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The Special Court for Sierra Leone: *Overview and Recommendations*

By
Celina Schocken*

We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.¹

I.

INTRODUCTION

A. Overview

The civil war in Sierra Leone was one of the most brutal and most overlooked wars in recent memory. Of the 4.2 million citizens of Sierra Leone, over one million are internally displaced, 500,000 are refugees, and upwards of 400,000 people have survived the amputation of one or more limbs. Thousands of children were killed, raped, mutilated, or conscripted as soldiers.

A peace agreement signed in Lomé, Togo in 1999 by the Government of Sierra Leone (GOSL) and the Rebel United Front (RUF) eventually led to the cessation of hostilities in January 2002. The agreement included a complete amnesty for the RUF and its leader, Corporal Foday Sankoh, and called for the creation of a Truth and Reconciliation Commission (TRC). On January 16, 2002, the United Nations signed an agreement with the GOSL to create a Special Court for Sierra Leone (SCSL), which will be similar to the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY).

The SCSL is supported by the GOSL as well as by international human rights groups, the United Nations Security Council, the United States, and the European Union. Establishing such a court in Sierra Leone will help the country reach some closure about the war, and bring to justice some of the defendants for their horrific crimes.

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1. Telford Taylor, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR*, 1992, at 168 (quoting Robert Jackson, Opening Statement in the Nuremberg Trials).

The SCSL also envisions a new model for international justice. It will be the first international criminal tribunal to sit in the country where the war crimes took place. National judges will sit alongside international judges. Moreover, the agreement itself is innovative, because it is an agreement between the U.N. and Sierra Leone, rather than an agreement by the Security Council imposed upon Sierra Leone. These changes may make the SCSL more relevant to the lives of ordinary Sierra Leone citizens trying to put their lives back together after the war than the ICTR and ICTY have proven to be for victims in Rwanda and Yugoslavia.

At the same time, the SCSL will lack many of the resources of the ICTR and the ICTY. The bilateral nature of the SCSL may make it as effective as other ad hoc tribunals, but it may lack the financial and institutional support necessary to achieve its goals. It remains to be seen if international criminal tribunals can operate with less funding than the ICTR and the ICTY. It will also be interesting to see if an ad hoc tribunal can work cooperatively with a Truth and Reconciliation Commission. The answers to these questions will point the way for future war crimes tribunals.

The SCSL presents an opportunity for Sierra Leone to punish the worst human rights offenders from the civil war, and an opportunity for the U.N. to prove that the ad hoc tribunal model can be expanded and improved upon, as it considers creating tribunals in Cambodia, East Timor and elsewhere. However, there are serious constraints that could cripple the SCSL. Implementers of the Special Court for Sierra Leone agreement from the U.N. and the GOSL must recognize the most serious problems of the Statute; in particular those dealing with funding provisions for the tribunal, trying juveniles, the abandonment of the Lomé Accord amnesty provisions, the lack of third-party extradition procedures, and the conflicts between the SCSL and the TRC. If they wish to create an effective model for international justice, solutions to these problems must be found.

The Statute of the SCSL and the plans for the Court must be viewed against the backdrop of the peace plans signed in Abidjan and Lomé. Many terrible crimes took place between the two Accords, but the latter granted amnesty for those crimes, while undertaking the creation of a TRC. The SCSL intends to target many of the crimes committed between the two agreements, thus implicating the amnesty agreement.

This paper begins with background information on the civil war. Parts II and III describe the Statute of the SCSL and outline how the Court will operate. Part IV examines other issues related to the establishment of the Court. Part V makes recommendations to the organizers of the SCSL in order to ameliorate some of the anticipated problems.

B. Background

Sierra Leone gained independence from the United Kingdom in 1961. Despite diamonds and other natural resources, as well as excellent farmland, approximately 70 percent of the government's budget comes from international

assistance programs.² Sierra Leone ranks last on the United Nations Development Program's Human Development Index, with a life expectancy of only thirty-four years in 1999.³

Since independence, politics in Sierra Leone have been rife with corruption and mismanagement. In 1985, military commander Joseph Momoh became President when dictator Siaka Stevens, in his late eighties and facing a student uprising, retired.⁴ Initially, Momoh was quite popular, but problems with student activists and dissidents such as Foday Sankoh, who were trained and funded by Libya, persisted.⁵

In March 1991, with the support of Mohamar Qaddafi of Libya⁶ and Charles Taylor of Liberia,⁷ the new Rebel United Front (RUF) entered Sierra Leone from Liberia. GOSL troops, loyal to Momoh, fought RUF troops on the Liberian border. After several months, a group of soldiers on the front line, upset about not being paid, went to Freetown to protest. On April 29, 1992, these soldiers overthrew President Momoh, establishing the National Provisional Ruling Council (NPRC) under 29-year-old Army Captain and paymaster Valentine Strasser.⁸ The NPRC entered into talks with the RUF to end the civil war, but these talks failed.⁹

Strasser held onto power for four years, despite the civil war, until he was overthrown in 1996. In elections held shortly after this coup, Ahmed Tejan Kabbah was elected President.¹⁰ At the same time, peace talks began in Abidjan, Ivory Coast. The RUF seemed willing to discuss peace terms. The NPRC had recently brought in fighters from Executive Outcomes, a South African mercenary company, who were successfully retaking RUF-held diamond mines.¹¹ The diamond mines provided essential funding for the war, and without access to them, the RUF would be unable to support their troops.¹² Thus, during the peace talks, the RUF appeared a spent force.

The Abidjan Agreement lasted for about nine months. Under the Agreement, Executive Outcomes was expelled from Sierra Leone and replaced by

2. The World Bank, *2001 World Development Indicators*, at 350.

3. U.N. Development Programme, *Human Development Report: Human Development Index 1999*, at <http://www.undp.org/hdro/HDI.html>.

4. David Pratt, *Sierra Leone: The Forgotten Crisis*, at <http://www.sierra-leone.org/pratt042399.html> (last modified April 23, 1999). This paper includes a very cursory overview of the civil war. For a detailed history, see Babafemi Akinrinade, *International Humanitarian Law and the Conflict in Sierra Leone*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 391 (2001).

5. Pratt, *supra* note 4.

6. Qaddafi has been involved in Sierra Leone since at least 1985, when he began training students in "the art of revolution". Qaddafi is widely involved in politics throughout Sub-Saharan Africa, through both funding development programs and influencing governments. *Id.*

7. Taylor first attacked Sierra Leone in 1989 with the support of Qaddafi. He is also supported by political and business connections in Cote d'Ivoire and Burkina Faso. *Id.*

8. Akinrinade, *supra* note 4, at 396.

9. *Id.*

10. Pratt, *supra* note 4.

11. *Id.*

12. Ian Smillie, Lansana Gberie & Ralph Hazelton, *The Heart of the Matter: Sierra Leone, Diamonds, and Human Security*, PAC (2000), at <http://www.sierra-leone.org/heartmatter.html>.

Nigerian peacekeepers.¹³ The RUF also achieved increased political legitimacy, and it looked like they might become a political party. However, because the RUF never adequately articulated any political position, the widespread assumption was that they were fighting for control of the diamonds, rather than for political change.¹⁴ In 1997, President Kabbah was overthrown by Johnny Paul Koroma of the Armed Forces Revolutionary Council (AFRC), which soon after joined with the RUF to form the AFRC/RUF.¹⁵ The AFRC/RUF proved a particularly brutal regime. To help protect civilians, the Economic Community of West African States (ECOWAS), with the support of the U.N. Security Council, increased the number of Nigerian troops stationed in Sierra Leone.¹⁶

The AFRC/RUF signed an agreement with Kabbah's deposed government, and with ECOWAS support, President Kabbah was returned to Freetown. The RUF continued to commit war crimes in the East, rebuilding their war chest through diamond sales to President Taylor of Liberia.¹⁷ During this time, Foday Sankoh was captured in Nigeria and returned to Freetown, where he was tried and sentenced to death for his role in the civil war.¹⁸

In January 1999, the RUF again attacked Freetown, this time defeating the peacekeepers in "Operation No Living Thing."¹⁹ Thousands of children were forcibly conscripted into the RUF army, drugged, killed, burned alive, or raped, before the rebels were eventually driven outside the city limits of Freetown.²⁰

In early 1999, there was essentially a stalemate. Economic Community of West African States Monitoring Group (ECOMOG) peacekeepers protected the capital (although they also stood accused of summary executions, rapes, and murders), but seemed unable to defeat the RUF and its allies. The RUF seemed content holding only the diamond-mining districts, as they had never seemed as interested in political power as they were in controlling access to the mines.²¹

13. Pratt, *supra* note 4.

14. *Footpaths to Democracy*, (1995) at <http://www.sierra-leone.org/footpaths.htm>. (This is the only political pamphlet ever released by the RUF. It contains populist slogans cribbed from Mao, Amílcar Cabral, and others, and was never taken seriously in Sierra Leone.)

