

Sierra Leone: African Solutions to African Problems?¹

Matthias Goldmann

- I. Introduction
- II. History of the Conflict
- III. State-Building or Nation-Building?
- IV. The Treacherous Path to Peace: African Solutions and International Solutions since 1997
 1. Introduction
 2. The 1997-1998 Intervention: An African Solution?
 - a. The Legality of the Intervention
 - b. A Right to Intervene in Defense of Democracy?
 3. Embargoes, Sanctions and UNOMSIL: Half-Hearted International Solutions
 4. The Lomé Agreement, ECOMOG and UNAMSIL: Multiple Actors Achieving No Solution
 - a. The Lomé Agreement
 - b. The Mandates of ECOMOG and UNAMSIL
 - c. The Failure of the Lomé Agreement: Africa Abandoned?
 - d. The Failure of the Lomé Agreement: Almost a Predictability?
 - aa. No Peace to Keep
 - bb. Difficulties of UNAMSIL and ECOMOG at the Operational Level
 - cc. Insufficient International Efforts
 5. Relief at the Last Minute: The British Intervention

¹ The author would like to thank Markus Benzing, Emanuele Cimiotta, Stefan Häußler, Dr. Christiane Philipp, Raphael Utz, and Prof. Dr. Rüdiger Wolfrum for comments on earlier drafts, and Dr. Roland Adjovi, Dr. Friedrich G. Lang, PD Dr. Frank Neubacher, as well as the participants of a seminar at the Max Planck Institute in January 2005 for their valuable advice.

6. The Success of a Coordinated Solution by Multiple Actors
7. Conclusion
- V. Post-Conflict Justice in Sierra Leone: A Mixed Solution or No Solution at All?
 1. The Role of Post-Conflict Justice in State-Building and Nation-Building
 2. The Truth and Reconciliation Commission
 - a. Overview of the TRC and its Objectives
 - b. The TRC's Impact on State-Building and Nation-Building
 3. The Special Court for Sierra Leone
 - a. Overview of the Special Court for Sierra Leone
 - b. The Court's Impact on State-Building and Nation-Building
 - aa. Overruling the Lomé Agreement Amnesty
 - bb. Prosecuting those "who bear the greatest responsibility"?
 - cc. Problems Deriving from the Special Court's Temporal Jurisdiction
 - c. Conclusion
 4. The Relationship Between the TRC and the Special Court: Restorative v. Retributive Justice?
 - a. Difficulties in the Relationship Between the TRC and the Special Court
 - b. Lessons to be Learned
- VI. Conclusion

I. Introduction

Sierra Leone is a small country, the size of Belgium, on the West African shore, encircled by Guinea in the West and Liberia in the East, with an estimated 4.4 million inhabitants in 1992². Starting in 1991 Sierra Leone was ravaged by a decade of civil war which cost the lives of thousands of people and left the country in a state of devastation.³ Much has been written about the causes of the conflict, in particular about the role of the diamond trade.⁴ The intervention of the Economic Commu-

² In 2004 there were more than 5 million inhabitants, see Population Reference Bureau, *World Population Data Sheet*, 2004.

³ Sierra Leone is currently the least developed country in the world according to UNDP. See UNDP, *Human Development Index 2004*, 2004, 142.

⁴ Cf. *Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone*, Doc. S/2000/1195 (2000) of 20 December 2000, paras 65-98; *Summary Report along with observations by the Chairman on the exploratory hearing on Sierra Leone Diamonds (31 July and 1 August 2000)*, Doc. S/2000/1150

nity of West African States (ECOWAS) has also aroused the interest of academics, as has the establishment of two very different institutions charged with delivering post-conflict justice.

In many ways this case study contrasts with the other case studies which form part of this project. During and after the conflict, Sierra Leone was never governed by an occupying power or an international authority vested with far-reaching competencies. As we shall see, it always retained its independence, while international and regional agents, namely the United Nations and ECOWAS, played a role in many aspects of the peace process. Similarly, the Special Court for Sierra Leone relies heavily on Sierra Leonean law and lawyers, as opposed to other mechanisms of post-conflict justice like the *ad hoc* tribunals for Rwanda and the Former Yugoslavia. In the context of the present project, this study therefore sets a counter-example as to how national and regional efforts, supported by the United Nations, may eventually contribute to sustainable peace. To allude to a famous saying, Sierra Leone provides us with insight into how African problems might be solved by predominantly African solutions.⁵

For these purposes it is necessary to go beyond mere legal analysis. This article will look into the question of how the legal framework adopted in the post-conflict phase impacted on the situation in the country. After an introduction to the history of the conflict (II.), the taxonomy of state-building and nation-building will be applied to Sierra Leone (III.). In the following section, it will be analyzed what lessons Sierra Leone teaches for peace-keeping in Africa. For this purpose it will be discussed whether the various interventions by regional and international actors were legal and to what extent they were successful (IV.). Lastly, some light will be shed on the possible contribution of means of transitional justice to state and nation-building (V.).

(2000), paras 9-10, 29 et seq.; W. Reno, *Warlord Politics and African States*, 1998, 113-145.

