of individual criminal liability under circumstances of conspiracy or *respondeat superior*.[68] This is not to discount the strong likelihood that the accused in these cases actually engaged in the proscribed conduct themselves, but it does provide an avenue for prosecution by way of the countless crimes of this nature perpetrated by individual soldiers not on trial at the Court.

From the start, the Court was intended to place sexual violence directly in its crosshairs; gender crimes were to be "emphasized as a war crime" and given "top priority."[69] The Prosecutor may have reviewed the Statute and decided that even if the amnesty hurdles were surmountable, the breadth of the domestic law provision was not enough to capture the forced marriages of women older than 16. Since section 12 of the Prevention of Cruelty to Children Act was clearly intended to outlaw marital or quasi-marital unions,[70] which was precisely what he thought the international criminal jurisprudence failed to address, the Prosecutor needed to create a new crime under international law if he was not going to utilize the Sierra Leonean domestic law provision. This he sought to do on the grounds that the evidence he had gathered with respect to the previously enumerated sex crimes (rape, sexual slavery, and so forth) was the same evidence that led him to conclude that an entirely new crime under international law had manifested itself in Sierra Leone: forced marriage. The Trial Chamber of the Court held that this crime was a "kindred offence" to those that already existed in the indictments.[71] The presumption was, apparently, that the Prosecutor had the discretion to introduce entirely new crimes as long as they did not require further information gathering and investigation that would create an equality of arms problem. The Court noted, in approving the Prosecutor's motion, that the expansive provisions of the Statute, "underscore the necessity for international criminal justice to highlight the high profile nature of the emerging domain of gender offenses."[72]

From the start, the Court was intended to place sexual violence directly in its crosshairs; gender crimes were to be "emphasized as a war crime" and given "top priority."

It is interesting to note that the Sierra Leonean government perceived the particular nature of crimes committed in its internal conflict, and advanced a tool for combating them. The Prosecutor chose not to employ this tool. But the problem that the government had identified remained. So, when confronted with the same evidence that led the government to insist on a particularized domestic legal provision, the Prosecutor generated an entirely new species of international crime. The

development of international criminal law, in this case, came about as the result of a decision not to employ domestic law where it was applicable.

A similar account can be made of the second domestic crime authorized by the government of Sierra Leone in the Statute. "Arson," or the specific variations of it that are enumerated by the Malicious Damage Act,[73] does not appear in any of the international crimes enumerated in Articles 2-4 of the Statute, and for this reason, the commentators thought it appropriate to include a domestic crime that covered with some specificity the "full culpability" of the accused.[74] Whether in deference to the daunting challenges posed by the amnesty, or for prosecutorial simplicity, the indictment shoehorned the act of arson into the Article 3 crime of "pillage."[75]

There was no authority in international law prior to the Special Court which specifically incorporated the notion of arson as a forbidden war tactic under Article 3 of the Geneva Conventions. Commentary on the Geneva Conventions and its Additional Protocols sets "pillage" firmly in the context of expropriation of property, not destruction: "Article 4 further obliges contracting states 'to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property...'"[76] The ICC Statute criminalizes the "attacking and bombardment" of civilian structures in the context of international conflict; and it criminalizes the destruction or seizure of non-specific property "of an adversary" in conflicts not of an international character.[77] But neither of these elements interprets "pillage" exactly as it has been used by the Prosecutor. Furthermore, the ICC Statute was not in force at the time the events of the Sierra Leone war occurred, and the war in Sierra Leone did not have an international character.[78]

Once again, the decision not to use specifically calibrated domestic law ran up against the unique reality of the war in Sierra Leone.

The plain meaning of "pillage" also includes no notion of arson. Consistent with the Conventions, both its noun and the verb cognates refer to the general concepts of theft, plundering, looting or booty.[79] Absent from the definition is destruction of the property, by fire or any other means. Thus, it appears that the Prosecutor successfully expanded the notion of "pillage" in Article 3 of the Statute to include arson, a significant broadening of the understanding of the term in international criminal jurisprudence. Once again, the decision not to use specifically calibrated domestic law ran up against the unique reality of the war in Sierra Leone. To address the "full culpability" of the accused without the benefit of domestic law, the Prosecutor was forced to generate new innovations in international criminal law.

International Humanitarian Law Advances, but at Whose Expense?

Even proponents of an international criminal jurisprudence recognize the potential of its aspirational tendencies to mutate into a rigid orthodoxy. As Dustin Sharp writes, "Advocates of international prosecutions have not always been modest or compromising."[80] When dealing with failed states of Africa, in particular, the typical reaction of the international community has been to throw up its hands in dismay.