15. Pratt, *supra* note 4.

16. U.N. SCOR, 3889th mtg., U.N. Doc S/RES/1171(1998).

17. See Pratt, *supra* note 4.

18. *Id.* at 11-12.

19. Pratt, *supra* note 4.

20. *Getting Away with Murder*, (Human Rights Watch), July 1996, at <http://www.hrw.org/reports/1999/sierra/SIERLE99.htm>.

21. Smillie, Gberie and Hazelton note that the war has little in common with most conflicts in Africa, in that there were few ethnic undertones and that the RUF has generally avoided stating its political agenda. They also note that "[t]he point of the war may not actually have been to win it, but to engage in profitable crime under the cover of warfare." *Supra* note 12. More recently, the diamond trade has been linked to the al Qaeda terrorist network. The Washington Post reported in November 2001 that RUF rebels sell diamonds for about one tenth their value to traders linked to Charles Taylor in Liberia. In return, the RUF is supplied with weapons. The diamonds are especially desirable to Hezbollah and al Qaeda, among others, because these groups fear having bank assets frozen. According to the Post, Antwerp is awash in Sierra Leonean diamonds, with amounts increasing rather than decreasing. Douglas Farah, *Al Qaeda Cash Linked to Diamond Trade: Sale of Gems from Sierra Leone Rebels Raised Millions*, *Sources Say*, THE WASH. POST, Nov. 2, 2001, at A1.

C. The Lomé Peace Accord

A peace accord, brokered with the assistance of the Reverend Jesse Jackson, was signed in July 1999 in Lomé, Togo.²² The peace agreement, with generous provisions to the RUF, was controversial, but generally supported by the U.K., the U.N., and the U.S.²³ Under the Accord, the RUF would share power with the Kabbah government, and RUF leader Foday Sankoh would become Chairman of the Board of the Commission for the Management of Strategic Resources, National Reconstruction and Development.²⁴ The agreement gave Sankoh an immediate and absolute pardon.²⁵ Having been sentenced to death, he was released from jail to fly to Lomé for the signing of the Accord.

The Lomé Accord created a timetable for disarming combatants and called for the U.N. to organize a peacekeeping force.²⁶ It also called for new elections and for a review of the Constitution.²⁷ In addition, the Accord established two new bodies: the Human Rights Commission and the Truth and Reconciliation Commission (TRC).²⁸

Most controversially, the Lomé Accord granted complete amnesty to all combatants. Article IX reads in part:

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 Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.²⁹

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

23. See *Prospects for Peace in Sierra Leone: Hearings Before the House International Relations Committee*, 106th Cong. (1999) (Statement of Susan Rice, Assistant Secretary of State for African Affairs); See H.R. Res. 199, 106th Cong. (1999); S. Res. 54, 106th Cong. (1999) (calling for a negotiated settlement).

24. Lomé Accord, *supra* note 22, art. V. This Chairmanship is generally regarded as the most powerful ministry, as Sankoh would be in charge of the diamond mines.

25. *Id.* at art. IX, para. 1 ("In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.").

26. Up to this point, peacekeeping had been performed nearly exclusively by Nigerians and supported by ECOWAS. There have been many complaints that Nigerian peacekeepers committed war crimes as well, such as summary executions, rapes, and banditry. See *Getting Away with Murder*, *supra* note 20, at ch.5, available at http://www.hrw.org/reports/1999/sierra/SIERLE99-04.htm#P1106_182912.

27. Lomé Accord, *supra* note 22, arts. X, XI.

28. *Id.* at arts. XXV, XXVI, para. 1.

29. *Id.* at art. IX.

The amnesty provisions were debated both outside and within Sierra Leone.³⁰ Many Sierra Leoneans, including amputees and refugees, believed the amnesty was the only way to avert further war.³¹ This internal support, and the reluctance of the U.S. and U.K. to expend many resources in Sierra Leone, led to the approval of the flawed agreement. The Government of Sierra Leone, pressured by the international community, negotiated the agreement, knowing its cooperation would help secure U.N. peacekeepers and international assistance.³²

The agreement was signed by Corporal Sankoh, representing the RUF, and President Kabbah, representing the GOSL. At the last minute, the U.N. representative added a reservation that, “[f]or the U.N. the amnesty cannot cover international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”³³ The reservation was added so late that it is not found in the text of the treaty or in public copies of the treaty. While the U.N. was not a party to the treaty, it signed as a “Moral Guarantor” under Article XXXIV of the Lomé Accord, along with the Economic Community of West African States (ECOWAS), the Organization of African Unity (OAU), and the Commonwealth of Nations.³⁴ The validity of this reservation will be addressed later in this paper.

D. *The Establishment of the Special Court for Sierra Leone*

The international response to the Lomé Accord was mixed. Human rights groups criticized the agreement for giving impunity to war criminals.³⁵ Mary Robinson, U.N. High Commissioner for Human Rights, said that the amnesty should apply only to national, not international, laws although this distinction is not made in the text of the accord.³⁶ The U.S. and the U.K. generally supported the agreement, largely avoiding the amnesty issue.³⁷ The U.N. representative who signed the Accord and made the reservation called human rights groups “sanctimonious” for not recognizing that without the amnesty, the war would likely have continued, resulting in more civilian casualties.³⁸

30. See Karen Gallagher, *No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone*, 23 T. JEFFERSON L. REV. 149 (2000).

31. Eleanor Bedford, *Sierra Leoneans Hope for Peace*, REFUGEE REPORTS, No. 9, Sept./Oct. 1999 (quoting one refugee: “The harm has already been done. It cannot be undone. We can just hope for a brighter future.”); Corinna Schuler, *Children Practice Forgiveness on Heels of Cruel Civil War*, CHRISTIAN SCIENCE MONITOR, Sept. 16, 1999.

32. Gallagher, *supra* note 30.

33. *Seventh Report of the Secretary-General, Observer Mission in Sierra Leone*, S/1999/836, para. 54 (July 1999); See *The Sierra Leone Amnesty Under International Law*, (Human Rights Watch), Aug. 3, 1999, at <http://www.hrw.org/campaigns/sierra/int-law-2.htm>.

34. Lomé Accord, *supra* note 22, art. XXXIV.

35. Corinna Schuler, *A Wrenching Peace: Sierra Leone's 'See No Evil' Pact*, CHRISTIAN SCIENCE MONITOR, Sept. 15, 1999.

36. *U.N. Human Rights Commissioner Wants International Probe into Sierra Leone*, AGENCE FRANCE PRESSE, July 9, 1999.

37. See *Prospects for Peace*, *supra* note 23, for the U.S. response. Declaration of the European Union on the Sierra Leone Peace Agreement, July 15, 1999, at <http://www.reliefweb.int>.

38. Schuler, *supra* note 35, at 9.

Seeking to take power from the AFRC, the RUF did not fully comply with the Lomé Accord. In May 2000, RUF rebels took 500 U.N. peacekeepers hostage, prompting intervention by British soldiers.³⁹ During the chaos in Freetown, Foday Sankoh, guarded by U.N. peacekeepers, was captured by the AFRC and is currently being held by the Government of Sierra Leone. He is now in jail awaiting trial.⁴⁰ There is a strong case against him and he is likely to be tried by the SCSL.⁴¹

Because of the continued hostilities in Sierra Leone and common discontent with the amnesty provisions of the Lomé Accord, the U.N. began to consider the creation of an International Criminal Tribunal for Sierra Leone similar to those of Rwanda and the former Yugoslavia. Security Council Resolution (SCR) 1315 authorized U.N. Secretary-General Kofi Annan to begin negotiations with the Government of Sierra Leone aimed at creating a Special Court.⁴² SCR 1315 recommends that the Court have subject matter jurisdiction for crimes against humanity, war crimes, and other serious violations of international humanitarian law.⁴³ Jurisdiction should be targeted at those "persons who bear the greatest responsibility for the commission of the crimes [listed above]. . . ."⁴⁴ Unlike the war crimes tribunals for Rwanda and the former Yugoslavia, the SCSL will not try defendants for genocide because the combatants did not target any specific ethnic group.⁴⁵

On October 4, 2000, the Secretary-General issued a report detailing his negotiations with the Government of Sierra Leone and laying out both a draft bilateral agreement and a draft Statute for the SCSL.⁴⁶ The finalized bilateral agreement and the Statute of the Special Court were signed in Freetown on January 16, 2002.⁴⁷

II.