⁵ The phrase “African solutions to African problems”, which dates from the time when African states received their independence, became widespread in the aftermath of the 1994 genocide in Rwanda when many Africans shared the feeling that they were better off if they found ways to tackle their problems themselves instead of relying on the United Nations and the Western world.

II. History of the Conflict

From the end of the 18th century Sierra Leone saw the settlement of former slaves from North America, side by side with the indigenous population. Having been a British crown colony since 1808 and subsequently a British protectorate since 1896, Sierra Leone was granted self-government within the British Empire in 1951. At that time, the exploitation of the country's rich diamond deposits and other mineral resources was on the increase. The country was led by Milton Margai's *Sierra Leone People's Party* (SLPP). Margai became Sierra Leone's first Prime Minister after independence in 1961.

In 1967 however, the *All People's Congress* (APC), a group which had detached from the SLPP in 1957, won the elections. Its leader, Siaka Stevens, formed a new government, and when Sierra Leone disengaged the British Queen as its Head of State in 1971, he became its first President. Stevens transformed Sierra Leone into a single-party state and set up what some called a veritable "kleptocracy".⁶ In 1985, Stevens ceded state leadership to Major-General Joseph Saidu Momoh, an army officer, yet not without first securing control over the economic wealth of the country for himself and his associates.⁷

More than a decade of civil war began in March 1991, with the *Rebel Unity Front* (RUF), a rebel group from the border region between Liberia and Sierra Leone, attacking Sierra Leone's armed forces.⁸ The RUF was led by Foday Sankoh and backed by Charles Taylor's *National Patriotic Front of Liberia* (NPFL). Taylor's NPFL was looking for resources beyond the Liberian border and had found a willful ally

⁶ A. Sawyer, "Violent conflicts and governance challenges in West Africa: the case of the Mano River basin area", *Journal of Modern African Studies* 42 (2004), 437 et seq. (443).

⁷ Reno, see note 4, 116.

⁸ This paper provides only an overview on the conflict. For detailed accounts see J. Hirsch, *Sierra Leone, Diamonds and the Struggle for Democracy*, 2001; D. Pratt, *Sierra Leone: The Forgotten Crisis*, 1999, available at <<http://www.sierra-leone.org/pratt042399.html>>; B. Akinrinade, "International Humanitarian Law and the Conflict in Sierra Leone", *Notre Dame Journal of Law, Ethics & Public Policy* 15 (2001) 391 et seq. (392 et seq.); C. Anthony, "Historical and Political Background to the Conflict in Sierra Leone", in: K. Ambos/ M. Othman (eds), *New Approaches in International Criminal Justice*, 2003, 131 et seq.

with Sankoh's RUF.⁹ The RUF consisted of a core of Sierra Leoneans wishing to seize power in their country who had received training in Libya, some Liberian fighters, and numerous soldiers, a minority of whom had joined the RUF voluntarily because of dissatisfaction with the government. Mostly they had been captured and forcefully conscripted.¹⁰ Compared to other rebel groups, the RUF stands out by not having any apparent political, ideological or ethnic agenda.¹¹ The role played by diamonds in the appearance of the RUF and throughout the conflict seems to remain obscure.¹² Once the RUF had begun attacking government forces, the desolate state of the hopelessly under-funded Sierra Leonean Army (SLA) allowed it to advance on Sierra Leonean territory.

In April 1992, Valentine Strasser, a 29-year-old SLA Captain, deposed President Momoh in a military coup d'état. A National Provisional Ruling Council was installed. However, fighting with the RUF continued, in particular for control of the diamond mines. The RUF was more successful. In 1995 siege was laid to Freetown, with the country falling into anarchy. The conflict turned in favor of the SLA in May 1995 when Strasser hired Executive Outcomes, a South-African security company, which provided him with well-trained and well-equipped mercenaries looking for new fields of activity after the end of apartheid. The cold war had deprived them of their former functions. By the end of 1995 the RUF was partly defeated and Executive Outcomes had gained control over the main diamond mines.

The security situation allowed elections to be scheduled for January 1996, but 10 days before election day Strasser was deposed by Julius Maada Bio, one of his own officers. However, Bio and the RUF agreed that presidential elections should be held on 15 March 1996. Ahmad Tejan Kabbah was elected. Some criticism has been voiced against the legitimacy of these elections because large parts of the population, especially those in areas controlled by the RUF, were prevented from cast-

⁹ Reno, see note 4, 123.

¹⁰ Akinrinade, see note 8, 398.

¹¹ I. Abdullah, "Bush Path to Destruction", *Journal of Modern African Studies* 36 (1998), 203 et seq. (in particular 222 et seq.) gives an interesting explanation of the rise of the RUF from a particular socio-cultural context.