Although the realities of the African context are difficult to ignore, one does not have to be a committed anti-imperialist to detect an ugly presumption that African states and jurists are just not up to the task.[81] Scott Luftglass exemplifies this strain of thinking when he criticizes the use of international criminal charges by domestic Gacaca courts in Rwanda.[82] "The lessons of Rwanda," he writes, "foreshadow the severe risks both for the [local stakeholders] and the international community should a majority of domestic judges on a mixed tribunal be *entrusted with the responsibility of addressing complex international and human rights law issues*."[83]

The danger of this perspective is that the needs of the very populations most affected by the trauma of war will be sacrificed for the benefit of humanity as a whole. While it is relatively easy for an international legal community with little personal exposure to oppression to call for such a sacrifice,[84] the costs of the erosion of state sovereignty are usually borne by the citizens. "[R]emoving the discretion from the state involved out of a false assumption that mankind's interests are served merely ensures that the state's interests are no longer served."[85]

While it is relatively easy for an international legal community with little personal exposure to oppression to call for such a sacrifice,[84] the costs of the erosion of state sovereignty are usually borne by the citizens.

The Special Court's treatment of the amnesty provision is a case in point. As noted above, the Court could easily have made a simple jurisdictional ruling that the President of Sierra Leone had no power to grant amnesty, or pardon, for international crimes because his power was limited to crimes arising under the Sierra Leonean Constitution. Instead, the Court made a much broader ruling based on a trend in international law that the Court "was entitled [to discern] in the exercise of its discretionary power," holding that a grant of amnesty for international crimes was not merely *ultra vires*, but a violation of customary international law.[86] William Schabas' critique was scathing as he pointed out the likely effect of this doctrine: "[T]hose who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict."[87] Under these circumstances, the temptation to enjoy "the judicial glory of being the first to make such broad pronouncements in an area where the law is undoubtedly evolving" is bought at dear cost to local populations.[88] Such international judicial activism does nothing to dispel the notion that, "first world lawyers are trying to utilize third-world...countries as legal laboratories for doctrines that even Western courts have not accepted."[89]

International law idealists dismiss this kind of criticism as cultural relativism, as if raising questions about the unforeseen dangers of further diminishing the sovereignty of an already de-legitimized and broken state were hopelessly naïve.[90] But those who raise these questions may rest assured that African jurisprudence rejects the notion that cultural traditions which are clearly contradictory to human rights

norms are somehow sacrosanct. Responding to a government argument that whipping served a legitimate deterrent function, one Botswanan judge wrote, "the assertions in this and in other submissions of [government counsel] which tend to portray the Africans as a different species of humanity different from all others, are not only unwarranted as being degrading, but to put it very mildly most unfortunate."[91] To imply that critics of internationalist legal primacy think otherwise infantilizes a legitimate concern, despite the recognized instability of many African governments, that eroding local sovereignty erodes the best and most appropriate protection local populations have.[92]

Yet the tendency is for the international community to presume that international intervention is the only, or at least the preferred, course of action. The result is reliance upon the international community for services, including but not limited to justice, that further erodes the ability of the state to provide for the needs of its people. The dependency spiral is corrosive. When international law appears, falsely, to be the law that animates the most effective actors in the state, it creates a false sense of security. "On a day-to-day basis, more people rely on the protection and viability of their own local law and its institutions than on international law or the United Nations."[93] Ceding legal authority to the international community allows states "to abrogate responsibilities to deal with their problems. In effect, the continued reliance on international criminal tribunals removes the responsibility of the state, as the unitary structure of social order, to ensure that violations do not occur."[94]

Paradoxically, the international criminal justice movement should restrain itself from assuming too much responsibility for justice, so as not to remove any incentive for states and their populations, to invest in the outcome.

Transitional justice[95] in post-conflict societies concerns more than just the fate of a small number of arch criminals. In fact, tribunals "only make sense in the context of an overall solution, a comprehensive and bold settlement addressing the foundational problems" that led to the disintegration of the society in the first place.[96] What is required is not just a conviction, but society-wide development. In essence, the realm of international criminal jurisprudence must bleed into the world of nation-building if the ultimate goal of stable societies, governed by the rule of law is to prevail.[97] While an international tribunal cannot be responsible for the full range of efforts that must be made to reconstruct such a society, it can move the process forward as much by passivity as it can by activity. Paradoxically, the international criminal justice movement should restrain itself from assuming too much responsibility for justice, so as not to remove any incentive for states and their populations, to invest in the outcome. "Law will never be strong or respected unless it has the sentiment of people behind it...Despite the trend toward international law enforcement, humanitarian interests would better be served by a renewed emphasis on domestic enforcement of the law of internal armed conflict."[98]

The method has been tried before, with relative success, in wholly domestic prosecutions for war and political crimes (Ethiopia and Argentina), and mixed international settings (East Timor).[99] In Ethiopia, domestic tribunals used the Ethiopian Criminal Code to prosecute party-members of a deposed autocratic regime for crimes against humanity and genocide.[100] Although this approach had certain drawbacks—reduced international attention, and a lower quality of trial than what was being provided at the ICTR, "in terms of benefits accruing to the two countries where these atrocities were carried out, the Ethiopian society as a whole stands to benefit more than its Rwandan counterpart."[101] Benefits include: training of cadres of local lawyers and judges in domestic and international criminal jurisprudence; proximity of the trial to the site of the crimes; a greater deterrent effect on the population and leaders; and psychological catharsis for people who can observe in person the process of justice.