STATUTE OF THE COURT

A. *The Legal Basis of the SCSL*

The ICTR and the ICTY are U.N. subsidiary organs, established by Security Council Resolutions 955 and 827, respectively.⁴⁸ While called for by Security Council Resolution (SCR) 1315, the SCSL was created by an agreement

39. Alison Stewart and Nathan Thomas, *Peace Process Deteriorates in Sierra Leone as Rebels Continue to Hold UN Peacekeepers Hostage*, ABC NEWS: WORLD NEWS NOW, May 9, 2000.

40. *A War Criminal in Custody*, THE WASH. POST, May 18, 2000, at A26.

41. Chris McGreal, *Unique Court to Try Killers of Sierra Leone: Those Who Were Enslaved, Raped and Mutilated Demand Justice*, THE GUARDIAN (LONDON), Jan. 17, 2002, at 15.

42. U.N. SCOR, 4186th mtg., U.N. Doc. S/RES/1315 (2000) [hereinafter SCR 1315].

43. *Id.*

44. *Id.*

45. *Judging Genocide*, THE ECONOMIST, June 16, 2001.

46. *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, U.N. Doc. S/2000/915 (2000) [hereinafter SCR 915].

47. *Sierra Leone News*, Jan. 16, 2002, at <http://www.sierra-leone.org/slnews.html> [hereinafter Sierra Leone News].

48. U.N. SCOR, 3453rd mtg., U.N. Doc. S/RES/955 (1994); U.N. SCOR, 3217 mtg., U.N. Doc. S/RES/827 (1993).

between the Government of Sierra Leone and the United Nations.⁴⁹ “The Special Court for Sierra Leone is different from earlier *ad hoc* courts in the sense that it is not being imposed upon a state,” according to Under-Secretary-General for Legal Affairs Hans Corell, who signed the agreements for the United Nations. “It is being established on the basis of an agreement between the United Nations and Sierra Leone—at the request of the Government of Sierra Leone.”⁵⁰

As a result of the treaty-based nature of the Court, there are three primary ways in which the SCSL will differ from the ICTR and the ICTY. First, the SCSL will be held inside Sierra Leone rather than in a third country and, thus, the Government of Sierra Leone will have significant involvement with its administration. The GOSL will have partial control over the hiring of judges, administrators, and other staff for the Court. Under the Statute of the Special Court, the GOSL will appoint one judge to the Trial Chamber, while the Secretary-General will appoint two.⁵¹ The Appellate Chamber will have two judges picked by the GOSL and three selected by the Secretary-General.⁵² Likewise, the Prosecutor, after consultation with the GOSL, will be selected by the Secretary-General.⁵³ The Deputy Prosecutor will be selected by the GOSL.⁵⁴ The SCSL does not intend to rely on the financial and administrative mechanisms of the U.N. to the same extent as the ICTR and the ICTY.⁵⁵ Perhaps this will make the SCSL more efficient, but it will also require creating new accounting and administrative systems, which could prove difficult.

The second primary difference between the SCSL and the ICTR and the ICTY is that the Statute of the SCSL will use both international and Sierra Leonean law. Thus, the Court will need to be incorporated into the law of Sierra Leone.⁵⁶ Some of the crimes defined in the Statute, further detailed below, are crimes identified in Sierra Leonean law, but not in international humanitarian law.⁵⁷ This will inevitably lead to some confusion. The international crimes will have a different temporal jurisdiction than the Sierra Leonean crimes because the Sierra Leonean crimes are covered by the Lomé Accord amnesty provisions, while the international crimes are not.⁵⁸ Briefly, international crimes such as crimes against humanity will have jurisdiction from November 30, 1996 forward, while crimes under Sierra Leonean law will have jurisdiction from July 1999 onward.

49. SCR 1315, *supra* note 42.

50. Sierra Leone News, *supra* note 47.

51. Statute of the Special Court for Sierra Leone, August 14, 2000, art. 12(1)(a), U.N. - S.L. at <http://www.sierra-leone.org/specialcourtstatute.html> [hereinafter SCSL Statute].

52. *Id.* at art. 12(1)(b). Sierra Leone requested that it be able to select judges of any nationality, rather than being required to select Sierra Leonean judges. SCR 915, *supra* note 46, at 14.

53. SCSL Statute, *supra* note 51, art. 15(3).

54. *Id.* at art. 15(4)

55. SCR 915, *supra* note 46, paras. 68, 69.

56. *Id.* para. 9.

57. SCSL Statute, *supra* note 51, art. 5. Article 5 crimes include abuse of girls and arson, which are crimes of municipal, rather than international, law.

58. Michaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 *EUR. J. INT'L L.* 857, 859 (2000).

The Statute calls for the general use, with the possibility of amendment, of the ICTR's Rules of Procedure and Evidence.⁵⁹ Rule 89 of the ICTR's Rules of Procedure and Evidence states that the ICTR should not use national rules of evidence,⁶⁰ but this will need to be changed to allow for the use of Sierra Leonean rules of evidence in instances in which Sierra Leonean crimes are being tried.⁶¹

The third significant difference is that the SCSL will be less able to count on the support of the Security Council and the U.N. system than the ICTR and the ICTY. Payments to the Court will be voluntary, as opposed to the mandatory method of assessing payments for the ICTR and the ICTY.⁶² The Secretary-General added the SCSL to the consolidated appeal for funds, making funding dependent upon gifts from U.N. members.⁶³ Already, this has meant that the size and funding of the Court have been scaled down, as evidenced by reduced staffing plans and the decision to try only twenty defendants.⁶⁴ Funding issues are further addressed later in the paper. There is, however, nothing in the bilateral nature of the SCSL requiring the Court to be funded voluntarily; rather it suggests that the U.N. is trying to adopt an arms-length relationship to the SCSL. The Security Council does not want the SCSL to be a U.N. organ, so it is requiring that the Court be funded voluntarily.⁶⁵ Some of the reasons for this may be that the Security Council believes war crimes courts will be more cost effective if independent of the U.N. system, that the Council does not want to be closely associated with the Court for lack of confidence in it, or that the Council is wary of being responsible for too many international tribunals.

The SCSL will have concurrent jurisdiction with Sierra Leonean Courts, although it has the power to request that a Sierra Leonean Court defer its proceedings and transfer a defendant to the SCSL.⁶⁶ This differs from the statutes of the ICTR and the ICTY, which have primacy over national courts.

59. SCSL Statute, *supra* note 51, art. 14.

60. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, as amended (May 31, 2000), Rule 89, at <http://www.ict.r.org>. ("The Rules set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.")

61. Frulli, *supra* note 58, at 860.

62. *Letter Dated 12 January 2001 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, U.N. Doc. S/2001/40 (2001) [hereinafter January 12, 2001 Letter].

63. *Id.*

64. *U.N. War Crimes Court to Try 20 Suspects in Sierra Leone*, N.Y. TIMES, Jan. 4, 2002, at A8.

65. SCR 1315, *supra* note 42, art. 8 ("Requests the Secretary-General to include recommendations on the following: (c) the amount of *voluntary contributions*, as appropriate, of funds, equipment and services to the Special Court. . . ." (emphasis added)).

66. SCSL Statute, *supra* note 51, art. 8(2).

B. Provisions of the Statute

1. Jurisdiction, Article 1

a. Temporal Jurisdiction

If the amnesty granted under the Lomé Accord is valid, the SCSL will only have jurisdiction over crimes committed after July 7, 1999. However, the U.N. and many NGOs have consistently maintained that an amnesty cannot be given for war crimes.⁶⁷

If the amnesty is invalid, temporal jurisdiction can extend to the pre-Lomé period. However, deciding exactly when the civil war began is somewhat complicated. In an effort not to over-burden the Prosecutor, the Secretary-General decided to begin jurisdiction on November 30, 1996, when the Abidjan Peace Agreement failed.⁶⁸ According to the Secretary-General, this date also coincides with a general escalation of war crimes, and will allow for inclusion of RUF crimes committed in the countryside as well as in Freetown.⁶⁹ Amnesty International protested, arguing that the Prosecutor should have the ability, and the resources, to try defendants dating back to the beginning of the conflict, in 1991.⁷⁰

Temporal jurisdiction of the Court will be open-ended, to accommodate the possibility of continued fighting. This differs from the ICTR, which limits jurisdiction to the period of the genocide, from January 1994 through December 1994,⁷¹ but is similar to the unlimited jurisdiction of the ICTY.⁷² The variances in temporal jurisdiction are explained in that at the time of the creation of the tribunals the conflicts in Sierra Leone and the former Yugoslavia were longer-lasting and less contained than the genocide in Rwanda.