¹² Compare the diverging views in Akinrinade, see note 8, 397 on the one hand, and Sawyer, see note 6, 445 on the other. See also note 4.

ing their vote.¹³ But apart from that, it was a small miracle that relatively free and fair elections¹⁴ were held in a country where dictatorship and “kleptocracy”,¹⁵ or rather “gemocracy”,¹⁶ had been the prevailing forms of government for decades and which found itself in the middle of a civil war. Why people invested their trust in elections might be explained by the glaring failure of all previous regimes. In addition to the general dissatisfaction among the population, the inexperience of the various usurpers to rule the country opened the way for calls for democratic change.¹⁷

With the help of Executive Outcomes, the RUF was partially pushed back by government forces. This opened the way for the conclusion of the *Abidjan Accord* on 30 November 1996.¹⁸ Its conclusion had been mediated by the Ivory Coast, the Organization of African Unity (OAU), the Commonwealth and the United Nations. It provided, *inter alia*, for an immediate ceasefire, the disarmament of the combatants, and the withdrawal of Executive Outcomes. However, the security situation worsened once Executive Outcomes withdrew, and on 25 May 1997, Kabbah was overthrown by Johnny Paul Koroma and his junta consisting of a segment of the Sierra Leone Army aligning with the RUF. He established an Armed Forces Revolutionary Council (AFRC), chaired by himself and with Sankoh as Vice-Chair.

This latter coup d'état triggered the intervention of mainly Nigerian units of the ECOWAS Monitoring Group (ECOMOG) in June 1997.¹⁹ The RUF was pushed back, but the ECOWAS peace plan of 23 Octo-

¹³ Other candidates in particular complained about such irregularities. See A. Bundu, *Democracy by Force?: A study of international military intervention in the conflict in Sierra Leone from 1991-2000*, 2001, 64 et seq.

¹⁴ See the statement of the President of the Security Council of 19 March 1996, Doc. S/PRST/1996/12.

¹⁵ On this Sierra Leonean legacy see A.B. Zack-Williams, “Sierra Leone: the political economy of civil war, 1991-1998”, *Third World Quarterly* 20 (1999) 143 et seq. (145).

¹⁶ I owe this expression to M.J. Jalloh, “The May 25, 1997 Coup and the Burden of Democratic Survival in Sierra Leone”, *L’Afrique Politique* 5 (1999) 161 et seq. (164).

¹⁷ In this sense Jalloh, see note 16, 164-165.

¹⁸ Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) of 30 November 1996, <www.sc-sl.org/abidjanaccord.html>.

¹⁹ The legality of this intervention will be discussed below at IV. 2.a.

ber 1997²⁰ was not crowned with success. Nigerian ECOMOG troops therefore intervened again in February 1998, and in March 1998 Kabbah was reinstated as President. Still, fighting continued in the hinterland. RUF and AFRC fighters retreated into the bush, resorting to guerrilla tactics. The performance of the ECOMOG troops also suffered from under-equipment and a lack of co-ordination and discipline.²¹ The RUF, on the other hand, continued to receive support from Liberia and Burkina Faso.²²

In July 1998, the Security Council set up the UN Observer Mission in Sierra Leone (UNOMSIL) to monitor the peace and disarmament process.²³ This meager effort of the international community could not prevent the rebels from launching another offensive in December 1998. The rebels seized parts of Freetown, but were eventually beaten back.

In May 1999 a military stalemate became apparent. Both the international community and those countries bearing the brunt of the ECOMOG mission, in particular Nigeria, were unwilling or unable to spend additional resources for defeating the RUF. Nor was the United Nations willing to extend its involvement in the situation, with no plans to set up a force vested with Chapter VII powers.²⁴ That opened the way for negotiations. The outcome of these negotiations was a power-sharing agreement between the government and RUF, the so-called *Lomé Agreement*.²⁵ It provided for a new government of national unity under Kabbah. Sankoh became Vice-President and head of the Commission for the Management of Strategic Mineral Resources, National Reconstruction and Development. Presidential and parliamentary elections were envisaged for 2002.

Security was provided first by ECOMOG, and subsequently by a new and significantly larger peace-keeping operation, the UN Mission

²⁰ Available at <<http://www.sierra-leone.org/conakryaccord.html>>

²¹ E.G. Berman/ K.E. Sams, *Peacekeeping in Africa: Capabilities and Culpa-bilities*, 2000, 119-120.

²² Berman/ Sams, see note 21, 121-122.

²³ S/RES/1181 (1998) of 13 July 1998.

²⁴ K. Gallagher, "No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone", *Thomas Jefferson Law Review* 23 (2000), 149 et seq. (160).

²⁵ Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, see Annex to Doc. S/1999/777(1999) of 12 July 1999.

in Sierra Leone (UNAMSIL).²⁶ Nevertheless, the security situation worsened considerably. Sankoh not only used his position to engage in illicit trade in diamonds,²⁷ but also instead of wooing voters to win the elections he decided to rely on his fighters whom he directed towards Freetown. UNAMSIL proved to be composed of too few, badly prepared and equipped troops to give meaningful resistance.²⁸ The RUF attacked UNAMSIL repeatedly, and kidnapped about 500 peacekeepers in May 2000.²⁹

In spite of several calls for a strong Chapter VII mandate for UNAMSIL, the Security Council only increased the troops strength to 13,000.³⁰ In August 2000, the Security Council eventually requested UNAMSIL to actively counter RUF attacks by responding robustly to any hostile actions.³¹ Only the combined efforts of UNAMSIL, the Sierra Leone Army, and a British intervention eventually led to the successful defeat of the RUF May 2000 offensive.³² This paved the way for the conclusion of the *Abuja Cease-Fire Agreement*.³³

Subsequent to this outbreak of violence Foday Sankoh was arrested, and a Special Court for Sierra Leone was established.³⁴ Slowly the security situation improved. By the end of 2001, the government had ob-

²⁶ S/RES/1270 (1999) of 22 October 1999, operative para. 8 et seq.