But the Rwandan dissatisfaction with the international process could not be more complete as the ICTR contemplates a sixteen-year lifespan, with hundreds of millions of dollars spent for a handful of prosecutions; in stark contrast, the Gacaca courts have completed thousands of trials in a few short years.

In East Timor, the United Nations reconstructed a judiciary from scratch. The trials have not been perfect and the system has had its low points.[102] But "[d]espite an almost complete evisceration of the local judiciary, the international community assisted in rebuilding a domestic judiciary with local judges, prosecutors and tribunals."[103] As of this writing, accountability for the Indonesian perpetrators of human rights abuses remains a sore point.[104] However, if citizens are "more likely to integrate these lessons of justice, accountability and reconciliation following a cathartic process that includes representatives of all parties," then the East Timor model should do a better job of reestablishing the rule of law in the long run than an international tribunal would have done.[105]

The paradigmatic contrary example to the international criminal system is the Gacaca Courts, set up by Rwanda to prosecute the thousands of low-level perpetrators of genocide who are not treated by the ICTR. This system was designed as a locally driven effort at rooting out all the culpable of the 1994 genocide. As the trials have commenced, criticisms have arisen that the number of perpetrators is so large that the trials risk ripping the scabs off the wounds of genocide and raising tension in Rwanda.[106] Others have criticized the Gacaca Courts for the judge selection criteria, the possibility of ethnic bias, and the lack of experience with international crimes and standards of due process.[107] But the Rwandan dissatisfaction with the international process could not be more complete as the ICTR contemplates a sixteen-year lifespan, with hundreds of millions of dollars spent for a handful of prosecutions; in stark contrast, the Gacaca courts have completed thousands of trials in a

few short years.[108] As Cruvellier writes, "To the extent that a legal culture has started to grow, however, tentatively, in Rwanda over the last ten years, this is due to the trials heard by the national courts...rather than the influence or supposed example of the UN tribunal."[109]

Such trials give credence to the notion that domestic processes can be employed to address crimes of international concern. Not only does doing so "make international justice locally relevant;"[110] more importantly, pushing for domestic responses to mass atrocity builds sustainable institutions for societies in the long run. "State sovereignty must be reinforced so that the evolution of individual criminal responsibility does not erode the vital concepts of state responsibility for the violation of international norms."[111]

That being said, realists will argue persuasively that a country like Sierra Leone, emerging from a ten-year civil war with society and government barely threaded together, is in no condition to handle potentially explosive trials, or manage the numbers of criminals that arise in situations of mass atrocity. "Overall, a transitional society...often is not likely to be at a state of judicial development and social cohesion necessary to carry out domestic war crimes trials in a fair and credible manner..."[112] As noted at the beginning of this paper, the Special Court was conceived with the failings of the ad hoc tribunals in mind and its efforts to fulfill its mission in a way that integrates general principles of nation-building have been laudable. Although international in character, the Court, chartered as a creature of Sierra Leonean law, has managed to address exactly those areas where the Ethiopian trials demonstrated the advantages of domestic prosecution.[113]

Yet integral to the Court's conception, and identity, is the notion that it serves not just to prosecute the criminals, but to re-establish the rule of law in a society that lost its compass.

Yet integral to the Court's conception, and identity, is the notion that it serves not just to prosecute the criminals, but to re-establish the rule of law in a society that lost its compass. Some have even gone so far as to call this the main objective of the Court.[114] Staff members have spoken in glowing terms about the role the Court will play in the restoration of a just society. Said Robin Vincent, Court Registrar, "[I]t will become not only a Special Court for the period 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."[115] Nancy Stafford wrote of that quote, "While [he] was primarily speaking about the physical structure of the 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 justice."[116]

Too often, the international legal community assumes that just having a trial will kick-start the rule of law, as if the problem in countries like Sierra Leone is simply that the locals were deprived of a genuine example of what the rule of law looks like.[117] But others have noted that this is not enough. Dustin Sharp suggested that maximizing the impact of an international tribunal required "training seminars with local lawyers

and legal aid groups, procedures to send seed money to local organizations working to fight impunity on a local level, educational campaigns, work with the local bar association, and measures to provide materials to law schools."[118] To the credit of the Special Court, it has implemented each of these measures.[119] They are, however, soft environmental contributions to a system that desperately lacks a legal infrastructure; moreover, the educational efforts are largely focused on enhancing the understanding of international, as opposed to Sierra Leonean, law and procedure.[120]

The Sierra Leone justice system is desperately under-resourced. An inadequate number of magistrates conduct a triage of cases up-country, with few ever going to trial. Adjournments are so endemic that detained suspects regularly riot simply to have some kind of official action taken in their case. Corruption has sunk deep roots, and the criminal process too often ends in "acquittal by baksheesh."[121] As noted, there are a handful of copies of the statutory code for Sierra Leone floating around the capital, and precedent is so rare as to be non-existent. The most recent case law is more than forty years old, and hard to find. Distressingly to the average citizen of Sierra Leone, the euphoria that greeted the end of the war has been slowly replaced by a growing awareness that the conditions which led to it are essentially unchanged. Human Rights Watch correctly points out that the Court is not responsible for this mess, and cannot be expected to clean it up. This will require a multi-national, multi-decade effort.