67. *U.N. Must Clarify Position on Sierra Leonean Amnesty*, (Human Rights Watch), July 12, 1999, at <http://www.hrw.org/press/1999/jul/s10712.htm>; *Sierra Leone: A Peace Agreement but No Justice*, (Amnesty International), July 9, 1999, at <http://www.amnesty-usa.org/news/1999/15100799.htm> (calling the peace accord "unacceptable."). In a September, 2001 report, Amnesty International wrote, "although the amnesty contained in the agreement is now part of Sierra Leonean law, it is contrary to international law, which stipulates that there can be no amnesty for serious breaches of international humanitarian law and for human rights abuses which may amount to crimes against humanity. Each state which is party to the Geneva Convention is under an obligation to bring to justice in its own courts those who have committed or ordered grave breaches of the Conventions, to extradite them to another country willing or able to do so or to transfer them to an international criminal court." *Sierra Leone: Renewed Commitment Needed to End Impunity*, (Amnesty International), Sept. 24, 2001, at <http://www.web.amnesty.org/ai.nsf/print/AFR510072001>.

68. SCSL Statute, *supra* note 51, art. 1(1).

69. SCR 915, *supra* note 46, at 6, para. 27.

70. *Sierra Leone: The U.N. Security Council Must Make the Special Court Effective and Viable*, (Amnesty International), Feb. 13, 2001, at <http://www.web.amnesty.org/ai.nsf/index/AFR510012001>.

71. UN SCOR, 3453 mtg., U.N. Doc. S/RES/955 (1994), art. 7, available at <http://www.un.org/Docs/scres/1994/9443748e.htm> (creating the International Criminal Tribunal for Rwanda) [hereinafter ICTR Statute].

72. Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, annex, art. 8, UN SCOR, 48th Sess., Res. & Dec., at 29, U.N. Doc. S/INF/49 (1993), available at <http://www.un.org/icty/basic/statut/stat2000.htm> [hereinafter ICTY Statute].

b. Personal Jurisdiction

The Security Council and the Secretary-General engaged in an extended debate about the language of Article 1, which establishes personal jurisdiction for the Court. SCR 1315, calling for the establishment of the Court, recommended that personal jurisdiction apply to those “who bear the greatest responsibility for the commission of the crimes.”⁷³ The Secretary-General suggested the more general “persons most responsible” language,⁷⁴ which gives the Prosecutor more authority to decide whom to try. “Persons most responsible,” according to the Secretary-General, “denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime.”⁷⁵

In response to the Secretary-General’s report, the Security Council proposed major changes to Article 1. While holding to their “greatest responsibility” language, the Security Council wrote that they did not wish to limit the prosecution to only those with leadership roles.⁷⁶ The Security Council proposed that all peacekeepers or related personnel accused of war crimes should be tried by their sending state, rather than by the SCSL. Should the sending state be unable or unwilling to investigate or prosecute, the Security Council could grant the SCSL jurisdiction.⁷⁷

As the debate between the Security Council and the Secretary-General continued,⁷⁸ the language of Article 1 remained unresolved until the signing of the agreement. Both sides worried that the language of Article 1 raised the possibility that the Court would try juveniles and peacekeepers. The Security Council believed that its “greatest responsibility” language reduced the likelihood of these events occurring, while the Secretary-General argued for greater discretion for the Prosecutor through the use of the “persons most responsible” language.⁷⁹ In the final version of the statute, the “persons who bear the greatest responsibility” language was used.⁸⁰ The Security Council also succeeded in including jurisdiction over peacekeeping personnel who committed war crimes, but only when authorized by the Security Council.⁸¹ It is unlikely that peacekeepers will be tried, if only for the politically necessary reason that trying peacekeepers risks a chilling effect on the recruitment of peacekeepers for future operations.

The individual criminal responsibility language in the Statute is nearly identical to that of the ICTR and the ICTY,⁸² with the exception that individual

73. SCR 1315, *supra* note 42, para. 3.

74. SCSL Statute, *supra* note 51, art. 1(1); SCR 915, *supra* note 46.

75. SCR 915, *supra* note 46, para. 30.

76. Letter Dated 22 December 2000 from the President of the Security Council Addressed to the Secretary-General, U.N. SCOR, para. 1, U.N. Doc. S/2000/1234 (2000).

77. SCSL Statute, *supra* note 51, arts. 1 (2) & (3).

78. See January 12, 2001 Letter, *supra* note 62; Letter Dated 31 January 2001 from the President of the Security Council Addressed to the Secretary-General, U.N. SCOR, U.N. Doc. S/2001/95 (2001).

79. January 12, 2001 Letter, *supra* note 62.

80. SCSL Statute, *supra* note 51, art. 1(1).

81. *Id.* at art. 1.

82. *Id.* at art. 6; ICTR Statute, *supra* note 71, art. 6; ICTY Statute, *supra* note 72, art. 7.

criminal responsibility under Article 5 (Crimes under Sierra Leonean Law) is to be determined in accordance with Sierra Leonean law. No such domestic legal provisions exist in the ICTR and the ICTY.⁸³

Article 6 of the Statute of the SCSL holds that if the superior “knew or had reason to know that the subordinate was about to commit to such acts [as defined in Arts. 2-4] and the superior had failed to take the necessary and reasonable measures to prevent such acts,” the superior will be held responsible.⁸⁴ Article 6 of the Statute of the SCSL mirrors Article 6 of the ICTR, Article 7 of the ICTY, and Article 28 of the Rome Statute of the International Criminal Court (ICC).⁸⁵

c. *Extraterritorial Jurisdiction*

Unlike the ICTR and the ICTY, which have the power to request extradition from other states,⁸⁶ or the ICC which can request extradition from any member of the treaty,⁸⁷ the SCSL will not have the power to demand extradition from a third country.⁸⁸ This could prove to be a major weakness for the Court if a defendant or evidence is outside Sierra Leone. In his report on the SCSL, the Secretary-General suggested that the problem could be avoided if the Security Council endowed the SCSL with Chapter VII of the U.N. Charter powers⁸⁹ for the purpose of requesting extradition or evidence from outside the jurisdiction of the Court.⁹⁰

How problematic this lack of extradition power will be is not yet clear. Foday Sankoh was apprehended in Nigeria and presumably other members of the RUF or other groups could escape to Liberia or other neighboring countries. However, few combatants appear to have made enough money during the war to

83. ICTR Statute, *supra* note 71; ICTY Statute, *supra* note 72.

84. SCSL Statute, *supra* note 51, art. 6(3).

85. SCSL Statute, *supra* note 51, art. 6; ICTR Statute, *supra* note 71, art. 6; ICTY Statute, *supra* note 72, art. 7; Rome Statute of the International Criminal Court, July 12, 1999, art. 28, U.N.-I.C.C. at http://www.un.org/law.icc/statute/99_corr/1.html [hereinafter ICC Statute].

86. ICTR Statute, *supra* note 71, art. 8; ICTY Statute, *supra* note 72, art. 9. Article 8 (2) of the ICTR states, “The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.” The ICTY Statute contains similar language.

87. ICC Statute, *supra* note 85, art. 13.

88. SCSL Statute, *supra* note 51.

89. Under Chapter VII of the U.N. Charter, “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”, the Security Council could pass a measure requiring member states to comply with requests to extradite suspects and provide evidence. Such an action could be justified under Article 41 of the Charter, which authorizes the Security Council to “decide what measures not involving the use of armed force are to be employed to give effect to its decisions . . .” or under Article 49, “The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.” Both the ICTR and the ICTY were established by the Security Council acting under Chapter VII. U.N. CHARTER arts. 41, 49.