²⁷ Anthony, see note 8, 146.

²⁸ *Report of the Panel on United Nations Peace Operations* ("Brahimi Report"), Doc. A/55/305-S/2000/809 of 21 August 2000, para. 106; C. Bernath/ S. Nyce, "A Peacekeeping Success: Lessons Learned from UNAMSIL", in: *International Peacekeeping: The Yearbook of International Peace Operations* 8 (2002), 119 et seq. (127-128); T. Neethling, "The UN in the Aftermath of the Crisis in Sierra Leone: Has Anything Changed Since May 2000?" *Strategic Studies* 22 (2002), 9 et seq. (20).

²⁹ A. Abass, "The Implementation of ECOWAS' New Protocol and Security Council Resolution 1270 in Sierra Leone: New Developments in Regional Intervention", *University of Miami International and Comparative Law Review* 10 (2001-2002), 177 et seq. (182).

³⁰ S/RES/1299 (2000) of 19 May 2000.

³¹ S/RES/1313 (2000) of 4 August 2000, operative para. 3(b). Strengthening the mission had been suggested by the Secretary-General beforehand, see *Fifth report of the Secretary-General on the United Nations Mission in Sierra Leone*, Doc. S/2000/751 of 31 July 2000, para. 65.

³² L.R. Hall/ N. Kazemi, "Prospects for Justice and Reconciliation in Sierra Leone", *Harv. Int'l L. J.* 44 (2003), 287 et seq. (289 note 8).

³³ Doc. S/2000/1091 of 14 November 2000.

³⁴ See below V. 3.

tained control over more or less the entire territory of the country thanks to UNAMSIL's efforts. An arms embargo and trade sanctions against Liberia, as well as travel bans against its President Charles Taylor, contributed to the weakening of the RUF in Sierra Leone.³⁵ With the conclusion of the disarmament process and the beginning of the return of refugees in January 2002, "normality" began for Sierra Leone for the first time in over a decade. Kabbah was confirmed as President at the elections held on 14 May 2002. Elections on the local level were successfully carried out in May 2004. In September 2004, responsibility for the security of the whole territory was passed to the government. UNAMSIL began to withdraw in 2002. A residual presence has remained in place since January 2005.³⁶ Today, the depressing economic situation as well as tensions spilling over from Liberia³⁷ put Sierra Leone's future development at risk and could be a source for renewed security concerns.

III. State-Building or Nation-Building?

Before analyzing the peace-building process in Sierra Leone, it seems appropriate to determine whether we are dealing with a case for state-building or for nation-building.³⁸ If state failure is defined as the failure of public institutions to deliver positive political goods to citizens on a scale likely to undermine the legitimacy and the existence of the state itself,³⁹ post-war Sierra Leone can be easily identified as a failed state: after years of "kleptocracy", increasing anarchy and disrespect for law and order, state structures had largely collapsed.⁴⁰ Instead, people relied

³⁵ S/RES/1343 (2001) of 7 March 2001.

³⁶ *Twenty-second report of the Secretary-General on the United Nations Mission in Sierra Leone*, 6 July 2004, Doc. S/2004/536; S/RES/1537 (2004) of 30 March 2004; S/RES/1562 (2004) of 17 September 2004.

³⁷ See e.g. the Doc. S/2004/724 of 9 September 2004.

³⁸ On the meaning of and difference between nation-building and state-building, as well as their relationship with state failure and nation failure see A. von Bogdandy et al., in this Volume.

³⁹ See R.I. Rotberg, "Failed States, Collapsed States, Weak States: Causes and Indicators", in: id. (ed.), *State Failure and State Weakness in a Time of Terror*, 2003, 1 et seq.

⁴⁰ Jalloh, see note 16, 165 with further references; D.J. Francis, "Torturous Path to Peace. The Lomé Accord and Postwar Peacebuilding in Sierra Leone", *Security Dialogue* 31 (2000), 357 et seq. (359).

on individual strongmen for their security. Public services were hardly delivered other than by international humanitarian organizations.⁴¹ Therefore, Sierra Leone is a case for state-building. In order to achieve a stable state and lasting peace, governmental and administrative institutions need to be rebuilt. Also, the relationship between the government and those being governed needs to be redefined in a positive way to ensure the legitimacy of the new state institutions.⁴²

For redefining this relationship and ensuring the legitimacy of the exercise of power, the concept of a nation could serve as a paradigm.⁴³ This raises the question whether there was a “nation” in Sierra Leone at the end of the hostilities or not, and whether nation-building is therefore an issue. Nation failure can be diagnosed if other community identities such as ethnicity or religion supersede national identity. In such a situation, the cultural idea of a nation does not serve people as a basis for their identity, because it cannot evoke their association with common traditions, customs, symbols, rituals, or historical experiences.⁴⁴

In fact, it would be difficult to conclude that a shared national identity existed in post-war Sierra Leone. First of all, since pre-colonial times there have been strong ethnic identities. Ethnic differences are reinforced by the fact that they correspond to linguistic differences.⁴⁵ Ethnic heterogeneity is reinforced by the fact that besides indigenous ethnic groups there are also the Creoles, the descendants of freed slaves and slaves rescued from slave ships.⁴⁶ Further, not only ethnicity, but also the adherence to a particular family, tribe, religious group, or the

⁴¹ See J. Dobbins et al., *The UN's Role In Nation-Building. From the Congo to Iraq*, 2005, 134-135.