The government made a calculated choice at the conclusion of a brutal war to internationalize the judicial process, and although it seems to fly in the face of some commentators' views, it was nevertheless a legitimate choice by a government that had clearly weighed its options.

Some would argue that despite the hurdles and challenges they posed, domestic adjudication of the war crimes of Sierra Leone should have been the preferred option. But the challenges were not only legal like the amnesty problem. Thorny political questions, such as the approach to Chief Hinga Norman and the CDF surely were influential factors as well. Although some have argued that an equal amount of money and international pressure focused on the Sierra Leone domestic justice system would have secured the same ends of fairness, justice and expediency as the Special Court,[122] the fact then, as now, is that this kind of investment was not forthcoming. The government made a calculated choice at the conclusion of a brutal war to internationalize the judicial process, and although it seems to fly in the face of some commentators' views,[123] it was nevertheless a legitimate choice by a government that had clearly weighed its options.

However, the government was clearly not ready to abandon its sovereignty entirely. The charter of the Special Court retained a landmark domestic presence, the deliberate inclusion of local law being the most remarkable element. The inclusion of

local law in the jurisdictional menu was an obvious effort to retain elements of sovereignty within an otherwise distasteful, if necessary, ceding of responsibility and national authority to the international community. If domestic adjudication as a whole is a superior solution for post-conflict transitional justice, it stands to reason that the application of domestic law, when possible, will provide proportional benefits that international law cannot.

Because the conviction is not an end unto itself, but rather a means to the end of transitional justice, the Prosecutor could have contributed to the larger purpose of the Court if he had insisted on filing domestic law charges despite their relative complexity. He still would have secured his international convictions, while also advancing the prospects for substantive rule of law development in Sierra Leone. It is true that the procedural complexities may have been time-consuming. But in a country with no available precedent, the Special Court's articulation of rules of procedure and of substantive law on at least two issues would serve the development of the rule of law in a far more concrete manner than even its positive outreach efforts have. The high-profile nature of the cases and the public communication resources of the Court would put the Sierra Leonean law squarely in the public eye. The provision of precedent by the Special Court would fix procedural elements of the law in the mind of the public, and embolden lawyers in upcountry districts. An essential feature of the corruption that plagues the criminal justice system in Sierra Leone is that the process is a mystery to its stakeholders. If the Special Court were to demonstrate how criminal proceedings under Sierra Leonean law were to function in a public sphere, this would remove the impenetrable veil behind which the magistrates sit as they exercise their limitless discretion. This is no small thing in a country where Western parliamentary law remains a mysterious, capricious and vaguely alien creature—the province of the elite.

If the Special Court were to demonstrate how criminal proceedings under Sierra Leonean law were to function in a public sphere, this would remove the impenetrable veil behind which the magistrates sit as they exercise their limitless discretion.

Although there would be numerous ancillary benefits for the Sierra Leonean legal system, in terms of the development of the law, if the Court had taken on the task of litigating under Sierra Leonean statute, the most important impact of a decision on the part of the Prosecutor to push domestic charges would be on the ability of the domestic courts to begin adjudicating the mass of foot soldiers of the war. Pierre Prosper, former United States Ambassador for War Crimes, explained that the structure of the Sierra Leonean response to the atrocities of the civil war was tripartite.[124] For the upper echelons of the warring factions, the Special Court had the mandate to prosecute those who "bear the greatest responsibility" for the war crimes.[125] The Truth and Reconciliation Commission (TRC) would conduct a nationwide process

of assembling the definitive historical record, providing psychological catharsis and making recommendations as to compensation and civil damages that victims could claim.[126] But this left a large number of former fighters untouched; neither would they be punished criminally by the Court, nor, due to their personal insolvency, could they ever realistically be forced to pay civil damages. Ambassador Prosper explained that the plan was for the national courts to address this gap by securing criminal convictions for the majority of fighters who were responsible for the actual acts of violence that tore the country apart. Unlike in Rwanda, this number is estimated to be no more than fifty thousand all together, not all of whom would require prosecution under these statutes, thus posing fewer risks for massive destabilization.[127]

The accused at the Special Court would be the test cases for all the lower level soldiers whom the state decided required prosecution.