90. SCR 915, *supra* note 46, para. 10.

be able to afford to leave Sierra Leone.⁹¹ Most, at this point, probably remain in the country.

d. Ne bis in idem

Another repercussion of the bilateral nature of the Court is that a defendant can be tried in a court outside of Sierra Leone and also by the SCSL. In addition, a defendant can also be retried for a crime by the SCSL under Articles 2 through 4 even if he was already tried in a Sierra Leonean national court (should the crime be classified as an ordinary crime, rather than as a war crime, or should the national court proceedings be found biased or under external influence).⁹² Therefore, the SCSL will have the power to try defendants already tried in Sierra Leone if the Prosecutor believes there was a sham trial or a weak investigation. This *limited primacy*⁹³ is less than the complete primacy held by the ICTR and the ICTY. There the Tribunals can request that a national court defer prosecution of individuals if the Tribunal is interested in trying them as well.⁹⁴

2. *Definition of Crimes, Articles 2 to 5*

The subject matter jurisdiction of the SCSL is similar to the Statutes of the ICTR and the ICTY. Article 2 of the Statute of the SCSL lists the crimes against humanity that the SCSL will have the power to prosecute. These include crimes such as murder, extermination, enslavement, imprisonment, torture, rape, or other inhumane acts, if they were committed as “part of a widespread or systematic attack against any civilian population.”⁹⁵

Article 3 covers Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. The crimes in Article 3 are defined exactly the same as those in Article 4 of the Additional Protocol for Non-International Armed Conflict.⁹⁶ These crimes include mutilation, torture, collective punishments, hostage-taking, terrorism, pillage, summary executions, and outrages on personal dignity.⁹⁷

Article 4 lists Other Serious Violations of International Humanitarian Law, including intentional attacks on civilian targets, intentional attacks on humanitarian and peacekeeping personnel, and abduction and recruitment of children under the age of fifteen into armed groups.⁹⁸

Not included on this list of crimes is genocide, since the attacks on civilians in Sierra Leone do not appear to have had an ethnic element. There are two

91. Farah, *supra* note 21.

92. SCSL Statute, *supra* note 51, art. 9(2).

93. Frulli, *supra* note 58, at 860.

94. ICTR Statute, *supra* note 71, art. 8(2); ICTY Statute, *supra* note 72, art. 9(2).

95. SCSL Statute, *supra* note 51, art. 2.

96. Geneva Convention Additional Protocol for Non-International Armed Conflict, art. 4 *at* <http://www.icrc.org/eng>; SCSL Statute, *supra* note 51, art. 3.

97. SCSL Statute, *supra* note 51, art. 3.

98. *Id.* at art. 4.

primary ethnic groups in Sierra Leone, the Mende and the Temne, and both suffered during the war.⁹⁹

In addition to the crimes against humanity, war crimes, and other serious violations of international humanitarian law, Article 5 of the Statute provides jurisdiction for Crimes under Sierra Leonean law. This covers abuse of girls and wanton destruction of property.¹⁰⁰ These crimes are included in the Lomé amnesty provisions because they are not included in the U.N.'s reservation.¹⁰¹ Hence there will be two different temporal jurisdictions for the SCSL. Article 5 only applies to crimes committed after the 1999 Lomé Accord, while the jurisdiction for Articles 2 through 4 begins on November 30, 1996.

Crimes under Sierra Leonean law are included in the Statute according to the unique bilateral arrangement of the Court. The ICTR and ICTY do not provide jurisdiction for Rwandan and Yugoslavian crimes.

3. Article 7, Jurisdiction Over Persons of 15 Years of Age

Children were active combatants in the civil war. They were abducted by both the rebels and the Government-sponsored Kamajors and Civil Defense Forces (CDF).¹⁰² Boys as young as eleven were kidnapped and trained to commit extreme violence—often they were perpetrators of amputations, sexual assaults, and summary executions. The boys were drugged and trained by older leaders, who sought to instill in the boys a sense of family.¹⁰³ Young boys often held leadership positions, up to the rank of Brigadier. Girls were abducted to become sex slaves, cooks, and spies, and were often mutilated after working for the RUF.¹⁰⁴ Many Sierra Leoneans would like to see juveniles tried for their crimes,¹⁰⁵ but it seems unlikely that this will happen because of objections from human rights groups and the United Nations Children's Fund (UNICEF).¹⁰⁶

Trying juveniles poses particular problems for the SCSL. Though many are clearly guilty of terrible crimes, they are also victims themselves. UNICEF, Amnesty International, and Human Rights Watch, among others, have actively campaigned against the inclusion of juveniles under the SCSL.¹⁰⁷

The Statute creates a special regime for youthful offenders who were between fifteen and eighteen at the time of the alleged crime.¹⁰⁸ The Secretary-

99. See <http://www.sierra-leone.org>.

100. SCSL Statute, *supra* note 51, art. 5.

101. The UN Reservation is for amnesties in "respect of the crimes referred to in articles 2 to 4" of the Statute. "Crimes under Sierra Leonean Law" are referred to in article 5 of the Statute. The text of the Reservation does not appear in official copies of the Lomé Accord. SCR 915, *supra* note 46, para. 22; SCSL Statute, *supra* note 51, art. 5.

102. Pratt, *supra* note 4.

103. *Id.* One method used to instill loyalty was to force the boys to mutilate their own families and people from their villages.

104. *Id.*

105. Chris McGreal, *Unique Court to try killers of Sierra Leone: Those who were enslaved, raped and mutilated demand justice*, THE GUARDIAN (London), Jan. 17, 2002, at 15.

106. Barbara Crossette, *Sierra Leone to Try Juveniles Separately in U.N. Tribunal Plan*, N.Y. TIMES, Oct. 6, 2000, at A7.

107. *Id.*

108. SCSL Statute, *supra* note 51, art. 7.

General included Article 7, he says, because of the desire of Sierra Leoneans to see judicial accountability for child combatants.¹⁰⁹ Article 7 lays out the special procedures and protections under which juveniles can be tried for the crimes defined in Articles 2 through 5.¹¹⁰

In recent testimony in a U.N. Security Council Debate on Children in Armed Conflict, fourteen-year-old Alhaji Sawaneh described the challenges of fitting back into society after being abducted and forced to fight for the RUF:

The community school children were not friendly to us [the freed child-soldiers]. . . In school I suffered resentment from other children. They looked at me differently like an evil person. Maybe they had good reason. After all, we used to do horrible things to them, their families, friends and communities. But we suffered just as they because we were forced to do so by our commanders. . . With family members I have faced a lot of distrust. Some doubt whether I will ever be a 'normal' child again.¹¹¹

Under Article 7, there are several protections for minors. The accused "shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society."¹¹² A convicted youthful defendant cannot serve jail time, but instead can be sentenced to training, counseling, foster care, reintegration programs or community service.¹¹³ In the Draft Statute, there were plans to create a special juvenile chamber to hear these cases, with qualified juvenile judges, but such plans were likely scrapped as part of cost-cutting measures by the drafters of the agreement.¹¹⁴ The question must be asked why these services cannot be provided without the necessity of a trial. If a proceeding is desirable to discern the nature of the juvenile's participation in war crimes, use of the Truth and Reconciliation Committee is preferable.

4. Article 10, Amnesty

Article 10 of the Statute of the SCSL provides, "[a]n Amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."¹¹⁵

The U.N. maintains that it made a reservation objecting to Article IX of the Lomé Accord, as an "amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of

109. SCR 915, *supra* note 46, para. 35.

110. SCSL Statute, *supra* note 51, art. 7.

111. *UN Security Council Debate on Children in Armed Conflict*, Nov. 20, 2001, at <http://www.sierra-leone.org/alhajisawaneh112001.htm> (Statement of Alhaji Babah Sawaneh, former child combatant).

112. SCSL Statute, *supra* note 51, art. 7(1).

113. *Id.* at art. 7(2).

114. SCR 915, *supra* note 46, annex, art. 7(3)(b) (Draft Statute of the Special Court for Sierra Leone).

115. SCSL Statute, *supra* note 51, art. 10.

international humanitarian law.”¹¹⁶ However, the U.N. was a moral guarantor, not a party, to the Lomé Accord. The Government of Sierra Leone’s consent to Article 10 of the Statute directly contradicts their obligations under the Accord, as the Accord drew no distinctions between national and international legal violations.

The amnesty was legally binding, at least between the GOSL and the RUF. It is permissible under international law to make such an amnesty, and there appears to be no customary international law requiring that perpetrators of war crimes be prosecuted.¹¹⁷ However, because NGOs like Amnesty International and Human Rights Watch also do not support the amnesty, it seems as though the GOSL will be allowed to break its commitment. Perhaps the GOSL could argue that because the RUF has not honored the Lomé Accord, they do not need to honor it either. However, this argument has not been advanced as a justification for breaking the amnesty provisions. Karen Gallagher, in *No Justice, No Peace: The Legalties and Realities of Amnesty in Sierra Leone*, suggests another way out: that the amnesty extend only to crimes committed while pursuing military objectives, and the atrocities committed against civilians not count as a military objective.¹¹⁸ To date, this argument has not been advanced by those who justify breaking the amnesty agreement.