⁴² von Bogdandy et al., in this Volume.

⁴³ Ibid. Note that the existence of a nation and, therefore, a national identity, is only a possible avenue for legitimizing the exercise of power, but not a necessary one. See A. von Bogdandy, “Europäische und nationale Identität: Integration durch Verfassungsrecht?”, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 62 (2003), 156 et seq. (178 et seq.).

⁴⁴ On this see R. Utz, in this Volume; von Bogdandy et al., in this Volume.

⁴⁵ There are 16 indigenous languages in Sierra Leone, each spoken by a different ethnic group. See D.J. Francis/ M.C. Kamanda, “Politics and Language Planning in Sierra Leone”, *African Studies* 60 (2001), 225 et seq. (229).

⁴⁶ On the Creoles see M. Bøås, “Liberia and Sierra Leone – dead ringers? The logic of neopatrimonial rule”, *Third World Quarterly* 22 (2001), 697 et seq. (705).

submission to a local strongman like the Paramount Chiefs⁴⁷ is constitutive for the identity of many.⁴⁸ And in the time before and during the civil war, Sierra Leone's identity mishmash was complemented by identities deriving from adherence to a particular youth culture.⁴⁹ It follows from this that "nationhood" is not a convincing concept to numerous Sierra Leoneans and that there is therefore no Sierra Leonean "nation".

In order for nation-building to be successful it seems that traditional structures like the larger family or the tribe have to be superseded not as social institutions as such, but as the focal point of the identity of the individual. In other words, for a nation to arise in Sierra Leone society has to be modernized.⁵⁰ Modernization here means the emergence of an impersonal government, of a society pursuing economic growth and allowing for social mobility, and a cultural system allowing for identification by all members of society, even in a non-homogeneous society.⁵¹ At this point it should be mentioned that indeed a number of social modernization processes have been initiated. For example, President Kabbah reformed the institution of the Paramount Chiefs, who are now chosen by election.⁵² The extent to which post-conflict justice mechanisms contribute to nation-building in Sierra Leone will be further analyzed below.⁵³

⁴⁷ On Sierra Leonean chiefdoms and their pre-colonial legacy see R. Fanthorpe, "Locating the Politics of a Sierra Leonean Chiefdom", *Africa: Journal of the International African Institute* 68 (1998), 558 et seq.; for a good overview see Minnesota Advocates for Human Rights, *Background on Sierra Leone*, available at <http://www.mnadvocates.org/Background_on_Sierra_Leone.html>.

⁴⁸ Ibid., 229 et seq.

⁴⁹ Abdullah, see note 11.

⁵⁰ To the concept of nation as a response to the demise of a traditional social order see R. Utz, in this Volume.

⁵¹ von Bogdandy et al., in this Volume.

⁵² On Kabbah's efforts to reform the institution see his statement of January 2003, available at <<http://www.statehouse-sl.org/parachiefs2003.htm>>.

⁵³ See below V.

IV. The Treacherous Path to Peace: African Solutions and International Solutions since 1997

1. Introduction

As has been said, no international administration or tutelage was set up or envisaged for Sierra Leone. By contrast, Sierra Leone saw a multiplicity of efforts by national actors, other states, as well as regional and international organizations. In the following, the legal framework of these interventions, as well as their strengths and shortcomings will be evaluated in light of their effect on sustainable state-building and nation-building.

2. The 1997-1998 Intervention: An African Solution?

a. The Legality of the Intervention

In the aftermath of the 1997 coup d'état, with which the *Abidjan Accord* collapsed, Nigeria and other states intervened in Sierra Leone in June 1997 after negotiations with those who had usurped power from President Kabbah had failed. This intervention is sometimes referred to as an intervention by ECOMOG. However, legally speaking, the intervention was not an ECOMOG intervention, but that of Nigeria, supported by Guinea and Ghana, because it finds no basis in the ECOWAS legal framework. The majority of the ECOWAS member states clearly preferred a diplomatic solution.⁵⁴

In particular, the intervention cannot be based on the ECOWAS Protocol on Non-Aggression,⁵⁵ since this is only applicable to international conflicts and obliges states to have recourse to peaceful conflict settlement.⁵⁶ The ECOWAS Protocol Relating to Mutual Assistance on Defense⁵⁷ covers cases of "internal armed conflict within any Member

⁵⁴ F. Olonisakin, *Reinventing Peacekeeping in Africa*, 2000, 143.

⁵⁵ Protocol on Non-Aggression of 22 April 1978, text in A. Ayissi (ed.), *Co-operating for Peace in West Africa: An Agenda for the 21st Century*, 2001, 31 et seq.