However, prosecuting these perpetrators in domestic courts would be a difficult task given the above mentioned amnesty arrangement and the difficulties in obtaining evidence. Had the Special Court's prosecution team, with its extensive investigatory resources and fertile combination of accomplished international lawyers and Sierra Leonean jurists, navigated these hurdles, it could have set the table for a round of swift domestic prosecutions that would have gone further towards rebuilding confidence in the Sierra Leonean domestic justice system than the proceedings at the Special Court have done.

Even assuming that the Court, after litigating the issue, held the amnesty to be valid, the Prosecutor still had between two and three more years of off-and-on hostilities after the 1999 amnesty date from which to generate evidence of violations of crimes under the two Sierra Leonean statutes. The investigatory teams of the Special Court, while researching the charges against their own accused, would accumulate evidence implicating lower-level combatants that could be turned over to state prosecutors per agreement. The trial process, conducted under Sierra Leonean procedural law, would provide a precise legal roadmap for how to prosecute these lower level soldiers. Appeals questions on broader legal questions would already be decided by the work of the Special Court during the trials of the principal accused; thus, domestic prosecutions of hundreds or thousands of individual soldiers would not be bogged down in ceaseless individual appeals. The accused at the Special Court would be the test cases for all the lower level soldiers whom the state decided required prosecution. In this way, the "full culpability" of the criminal actors as a category would be addressed and a real measure of justice served.

Conclusion

The Special Court for Sierra Leone has been a genuine success. Early claims that the Special Court offered "boutique justice"[128] have given way to a strongly positive assessment from both the international human rights community and the people of Sierra Leone.[129] Yet the substantive integration of international law and Sierra Leonean law was inadequate given the context of the war and the long road to recovery faced by the people of Sierra Leone. Although there were rational reasons

for the Prosecutor not to indict under Sierra Leonean law, the totality of the context in which the Court operates demanded a calculus different from that of the typical municipal prosecution. The Prosecutor's creative efforts to fill the legal gaps with international law served the field of international criminal jurisprudence well, but at some cost to the needs of the state and the interests of the people of Sierra Leone. While this does not mean that the Court is a failure, it does mean that a great opportunity has been lost, for Sierra Leone and for the international human rights and development community. As Jose Alvarez writes, "Effective international criminal law enforcement requires international efforts directed at prosecuting crimes such as genocide by the most effective means any of us are likely to see in our lifetimes—by local police, local prosecutors, and local courts... properly mediated by international law (and fora where necessary), local criminal accountability helps restore the rule of law where it matters most—at the local level where all of us live."[130]

Endnotes

1 The Revolutionary United Front (RUF) joined forces with the Armed Forces Revolutionary Council (AFRC), a splinter group of dissatisfied former Sierra Leone Army soldiers and officers, after the Junta government of the AFRC was driven out of Freetown by the Nigerian Army in 1998.

2 Celina Schocken, "The Special Court for Sierra Leone: Overview and Recommendations," *Berkeley Journal of International Law* 20 (2002): 436.

3 "Operation No Living Thing," the RUF/AFRC assault on Freetown in January 1999, institutionalized what had been a sporadic rebel tactic of amputation. Victims were asked if they preferred "long sleeves" or "short sleeves" before their limbs were hacked off at either the elbow or the wrist. Houses were set aflame and residents forced to choose whether to stay inside and be burned alive, or shot when they emerged.

4 See Human Rights Watch, "Sowing Terror: Atrocities Against Civilians in Sierra Leone," (July 1998 Report), Part V, www.hrw.org/reports98/sierra/ [hereinafter "Sowing Terror"].

5 Human Rights Watch, "Bringing Justice: The Special Court for Sierra Leone," (Sept. 2004 Report), 1, hrw.org/reports/2004/sierraleone0904/ [hereinafter "Bringing Justice"].

6 James Cockayne, "The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals," *Fordham International Law Journal* 28 (2005): 618; Thierry Cruvellier, "Africa: The Laboratory of Justice," *Crimes of War Project: War in Africa* (Oct. 2004 Report), 2, www.crimesofwar.org/africa-mag/afr_06_cruvellier_print.html.

7 Cockayne, "The Fraying Shoestring," 619.

8 Human Rights Watch, "Justice in Motion: The Trial Phase of the Special Court for Sierra Leone," (Oct. 2005 Report), 2-6, hrw.org/reports/2005/sierraleone1105/ [Hereinafter "Justice in Motion"].

9 Two of the worst, Foday Sankoh, RUF's leader, and Sam Bockarie, aka "General Mosquito," died after being indicted; Johnny Paul Koroma is missing and many believe that he is dead.

10 Nancy Kaymar Stafford, "A Model War Crimes Court: Sierra Leone," *ILSA Journal of International & Comparative Law* 10 (2003): 133-34.