Although amnesties for human rights violations have been granted in Argentina, Algeria, Romania, Haiti, El Salvador, Mozambique and South Africa,¹¹⁹ international criminal tribunals were not established in these conflicts and perhaps those amnesties only applied to national prosecution of war crimes. The Sierra Leonean people supported this amnesty. The U.N. and international human rights NGOs objected to the amnesty at the time, but the U.S., the U.K., and others supported it.¹²⁰ Therefore, the Sierra Leonean amnesty, and its use in the SCSL, is not analogous to the other amnesties.

The implications of breaking the amnesty could be problematic in the future. The Lomé Accord worked for at least a year, and successfully slowed the commission of atrocities in Sierra Leone. In the next civil war, however, it is questionable as to whether revolutionaries or rebel groups will agree to a complete amnesty in exchange for a cessation of hostilities, if they have little reason to believe that the amnesty will have legal effect. Amnesty has been a useful tool in ending conflicts, but it may not be viewed the same way in the next conflict. On the other hand, victims may not trust a legal system that grants amnesties to war criminals, so perhaps the victims’ wishes should also be a factor in such decisions. This points to the conclusion that amnesties should be

116. SCR 915, *supra* note 46, para. 22.

117. Gallagher, *supra* note 30.

118. *Id.* at 163.

119. See IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Naomi Roht-Arriaza ed., 1995); Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41 (1996); Emily Schabacker, *Reconciliation or Justice in Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses*, 12 N.Y. INT’L L. REV. 1 (1999).

120. See S. Res. 54, *supra* note 23.

made deliberately, after weighing the wishes of the victims against the possibilities of creating a lasting peace, and amnesty decisions, once made, should be final.

III.

HOW THE SCSL WILL OPERATE

A. *Organization of the Court and Rules of Procedure*

The structure of the Court and the rules of procedure will be similar to the ICTR and the ICTY. The U.N. expects that the two established tribunals will help with the selection and training of judges, prosecutors, and staff, as well as help build a library and answer questions as they arise.¹²¹

The Rules of Procedure and Evidence will be adopted from the ICTR, although they can be amended as necessary.¹²² The appellate chamber will be guided by decisions of the appeals chambers of the ICTR and ICTY, as well as by the decisions of the Supreme Court of Sierra Leone in the application of the laws and legal principles of Sierra Leone.¹²³

Imprisonment is to be carried out in Sierra Leone, if the prisons meet U.N. requirements, or in any third country that has signed an agreement with the ICTR or the ICTY.¹²⁴ Enforcement of sentences is a difficult problem because any prison that meets U.N. requirements will likely have better health care, food, and accommodations than most Sierra Leoneans currently experience. It will be difficult to make arrangements for a prison that is actually seen as punishment. The only true punishment inflicted by such a prison may be holding a convict far from his family and tribal lands. Many Sierra Leoneans are disappointed that the accused will face life imprisonment, rather than hanging, which is imposed in Sierra Leone for murder.¹²⁵

The SCSL also faces the problem of where to locate the Court and detention facilities. After evaluating the High Court of Sierra Leone and a few other locations, the U.N. believes it will be necessary to construct a new building, as no location is secure enough or large enough for the Court.¹²⁶ The cost of building the prefabricated courthouse and renovating a prison will cost about \$3.5 million.¹²⁷ These costs are unknown to the ICTR and the ICTY. Should fighting escalate in Sierra Leone, the SCSL will likely be moved to an English-speaking nation in West Africa.¹²⁸

The working language of the SCSL will be English,¹²⁹ as English is the official language in Sierra Leone. However, some defendants and witnesses are

121. SCR 915, *supra* note 46, para. 65.

122. SCSL Statute, *supra* note 51, art. 14 (1).

123. *Id.* at art. 20 (3).

124. *Id.* at art. 22.

125. McGreal, *supra* note 41.

126. SCR 915, *supra* note 46, para. 60.

127. *Id.* at paras. 61 & 62.

128. *Id.* at paras. 51-54.

129. SCSL Statute, *supra* note 51, art. 24.

likely to speak only Krio, the lingua franca of Sierra Leone, or a tribal language.¹³⁰ Because there are relatively few languages spoken in Sierra Leone, it would not be a large burden for the SCSL to provide translation services to both defendants and witnesses, as do the ICTR and ICTY. Under Article 17(4)(f) of the Statute of the SCSL, the accused has the right to an interpreter “if he or she cannot understand or speak the language used in the Special Court.” However, witnesses have no such right.¹³¹

B. Funding

1. Problems Funding the Court

Security Council Resolution 1315 recommended that the SCSL be funded voluntarily.¹³² Because the ICTR and ICTY are funded by mandatory assessments, they have a stable funding source.¹³³ They also have considerably larger budgets.¹³⁴ The change in U.N. policy may suggest that it is reluctant to add another court to its mandatory funding structure or that it is trying to keep an arms-length relationship with this Court.

Initially, the U.N. planned to fund the Court with \$30.2 million for the start-up and the first year of the Court, and \$84.4 million for the subsequent two years.¹³⁵ Due to severe difficulties raising this money, the U.N. dramatically scaled back the budget to \$16.8 million for the first year and a total of \$57 million for the first three years of the Court.¹³⁶ Of this, nearly the entire first year costs have been raised, but a \$20 million shortfall for the next two years of the SCSL remains.¹³⁷ The only in-kind contributions collected thus far have been furniture.¹³⁸

In contrast to the ICTR and the ICTY, the SCSL will clearly be operating on a shoestring budget. The ICTR has an annual budget of \$80 million and a staff of 800,¹³⁹ and the ICTY’s 2001 budget was \$96.4 million, with a staff of 1,188.¹⁴⁰ In addition, the ICTY receives many in-kind contributions from neighboring countries that Sierra Leone cannot expect.¹⁴¹

One advantage of voluntary contributions is that the Court will be more accountable to its donors because it will have to earn its own money. However, it will be very difficult for this Court to look productive given the constraints it will have operating in Sierra Leone. The Secretary-General does not believe

130. See <http://sierra-leone.org> for more information about Sierra Leone.

131. SCSL Statute, *supra* note 51, art. 17(4)(f).

132. SCR 1315, *supra* note 42, art. 8.

133. Judging Genocide, *supra* note 45.

134. *Id.*

135. Letter dated 12 July 2001 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, U.N. Doc. S/2001/693 (2001).

136. *Id.*

137. *Id.*

138. Author’s conversations with U.N. employees in New York.

139. <http://www.ictor.org/>.

140. ICTY Key Figures, at <http://www.un.org/icty/glance/keyfig-e.htm>.

141. Judging Genocide, *supra* note 45. The ICTY receives an amount roughly equal to that of its annual funding in gifts in kind and one-off bilateral payments.

that voluntary contributions will work. He wrote, "In my view, the only realistic solution is financing through assessed contributions. This would produce a viable and sustainable financial mechanism affording secure and continuous funding."¹⁴² The Security Council has not agreed to this request. Under Article 6 of the Agreement of the U.N. and the GOSL on the establishment of the Court, the Secretary-General and Security Council are authorized to "explore alternate means of financing the Special Court"¹⁴³ if voluntary contributions prove insufficient for the Court to meet its mandate. In light of the continuing problems raising funds, the Secretary-General should advocate this option sooner rather than later.

2. *The Effects of Funding Limitations*

The decision to fund a smaller Court than originally envisioned has affected the planning considerably. Rather than two trial chambers, as originally planned, there will only be one.¹⁴⁴ The U.N. also scaled back the grade level of employees who will work at the Court, thereby reducing the qualifications of Court personnel.¹⁴⁵ The most significant decision, though, was the admission that the smaller Court would only seek to try twenty defendants.¹⁴⁶

Considering that the Court will cost over \$150 million by the time it is finished,¹⁴⁷ this is a high price for justice. The cost of trials in Arusha and The Hague are equally, if not more, expensive. As of December 2001, the ICTR had indicted one hundred people, begun trials for forty-one,¹⁴⁸ and convicted eight¹⁴⁹ at a cost of \$470 million.¹⁵⁰

Several factors explain these seemingly extraordinary expenses. U.N. employees are very expensive, especially accounting for the transportation, health, and safety costs associated with living in places such as Freetown or Arusha. The trials are held to an international standard that would not be afforded in Sierra Leonean or Rwandan Courts. The prisons where indicted defendants and those convicted will live must also meet international standards that most housing in Sierra Leone does not.

142. SCR 915, *supra* note 46, para. 71.

143. *Id.* at art 6.