⁵⁶ *Ibid.*, article 5.

⁵⁷ Protocol Relating to Mutual Assistance on Defense of 29 May 1981, text reprinted in Ayissi, see note 55, 37 et seq.

State engineered and supported actively from outside likely to endanger the security and peace in the entire Community.”⁵⁸ Given that the RUF received support from Liberia and Libya and that the situation in the entire sub-region was fragile, aggravated by a refugee influx in neighboring countries,⁵⁹ the protocol was applicable to the case at hand. On the request of the head of state of the state concerned, the ECOWAS Authority⁶⁰ could have decided to launch an intervention.⁶¹ President Kabbah indeed had called for an intervention,⁶² but there was no decision by the ECOWAS Authority. While, at the beginning of the Nigeria-led intervention, no decision had been taken at all, the Final Communiqué of a meeting of the ECOWAS foreign ministers in Conacry on 26 June 1997 read in the relevant part as follows: “The Ministers [...] urged that [...] every effort be made to restore the lawful government by a combination of three measures, i.e.: the use of dialogue; the application of sanctions, including an embargo; and the use of force.”⁶³ Although the Communiqué refers to the use of force, it is not a decision mandating an intervention. First and foremost, decisions on intervention are reserved to the Authority of Heads of State and Government.⁶⁴ Further, all the other provisions of the Final Communiqué contain only declarations of intent and recommendations, not binding commitments. This indicates that the provision quoted above does not entail any legal consequences, either. The use of force is merely referred to as an abstract option.

On 29 August 1997 the ECOWAS Authority imposed an embargo on petroleum products and arms, economic sanctions, as well as travel

⁵⁸ Ibid., article 4 (b).

⁵⁹ See W. O’Neill, “Conflict in West Africa: Dealing with Exclusion and Separation”, *International Journal of Refugee Law* 12 (2000), 171 et seq.

⁶⁰ “Authority” refers to the “Authority of Heads of State and Government”, as defined in article 7 of the amended Treaty of ECOWAS of 23 July 1993.

⁶¹ Protocol Relating to Mutual Assistance on Defense, see note 57, article 6 in conjunction with arts 16 and 18.

⁶² UN Press Briefing, Press Conference by the Permanent Representative of Sierra Leone James Jonah of 27 May 1997; see also <<http://www.sierra-leone.org/slnews0597.html>>. Note that it is doubtful whether the request met the formal requirements of article 16 of the Protocol Relating to Mutual Assistance on Defense.

⁶³ Final Communiqué of the Meeting of the Ministers of Foreign Affairs, 26 June 1997, para. 9(iii), see annex to Doc. S/1997/499 of 27 June 1997.

⁶⁴ Article 6 (3) of the Protocol Relating to Mutual Assistance on Defense.

restrictions on Sierra Leone for the members of the junta.⁶⁵ ECOMOG was given the mandate to use “all necessary means” to enforce the decision.⁶⁶ By inference, this means that ECOMOG was not authorized to depose the junta and reinstate Kabbah. Apparently other states in the sub-region attempted to put legal limits on Nigeria’s intervention. It was feared that Nigeria would hijack ECOMOG for expansionist ends. Thus, unlike in the case of Liberia,⁶⁷ the intervention had not received prior authorization by ECOWAS.⁶⁸

This raises the question whether the intervention was legal at all, since it occurred without prior UN Security Council authorization. Afterwards the UN Security Council welcomed the return of the legitimate government,⁶⁹ but even if this should be understood as giving its *ex post facto* blessing,⁷⁰ the UN Charter requires prior authorization by the Council.⁷¹ Nigeria invoked a bilateral defense agreement as a basis

⁶⁵ Decision of the ECOWAS Authority of 29 August 1997, see Annex II to Doc. S/1997/695, article 2.

⁶⁶ *Ibid.*, article 7. This was later approved by the Security Council, see S/RES/1132 (1997) of 8 October 1997, operative para. 8. On the controversy whether subsequent approvals are admissible under Chapter VIII of the UN Charter see below note 71.

⁶⁷ ECOWAS Standing Mediation Committee, Decision A/DEC.1/8/90. On the controversy whether the Protocol Relating to Mutual Assistance on Defense was applicable see Berman/ Sams, see note 21, 86. On the legality of the ECOMOG intervention in Liberia under the UN Charter see J. Allain, “The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union”, *Max Planck UNYB* 8 (2004), 237 et seq. (260 et seq.).

⁶⁸ See also V. Grado, “Il ristabilimento della democrazia in Sierra Leone”, *Riv. Dir. Int.* 83 (2000) 361 et seq. (373). If ECOWAS had given its authorization the question of the conformity of the latter with Chapter VIII of the UN Charter would have become relevant. On this see Allain, see note 67, 261 et seq.

⁶⁹ See S/RES/1156 (1998) of 16 March 1998.

⁷⁰ For a critical discussion see Grado, see note 68, 392; D. Wippman, “Pro-democratic intervention by invitation”, in: G.H. Fox/ B.R. Roth (eds), *Democratic Governance and International Law*, 2000, 293 et seq. (310). Note that the UN Secretary-General had repeatedly called for a peaceful solution of the situation, see *Letter Dated 7 October 1997 from the Secretary-General Addressed to the President of the Security Council*, Doc. S/1997/776.