11 Cockayne, "The Fraying Shoestring," 662.

12 Ibid.,135.

13 Special Court Agreement Ratification Act (2002) [hereinafter *Statute*]: **Article 2** authorizes the prosecution of Crimes Against Humanity, with specific acts enumerated **Article 3** authorizes prosecution for violations of Article 3 common to the Geneva Conventions and Additional Protocol II, with specific acts enumerated. Article 4 authorizes prosecution for Other Serious Violations of International Humanitarian Law, with specific acts enumerated.

14 Ibid., art. 5.

15 Ibid., art. 6.

16 Ibid., art. 14
17 Ibid., arts. 19 and 22
18 Ibid., art. 20
19 Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000), para. 19 [hereinafter *Report of the Secretary General*].
20 Daniel Macaluso, "Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lomé Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone," *Brooklyn Journal of International Law* 27 (2001): 363 .
21 See generally, Thekla Hansen-Young, "Defining Rape: A Means to Achieving Justice in the Special Court for Sierra Leone," *Chicago Journal of International Law* 6 (2005): 490-92.
22 Macaluso, "Absolute and Free Pardon," 364-66.
23 Nicole Fritz and Alison Smith, "Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone," *Fordham International Law Journal* 25 (2001): 409.
24 Stafford, "A Model War Crimes Court," 135-36.
25 Macaluso, "Absolute and Free Pardon," 362.
26 "Bringing Justice," 1-2.
27 Fritz & Smith, "Current Apathy," 409; see *Statute*.
28 See Fritz & Smith, "Current Apathy," n. 92.
29 *Statute*, Article 20(3).
30 Fritz & Smith, "Current Apathy," 409. Unpublished materials are archived in piles in the high court building, Freetown.
31 See Macaluso, "Absolute and Free Pardon," 363; Anthony O'Rourke, "The Writ of Habeus Corpus and the Special Court for Sierra Leone: Addressing an Unforeseen Problem in the Establishment of a Hybrid Court," *Columbia Journal of Transnational Law* 44 (2006): 649; William Schabas, "Amnesty, the Sierra Leone Truth and Reconciliation Commission, and the Special Court for Sierra Leone," U.C. Davis Journal of International Law & Policy 11 (2004): 145.
32 Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, UN SCOR, UN Doc S/1999/777 (1999), art. IX [hereinafter *Lomé Accord*].
33 Human Rights Watch, "Annan Must Reject Amnesty for Sierra Leone Crimes," (Statement of July 7, 1999), hrw.org/english/docs/1999/07/07/sierra967_txt.htm.
34 Schabas, "Amnesty," 163-64.
35 *Report of the Secretary General*, para. 22.
36 Schabas, "Amnesty," 148-49.
37 Ibid., 148.
38 *Statute*, Art. X.
39 See Karen Gallagher, "No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone," *Thomas Jefferson Law Review* 23 (2000): 163 .
40 Sierra Leone Const. (1991) ch. V, pt. II, §63(a).
41 O'Rourke, "The Writ of Habeus Corpus," 683; Schocken, "The Special Court," 451.
42 Macaluso, "Absolute and Free Pardon," 379.
43 Schabas, "Amnesty," 146.
44 Prosecutor v. Kallon, Case No. SCSL-2003-07-PT, Preliminary Motion based on lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (June 16, 2003); Prosecutor v. Kamara, Case No. SCSL-2003-10-PT, Application by Brima Bazzy Kamara in respect to Jurisdiction and Defects in Indictment (June 16, 2003). Both were upheld by the Appeals Chamber (*see* SCSL-04-15-PT-060-I, SCSL-04-15-PT-060-II).
45 Schabas, "Amnesty," 158-165.
46 Ibid., 161.
47 Ibid.
48 Ibid., quoting Prosecutor v. Kallon, para. 84 (n. 44)
49 *Statute*, Art. 1.
50 See, Fritz & Smith, "Current Apathy," 409; Schocken, "The Special Court," 449.
51 Prosecutor v. Brima, Kamara, and Kanu, Case No. SCSL-2004-16-PT, Count 14, paras 74-79 and Counts 6-9, paras 51-57.

52 One of the great successes of the Special Court has been the indictment of Chief Hinga Norman, President Kabbah's Minister of the Interior, who mobilized the CDF to fight the RUF. Because he was popular, there was considerable apprehension surrounding his arrest.

53 Human Rights Watch, "World Report 2000: Sierra Leone," www.hrw.org/wr2k1/africa/sierraleone.html: "Violence against women had been very uncommon among CDF militias until recently[.]"

54 When queried at the Boston College Law School Symposium, *Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals* (March 2006) [hereinafter *Symposium*], (now former) Prosecutor David Crane suggested that the appeals complications were a significant factor.

55 The ICTY and ICTR were the first true post-Nuremberg attempts to prosecute for international war crimes; they continue to conduct business at this writing. Of the tribunals which have been chartered since those two, the SCSL, and tribunals for East Timor, Cambodia, and Iraq also continue their work.