144. SCSL Statute, *supra* note 51, art. 11.

145. Author's conversations with U.N. employees in New York.

146. Daniel B. Schneider, *New War Crimes Tribunal for Sierra Leone*, N.Y. TIMES, July 25, 2001, at A10; *See U.N. War Crimes Court to Try 20 Suspects in Sierra Leone*, N.Y. TIMES, Jan. 4, 2002, at A8.

147. It is impossible to know how long the SCSL will last or how much it will cost. However, the ICTY was the first tribunal, established in 1993, and it is only now operating at full capacity. It must be assumed that the SCSL will last for six to ten years, and this will conservatively cost at least \$150 million.

148. <http://www.icty.org/> (last visited Dec., 2001).

149. As of June 16, 2001. *See*, Judging Genocide, *supra* note 141.

150. *Supra* note 148.

IV.

OTHER ISSUES RAISED BY THE STATUTE AND THE CREATION OF
THE COURTA. *Is this "Victor's Justice"?*

The RUF is singled out for committing the worst war crimes, and there is no question that its members should be held accountable for "Operation No Living Thing" and other acts. However, the Kamajors, the Civil Defense Forces (CDF), and other armies also committed war crimes,¹⁵¹ as did the Nigerian peacekeepers.¹⁵²

War crimes tribunals have a reputation for dispensing "Victor's Justice." The post-World War II Nuremberg trials did not consider possible crimes committed by the Allies. The Serbs claim that the ICTY unfairly singles them out, while the Hutus in Rwanda charge that the Tutsis should be investigated.¹⁵³

The RUF has a legitimate claim that they are being singled out for attention, and are refusing to testify in the TRC until they are granted testimonial immunity, so that their statements to the TRC are not used against them at the SCSL.¹⁵⁴ It is unclear how the Prosecutor for the SCSL will deal with this problem. The Prosecutor is also certain to face pressure from the GOSL not to try AFRC or Kamajor soldiers, and from U.N. members not to try peacekeepers. The creation of the SCSL, in fact, will create huge pressure on the fragile government because of competing pressures to try or not to try its supporters.

B. *Relationship of the SCSL to the Truth and Reconciliation Commission*

The United Nations Mission in Sierra Leone (UNAMSIL) has been working to set up the TRC called for in the Lomé Accord. The National Truth and Reconciliation Act became law in Sierra Leone in 2000 and the first commission has been set up in Makeni, in Eastern Sierra Leone.¹⁵⁵ The purpose of the TRC, according to Rodolfo Mattarolo of UNAMSIL's Human Rights Section, is to "gather a historical record and provide a balanced account of the Sierra Leonean conflict."¹⁵⁶

151. Amnesty International and other groups have urged that the SCSL not be used to only try the RUF. According to Amnesty, other groups such as the AFRC and CDF should be investigated "regardless of any individual's current political position or allegiance." *Sierra Leone: Renewed Commitment Needed to End Impunity*, *supra* note 67, at 5.

152. ECOMOG peacekeepers have been accused of extrajudicial executions, rapes, and other crimes. They were also known for publicly humiliating, beating, and whipping civilians, and for stealing equipment belonging to aid organizations. *See id.*; *see also* Pratt, *supra* note 4.

153. Susan Stamberg and Sylvia Poggioli, *Slobodon Milosevic Mounts Surprisingly Skillful Defense During His Trial in The Hague*, NPR News, March 12, 2002.

154. *Rebel Group Fears Being Target of Truth and Reconciliation Court*, BRITISH BROADCASTING CORPORATION, Aug. 19, 2001.

155. The Truth and Reconciliation Commission Act 2000, at <http://www.sierra-leone.org/tracat2000.html>.

156. *UN Launches Reconciliation Commission in S. Leone's Northern Town*, XINHUA NEWS, Aug. 5, 2001.

However, there is nothing in the TRC Act preventing testimony given at the TRC from being used in a prosecution by the SCSL or a national court. The RUF claims it supports the TRC, but worries that it will be unfairly targeted.¹⁵⁷

To be effective, the TRC will likely need to give testimonial immunity to those who appear before it, as the South Africa Truth and Reconciliation Commission did.¹⁵⁸ The TRC will be most effective if it seeks testimony from lesser commanders who will not be indicted by the SCSL, so as not to create a conflict between the two bodies. Another good use of the TRC would be to solicit testimony from child soldiers, rather than sending them to the SCSL. In this case, juveniles would be required to describe their crimes and help create an accurate historical record, but would not face prosecution. With only twenty defendants to try, the SCSL should focus on those adults most responsible for the crimes, while the TRC should focus on those who played a role, but were also victims.

C. U.S. Support for the Special Court

The Bush Administration pledged \$5 million for the SCSL.¹⁵⁹ The Administration supports special tribunals being proposed in places such as Sierra Leone, Congo, Sudan and Cambodia, rather than the establishment of a permanent court. According to Pierre-Richard Prosper, Ambassador-at-Large for War Crimes and himself a former ICTR Prosecutor, tribunals should be located in the country where the abuses occurred so that they are able to focus on the specific crimes that took place there. According to Prosper, each conflict is different, and the court should reflect these differences.¹⁶⁰

In reality, it appears the Bush Administration is supporting these ad hoc tribunals as a way of showing that there is no need for a permanent criminal court.¹⁶¹ Establishing ad hoc tribunals might work in many countries, but it will be difficult to establish them in places that do not have strategic importance or other compelling reasons of interest to the Security Council. Certainly establishing three or four such panels a year would likely create donor fatigue, considering how difficult it has been to fund the SCSL.

Another appealing aspect of the SCSL for the U.S. State Department is the bilateral nature of the Court. According to the War Crimes Office, there will be much less U.N. involvement in its staffing and operation.¹⁶² This is appealing to State Department officials who complain about the U.N. bureaucracy.¹⁶³

157. *Rebel Group Fears Being Target of Truth and Reconciliation Court*, *supra* note 154.

158. Paul Lansing & Julie King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L. & COMP. LAW 753, 760-61 (1998).

159. *Annan Will Meet Cash Target for War Crimes Court*, AFRICA NEWS, July 25, 2001.

160. Norman Kempster, *U.S. May Back Creation of Special Atrocity Tribunals*, L.A. TIMES, Aug. 2, 2001, at A4.

161. *Id.*

162. Letter from Jonathan Crock, State Department Office of the Ambassador-at-Large for War Crimes Issues (Sept. 17, 2001) (on file with the author).

163. *See id.*

D. Implications for the ICC

Some of the provisions of the Statute come directly from the Rome Statute of the ICC. The language “persons who bear the greatest responsibility” that the Secretary-General supported for Article 1 of the Statute of the SCSL came from the Rome Statute.¹⁶⁴ Unlike the ICTR and the ICTY Statutes, but like the Statute of the SCSL, sexual crimes are defined as crimes against humanity by the Rome Statute.¹⁶⁵ Article 4(b) of the Statute of the SCSL mirrors Article 8(2)(b)(iii) of the ICC Statute. Both protect humanitarian assistance and peacekeeping missions.¹⁶⁶ These uses of the ICC Statute show gradual development in international criminal law, as the ad hoc tribunals move towards the ICC.

The ICC officially came into existence July 1, 2002.¹⁶⁷ It is expected to begin its work this fall.¹⁶⁸ With the terrorist attacks of September 11, 2001, many states ratified the Statute of the ICC sooner than expected, hoping to use international law to address the problems of terrorism.¹⁶⁹

The ad hoc tribunals are seen as temporary. Most regional variations in international criminal justice will likely end with the creation of one unified criminal court. At this point, it seems likely that the ICTR, the ICTY, and the SCSL will not be folded into the ICC, but this could change if the ad hoc tribunals continue their work for many years, at high cost and without an exit strategy.

V.

RECOMMENDATIONS FOR THE SCSL

The SCSL has not yet begun work, hence there are procedural and policy decisions that the implementers of the Statute should make to increase the Court’s likelihood of success.

A. *Acknowledge and Reconcile the Amnesty Provisions of the SCSL with the Lomé Accord.*

The most serious problem with the SCSL is that it violates Article IX of the Lomé Accord. The U.N. has not provided an adequate justification for this, because it could have blocked ratification of the Lomé Accord if it truly opposed

164. SCSL Statute, *supra* note 51, art. 1.

165. SCSL Statute, *supra* note 51, art. 2(g); ICC Statute, *supra* note 85, art. 7(1)(g); *The Prosecutor v. Akayesu*, No. ICTR-96-4-T, available at <http://www.ictor.org/wwwroot/ENGLISH/cases/index.htm>. The Tribunal held that rape is a crime against humanity. Therefore, the jurisprudence of the ICTR and the ICTY now allows for the prosecution of sex crimes, however they have only been defined statutorily in the ICC, and now the SCSL, thus far.