⁷¹ For the debate whether an *ex post* authorization is sufficient see G. Ress/ J. Bröhmer, “Article 53”, in: B. Simma et al. (eds), *The Charter of the United*

for its intervention,⁷² but this does not tide over the question whether an intervention in an *internal* conflict of another state violates article 2 (4) of the UN Charter.

However, it is a rule of customary international law that intervention on invitation by the legitimate government is admissible,⁷³ as long as the objective of the intervention is confined to helping the government restore its power.⁷⁴ The case at hand raises the question whether the right to request an intervention rests with the legitimate head of state or with the *de facto* authority. At the time of his public request for intervention⁷⁵ Kabbah literally no longer had control over the country. In international law, a state is, in general, represented by the government exercising effective control.⁷⁶ Nevertheless, it is argued that, as long as there is still a fragile transitional phase, the usurpers do not follow in the position of the former government.⁷⁷ Moreover, the increasing importance of material rights in international relations, such as the right to self-determination justifies attributing more importance to the legitimacy of the *de jure* government.⁷⁸ Kabbah's public request for as-

Nations. A Commentary, 2nd edition 2002, marginal notes 16-17 (in relation to measures by regional organizations, but the same considerations apply *a fortiori* in relation to measures by individual states).

⁷² Berman/ Sams, see note 21, 113 (note 158).

⁷³ See the extensive study by G. Nolte, *Eingreifen auf Einladung*, 1999, 422 et seq., 563-564, 573-574, 600; for a more cautious view see A. Randelzhofer, "Article 2 (4)", in: Simma, see note 71, marginal notes 30-34 with numerous further references.

⁷⁴ Nolte, see note 73, 562-563, 570.

⁷⁵ See note 62.

⁷⁶ H. Lauterpacht, *Recognition in International Law*, 1948, 98.

⁷⁷ G. Dahn/ J. Delbrück/ R. Wolfrum, *Völkerrecht*, Vol. I/2, 2nd edition 2002, 303; Nolte, see note 73, 145-148; Lauterpacht, see note 76, 93.

⁷⁸ See generally J.A. Frowein, *Das de facto-Regime im Völkerrecht*, 1968, 230; with a focus on democratic regimes T.M. Franck, "The Emerging Right to Democratic Governance", *AJIL* 86 (1992), 46 et seq.; on Sierra Leone see K. Nowroth/ E.W. Schabacker, "The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone", *Am. U. Int'l L. Rev.* 14 (1998), 321 et seq. (396). For a contrary view based on a survey of recent state practice S.D. Murphy, "Democratic legitimacy and the recognition of States and governments", in: G.H. Fox/ B.R. Roth (eds), *Democratic Governance and International Law*, 2000, 123 et seq. (143-151). Grado, see note 68, 375 and 377, concedes that the legitimate regime, though disposed of all effective control, can still represent the

sistance therefore empowered Nigeria and other states to intervene. Thus, the 1997 intervention did not violate international law because it was requested by a legitimate government.⁷⁹

The ECOMOG presence following the June 1997 intervention was not based on any specific mandate. The junta accepted in the *Conakry Peace Agreement* of 23 October 1997⁸⁰ that ECOMOG monitored the ceasefire, the disarmament process, and the delivery of humanitarian assistance. ECOMOG, however, performed operations that would have required a peace-enforcement mandate.⁸¹ As with the June 1997 intervention, it is difficult to base those operations on the ECOWAS Protocol Relating to Mutual Assistance on Defense. For reasons stated above, Security Council Resolution 1132 is not an option, either.⁸² Therefore the only legal basis for ECOMOG's operations remains Kabbah's invitation. Likewise, after Kabbah had been reinstated, ECOMOG remained in the country on his request.⁸³

b. A Right to Intervene in Defense of Democracy?

Certainly, the Nigerian intervention would not have been acceptable on the international level without a legitimate president. Therefore one might ask whether Sierra Leone might serve as a case in point for the

state, but deduces from recent state practice that it does not have the right to request an intervention.

⁷⁹ Other arguments put forward to justify the intervention include a right of intervention to safeguard democracy after a coup against a democratic government J. Lewitt, "Humanitarian Intervention by Regional Actors in International Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone", *Temp. Int'l & Comp. L. J.* 12 (1998), 333 et seq. (369); and, similarly, a right of intervention deriving from a violation of the principle of internal self-determination (Grado, see note 68, 395 et seq.), accompanied by other grave circumstances, which threaten international peace (*ibid.*, 423). This will be discussed in the following section.

⁸⁰ See note 20.

⁸¹ Grado, see note 68, 388.

⁸² S/RES/1132 (1997) of 8 October 1997, operative para. 8.