56 Cruvellier, "Africa Laboratory," 1.

57 Wanda Akin, "Justice on the Cheap," *Thomas Jefferson Law Review* 28 (2005): 26; *see* Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Prosecutor v. Norman (Moinina Fofana intervening), No. SCSL-2003-14-AR72(E) (May 31, 2004). "The only real issue in dispute in the Appeals Chamber was whether this duty flows from the Geneva Conventions and the Convention on the Rights of the Child, which would establish a pre-war duty, or from the Rome Statute for the International Criminal Court, which would establish a duty as of 1998."

58 Mark Wojcik et al, "International Legal Developments in Review: 2004," *International Lawyer* 39 (2005): 294 (2005).

59 Special Court for Sierra Leone, "Second Annual Report," (Report January 1/2004-January 17/2005), 1 [hereinafter *Court Annual Rep. 2005*].

60 *Black's Law Dictionary*, 2nd Pocket ed. 2001, s.v. "Notice Pleading": "A procedural system requiring that the pleader give only a short and plain statement of the claim showing that the pleader is entitled to relief, and not a complete detailing of all facts."

61 International Center For Transitional Justice, "The Special Court for Sierra Leone: the First Eighteen Months," (Report 2004), 5.

62 *Court Annual Rep. 2005* 16: "Concerned that existing counts in the indictments did not fully address the gravity of the factual situation of forced marriage during the conflict (commonly known as the taking of "bush wives"), the Prosecution broke new ground in international criminal law by seeking to prosecute this practice as a new crime against humanity, classified as an 'Other Inhumane Act.' On 6 May 2004, Trial Chamber I granted leave to amend the indictments in the RUF and AFRC cases to include the new count."

63 *Black's Law Dictionary*, 8th Ed. 2004, s.v. "Ut res magis valeat quam pereat."

64 Prevention of Cruelty to Children Act (1926), §§ 6, 7, 12.

65 Hansen-Young, "Defining Rape," 484-495.

66 Ibid., 490-92.

67 See Macaluso, "Absolute and Free Pardon," 364-65.

68 See *People v. Brown*, 24 N.Y.S. 1111 (N.Y. Sup. Gen. Term. 1893)

69 Hansen-Young, "Defining Rape," 483-84.

70 Prevention of Cruelty to Children Act, Section 12 outlaws the abduction of a woman less than sixteen years of age, *without the consent of her parents*. "Any person who, with intent that any unmarried girl under the age of sixteen years should be unlawfully and carnally known, takes or causes to be taken such girl out of the possession and against the will of her father or mother or any other person having the lawful care or charge of her, shall be guilty of a misdemeanour..." Presumably, with consent of the parents there would be no abduction. Thus, the crime is forced marriage or union, not merely rape.

71 Decision on Prosecution Request to Amend the Indictment, SCSL-04-15-PT, at 14-15 [hereinafter *Request to Amend the Indictment*].

72 Ibid., 11.

73 Malicious Damage Act (1861), §§ 3, 5, 6.
74 See Ibid., 12; *Statute*, Arts. 2-4; Macaluso, "Absolute and Free Pardon," 365-66.
75 *Statute*, Art. 3(f): Pillage
76 Fritz Kalshoven and Liesbeth Zegfeld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Geneva: International Committee for the Red Cross, 2001), 49.
77 See Rome Statute of the International Criminal Court (1998), art. 8, §§ 2(b)(v) and 2(e)(xii) [hereinafter, *ICC Statute*]. The ICC Statute entered into force in 2002.
78 Macaluso, "Absolute and Free Pardon," 366.
79 *Webster's New Collegiate Dictionary*, 9th Ed. 1988, s.v. "Pillage."
80 Dustin Sharp, "Prosecutions, Development and Justice: The Trial of Hissein Habré," *Harvard Human Rights Journal* 16 (2003): 151.
81 José Alvarez, "Crimes of States/Crimes of Hate: Lessons from Rwanda, *Yale Journal of International Law* 24 (1999): 466.
82 Anne Pitsch, "The Gacaca Law of Rwanda: Possibilities and Problems in Adjudicating Genocide Suspects," *Center for International Development and Conflict Management, University of MD* (August 2002 Working Paper) 3. The Gacaca courts are a traditional conflict resolution mechanism that has been adapted to process the 100,000+ detainees who are suspected of having committed crimes during the 1994 genocide.
83 Scott Luftglass, "Crossroads in Cambodia: The United Nations' Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge," *Virginia Law Review* 90 (2004): 937-38 (emphasis added); see Simon Chesterman, "Rough Justice: Establishing the Rule of Law in Post-Conflict Territories," *Ohio State Journal on Dispute Resolution* 20 (2005): 81, "UN officials were reluctant to introduce international judges [into local war crimes trials in Kosovo]. A senior UN official responded to such a recommendation by stating: 'This is not the Congo, you know.'"
84 Mark Drumbl, "Violence and Individual Punishment: The Criminality of Mass Atrocity," 99 *Northwestern University Law Review* 99 (2005): 599-600.
85 Alex Peterson, "Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict," *Military Law Review* 171 (2002): 72 (2002); Alvarez, "Crimes of States," 422.
86 Prosecutor v. Kallon, para. 84, (see n. 44).
87 Schabas, "Amnesty," 163.
88 Ibid.; Eileen Simpson, "Stop to the Hague: Internal Versus External Factors Suppressing the Advancement of the Rule of Law in Serbia," *Georgetown Journal of International Law* 36 (2005): 1266.
89 Sharp, "Prosecutions," 154.
90 *Symposium*,. Professor Diane Orentlicher, when queried about the advantages of domestic law over international law, replied that, "Surveys have shown in the Congo that victims actually want justice." The answer seems to presuppose that the call for a consideration of domestic law—which, in the post-colonial nation-states of Africa, is all of Western origin—is a call for no law whatsoever. *See* Woodrow Wilson School of Public and International Affairs, "Balancing Peace, Justice and Stability: A Special Tribunal in the Democratic Republic of Congo," (2003), 14; International Human Rights Law Group, "Ending Congo's Nightmare: What the US Can Do to Promote Peace in Central Africa," (2003), 10.
91 Petrus v. State, BLR 14, 43 (Bots. Ct. App. 1984)
92 Peterson, "Order Out of Chaos," 79; Drumbl, "Violence and Individual Punishment," 602.
93 Alvarez, "Crimes of States," 403. Consulting with the IRC in Kono District, Sierra Leone, I encountered this phenomenon up close. In the context of a civic education project, there was a presumption that the international rights regime was superior. I did not disagree with this conclusion as a matter of substance. But if any people should grasp the limits of the ability, or will, of the international community to enforce its rights regimes, it should be the population of a country like Sierra Leone.
94 Peterson, "Order Out of Chaos," 70; Simpson, "Stop to the Hague," 1266-67.
95 Chesterman, "Rough Justice," 71-72. The general idea of "transitional justice" is captured by his characterization of it as "the question of how an emerging regime should deal with past abuses..."