166. SCSL Statute, *supra* note 51, art. 4(b); ICC Statute, *supra* note 85, art. 8(2)(b)(iii).

167. <http://www.iccnw.org>.

168. *Id.*

169. *ICC Establishment Pushed by Experts*, BUSINESS WORLD, Oct. 17, 2001 at 10 (discussing international legal experts’ views that in the wake of Sept. 11 states are ratifying the Statute of the ICC at a faster rate than had been expected, in part because they believe the ICC will be used to try terrorists).

Article IX. The SCSL will be greatly constrained if it can only try defendants for crimes committed after July 1999.

The U.N. should make a deliberate decision, rather than hiding behind the cloak of its problematic reservation. The U.N. must acknowledge that the Lomé Accord was flawed and decide not to participate in such agreements in the future if they have such broad amnesties. Making this decision will reduce the room for negotiating with future groups like the RUF, but the rule of law is harmed when amnesties are withdrawn after they have been made. In this case, if the SCSL is to be created, Article IX must be violated.¹⁷⁰

B. Grant Testimonial Immunity to Those Testifying Before the TRC.

The South African TRC, upon which the Sierra Leone TRC is modeled, provides immunity to those testifying before it.¹⁷¹ The immunity is important, because otherwise people will not tell the full truth for fear of self-incrimination. The purpose of the TRC is to promote national reconciliation and healing, not to punish criminals.¹⁷² Those who the Prosecutor believes should be tried by the SCSL should not be called to the TRC.

Most importantly, TRCs are not a panacea. Many people believe that those who commit war crimes should be punished, regardless of the testimony they give at a TRC. The South African TRC, one of the best models, required strong leadership from Bishop Desmond Tutu.¹⁷³ Charles Villa-Vicencio, Former Director of Research for the South African TRC, describes the duty to prosecute and the non-prosecutorial initiatives such as amnesty and the TRC as a Scylla and Charybdis:

The duty to prosecute . . . can shipwreck non-prosecutorial initiatives by nations seeking seriously to move away from past gross violations of human rights. The unbridled affirmation of national sovereignty, which may allow nations to devise a form of amnesty that bypasses the demands of international human rights, has, in turn, the capacity to negate the important advances made in the affirmation of human rights. . . .¹⁷⁴

There has not been enough information provided to the people of Sierra Leone about the TRC. Without support, it is likely to fail, as did the proposed TRC for Rwanda.¹⁷⁵ If the U.N. is serious about creating a joint tribunal-TRC

170. It should be noted that the U.N. has further amnesty problems on the horizon. Ieng Sary of the Khmer Rouge was given amnesty from prosecution, and Hun Sen, the Prime Minister, is not willing to have him tried, despite the U.N.'s insistence that amnesties not be recognized in the proposed Cambodian Tribunal. See *Masters of the Killing Fields*, BBC NEWS ONLINE, Jan. 2, 2001, available at http://news.bbc.co.uk/1/hi/english/world/asia-pacific/newsid_135000/.

171. Charles Villa-Vicencio, *Essay: Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205 (2000); Lansing and King, *supra* note 158; Kerry O'Shea Gorgone, Book Note: *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, 24 SUFFOLK TRANSNAT'L L. REV. 211 (2000).

172. Lansing & King, *supra* note 158.

173. *Id.* at 762.

174. Villa-Vicencio, *supra* note 173, at 220.

175. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE*, (1998).

system, it must clearly lay out the boundaries of each. The experience of South Africa shows that a TRC will only work if it is adequately funded, if it is supported by the population, and if it provides immunity to the participants rather than allowing them to incriminate themselves.

C. Disregard Article 7, Which Gives the SCSL Jurisdiction to Try Juveniles.

As described in section II (B)(3) above, UNICEF and international NGOs oppose trying juveniles in the SCSL. Most experts do not believe the SCSL will actually try them.¹⁷⁶ The punishments available under Article 7 do not include jail time, so it would be more appropriate to subpoena juveniles to the TRC and provide counseling.

Since the SCSL will only try twenty people, the Prosecutor should choose people who forced children to commit crimes, as these are the “persons who bear the greatest responsibility.”¹⁷⁷

D. Strengthen the Funding Mechanisms of the SCSL.

The Secretary-General acknowledges that the voluntary funding mechanism will not be reliable enough for the SCSL.¹⁷⁸ The Security Council, if it truly wants the Court to succeed, must create a mandatory funding mechanism, even if it provides for lower funding levels than those of the ICTR and the ICTY. It is possible that the SCSL can be operated more cheaply than the existing tribunals, but it must be secure in its funding. Article 6 of the agreement between the U.N. and GOSL allows the Secretary-General and the Security Council to consider other funding mechanisms. Acknowledging the funding problem immediately will help ensure the continued funding and smooth operation of the Court.

E. Ensure Third-Nation Extradition and Evidence Retrieval Capability Through the Security Council.

Because the primacy of the SCSL is limited to Sierra Leone, unlike the ICTY and the ICTR, the Court will not have the power to demand extradition and evidence from third nations.¹⁷⁹ The Secretary-General has already recommended that the Security Council should grant the Court U.N. Chapter VII powers for the purpose of requesting the extradition of suspects from third nations.¹⁸⁰ This decision would increase the power of the Court, and should be adopted by the Security Council.

176. UNICEF and other children’s advocacy groups have been critical of the decision to try juveniles. See Barbara Crosssette, *Sierra Leone To Try Juveniles Separately in U.N. Tribunal Plan*, N.Y. TIMES, Oct. 6, 2000, at A7.

177. SCSL Statute, *supra* note 51, art. 1(1).

178. SCR 915, *supra* note 46, para. 70.

179. SCSL Statute, *supra* note 51.

180. SCR 915, *supra* note 46, para. 10.

F. *Translate Court Proceedings into Krio, Mende, and Temne
Where Necessary.*

As it is presently written, all Court proceedings will be in English. This does not reflect the true linguistic nature of Sierra Leone, although most educated people speak English, as it is the national language. The Court should offer its services in Krio, Mende, and Temne where necessary, just as the ICTR translates into Kinyarwanda and the ICTY translates into Croatian, Serbian, and Bosnian.¹⁸¹ The official language of the Court can remain English, as long as those who appear before it understand the proceedings.

Translating into more accessible languages increases the likelihood that the population will understand, and thus support, the work of the SCSL. Under Article 17(4)(f), the accused has the right to an interpreter "if he or she cannot understand or speak the language used in the Special Court."¹⁸² While this is a good beginning, translation should be expanded so that ordinary Sierra Leoneans can be informed about the Court and understand its proceedings.

G. *Create a Public Relations Bureau to Disseminate Information About the
SCSL to the Public.*

Although the SCSL will have a tight budget, the Court should consider creating a public relations bureau. One reason for the creation of the Court is to help the nation heal and move past the civil war, and this will be facilitated if people know and understand what is happening in the Court. In Sierra Leone (as in many places in Africa) radio is an excellent, and inexpensive, medium for spreading information. The SCSL should consider broadcasting a regular radio program in local languages.

VI.

CONCLUDING REMARKS

Wars in Africa have long failed to receive the attention focused on wars elsewhere in the world. The civil war in Sierra Leone devastated the country, killing thousands and leaving thousands of mutilated victims who will bear their wounds for the rest of their lives. The Special Court for Sierra Leone may help the country deal with its past and punish some of those most responsible for the death and destruction.

The SCSL also presents an opportunity for the U.N. to expand the use of ad hoc tribunals, thereby increasing the prosecution of war crimes and crimes against humanity around the world. However, courts cannot be built nor run without significant funding—they require qualified personnel, adequate resources, and institutional support. The SCSL will operate largely like the ICTR and the ICTY, but with new innovations. Some of these, like the TRC and the establishment of the Court in the country where the crimes were committed,

181. See <http://www.icty.org>; See <http://www.ictcr.org>.

182. SCSL Statute, *supra* note 51, art. 17(4)(f).

may reflect good future directions for ad hoc tribunals. Others, however, like the provisions to try juveniles, the voluntary funding mechanisms, the decision not to honor the Lomé Accord amnesty, and the lack of third party extradition procedures, are likely to create problems.

If the United Nations wishes to create an effective model for international justice, it must devise solutions to these fundamental problems.