96 Makau Mutua, "Never Again: Questioning the Yugoslav and Rwanda Tribunals," *Temple International and Comparative Law Journal*, 11 (1997): 168; Sharp, "Prosecutions," 154.
97 Ibid., 155
98 Peterson, "Order Out of Chaos," 66.
99 Yacob Haile-Mariam, "The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court," *Hastings International and Comparative Law Review* 22 (1999): 719-20; Peterson, "Order Out of Chaos," 79.
100 Haile-Mariam, "Quest for Justice," 708-09.
101 Ibid., 744.
102 Chesterman, "Rough Justice," 87. "These delays, combined with the lack of access to qualified defense lawyers, were blamed when over half of the Timorese prison population escaped in August 2002."
103 Peterson, "Order Out of Chaos," 79.
104 See also John Dermody, "Beyond Good Intentions: Can Hybrid Tribunals Work After Unilateral Intervention," *Hastings International and Comparative Law Review* 30 (2006): 94. The Indonesian authorities have not turned over the worst criminals to the Timorese for prosecution, and the Timorese government has been reluctant to push for extradition, apparently for political and economic reasons.
105 Simpson, "Stop to the Hague," 1267-68.
106 Transitional Justice Forum (Hellen Cobban Blog), *available at* tj-forum.org/archives/001684.html
107 Luftglass, "Crossroads in Cambodia," 937.
108 Cruvellier, "Africa Laboratory," 2.
109 Ibid.
110 Ibid.
111 Peterson, "Order Out of Chaos," 87-88.
112 Simpson, "Stop to the Hague," 1268.
113 Haile-Mariam, "Quest for Justice," 744; see "Justice in Motion," 28-33.
114 Stafford, "A Model War Crimes Court," 133.
115 Ibid.
116 Ibid.
117 Fritz & Smith, "Current Apathy," 406; Stafford, "A Model War Crimes Court," 135; Luftglass, "Crossroads in Cambodia," 938.
118 Sharp, "Prosecutions," 160.
119 "Justice in Motion," 28-33.
120 Ibid.
121 Sharp, "Prosecutions," 169.
122 Peterson, "Order Out of Chaos," 84.
123 Ibid., 85; Simpson, "Stop to the Hague," 1266-67.
124 *Symposium*. Ambassador Prosper was a panelist.
125 *Statute*, Art. 1
126 Elizabeth Evenson, "Truth and Justice in Sierra Leone: Coordination Between the Commission and Court," *Columbia Law Review* 104 (2004): 737.
127 Transitional Justice Forum,(see n. 106); Human Rights Watch, "World Report 2003: Sierra Leone," www.hrw.org/wr2k3/africa10.html: while nearly 50,000 combatants disarmed, most estimates during the war numbered the hardcore combatants at 7-12,000.
128 Fritz & Smith, "Current Apathy," 430.
129 See "Justice in Motion."
130 Alvarez, "Crimes of States," 482-83.

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