⁸³ See S/RES/1181 (1998) of 13 July 1998, operative para. 5: "Commends the positive role of ECOWAS and ECOMOG in their efforts to restore peace, security and stability throughout the country at the request of the Government of Sierra Leone [...]".

scholarly discussion⁸⁴ about a right of intervention in order to overturn an undemocratic regime.⁸⁵ Indeed, there is abundant documentary evidence of how much the United Nations and the International Community, by condemning the May 1997 coup d'état, stressed the fact that it had been directed against a legitimate government.⁸⁶ The regime installed by Koroma's junta which had carried out the putsch had severe problems not only in holding onto power, but also in acquiring at least a glint of legitimacy, both domestically and internationally.⁸⁷ Official documents referred to the junta as an "illegal regime."⁸⁸ This demonstrates how much importance the various actors attributed to Kabbah's democratic legitimacy.

Nevertheless, the intervention to save democratic rule in Sierra Leone was initiated by a country then still under the rule of a military dictator. Nigeria's motivation to intervene was to prevent an escalation of the conflict which would have affected the whole region.⁸⁹ Further, it was not unbeneficial for Nigeria to keep large parts of its troops away from home where they could not cause trouble. Allegedly, Nigeria hoped for financial gain by receiving a share of mining concessions.⁹⁰ Some even say that the Nigerian government could only launch such a costly intervention because at the time it was not accountable to an electorate.⁹¹ This makes it less credible to see Sierra Leone as a prece-

⁸⁴ The discussion was mainly spurred by W.M. Reisman, "Coercion and Self-Determination: Construing Charter Art. 2(4)", *AJIL* 78 (1984), 642 et seq.

⁸⁵ See note 79.

⁸⁶ See Secretary-General Kofi Annan's statements Doc. SG/SM/6245 of 2 June 1997, and Doc. SG/SM/6255 of 12 June 1997 (therein not excluding the use of force); Security Council Presidential Statement Doc. S/PRST/1997/42 of 6 August 1997; and, most notably, the OAU's "authorization" of ECOWAS to use "all necessary means", see Doc. CM/Dec.356 (LXVI) – Sierra Leone – Doc. CM/2004 (LXVI) – c; and the presidency statement on behalf of the European Union of 28 May 1997, EU-Bulletin 5-1997, point 1.4.13.

⁸⁷ Jalloh, see note 16, 168.

⁸⁸ See e.g. the ECOWAS Decision, see note 65, article 2(c).

⁸⁹ Murphy, see note 78, 149. Grado, see note 68, 416-418 provides a detailed analysis of the effects the 1997-1998 crisis in Sierra Leone had on the whole region in terms of refugees, humanitarian disaster, and relations with Liberia.

⁹⁰ Berman/ Sams, see note 21, 117.

⁹¹ Olonisakin, see note 54, 143.

dent for an emerging right to intervene in defense of democracy, whether the intervention be solicited or not.

Also, it might be questioned how “democratic” Sierra Leone really was under Kabbah. Whereas Kabbah had acquired legitimacy through a formalized election procedure, there is nevertheless little reason to assume that Sierra Leone had entered the circle of democratically enlightened countries. Sierra Leone did not transform from a “kleptocracy” into a stable democracy overnight.⁹² For these reasons, Sierra Leone should not be overrated as a precedent for a right to intervene in defense of “democracies”.⁹³

3. Embargoes, Sanctions and UNOMSIL: Half-Hearted International Solutions

Six years of civil war with consequences for the whole sub-region had not prompted the Security Council to adopt a single resolution regarding Sierra Leone. Only the 1997 putsch led to UN embargoes on arms and petroleum products, as well as travel restrictions on the members of the junta, following the example of ECOWAS.⁹⁴ Interestingly, resolution 1132 was adopted under Chapter VII. In its preamble, the Security Council deplores the overthrow of the “democratically-elected government”.⁹⁵ However, in the following paragraph, reference is made to the “consequences for neighboring countries” of the security situation in Sierra Leone. As in the case of Haiti,⁹⁶ it seems that the Security Council hesitated to consider the overthrow of the legitimate government alone as sufficient in order to establish that there was a threat to peace.

After Kabbah had been reinstated, the United Nations established UNOMSIL in July 1998. The Security Council, using its implied powers under the UN Charter,⁹⁷ charged UNOMSIL with the task of monitoring the security situation, the disarmament and demobilization

⁹² See also above III.

⁹³ Cf. B.R. Roth, *Governmental Illegitimacy in International Law*, 1999, 408.

⁹⁴ S/RES/1132 (1997) of 8 October 1997.

⁹⁵ Ibid., 7th paragraph of the preamble.

⁹⁶ S/RES/841 (1993) of 16 June 1993, 11th paragraph of the preamble.

⁹⁷ See E. Suy, “United Nations Peacekeeping System”, in: R. Bernhardt (ed.), *EPIL* Vol. IV (2000), 1143 et seq. (1144).

process, including the role of ECOMOG in the provision of security to this process and the collection and destruction of arms, as well as respect for international humanitarian law.⁹⁸ With regard to the host state, the legal basis of UNOMSIL was an agreement between the United Nations and Sierra Leone.⁹⁹

With only 70 observers,¹⁰⁰ UNOMSIL however proved helpless in the subsequent RUF offensive.¹⁰¹ In early 1999, the RUF operation “No Living Thing”, motivated by indications that the Nigerian ECOWAS contingent would withdraw for financial reasons and Nigeria’s transition to a civilian government scheduled for May 1999, led to the evacuation of UNOMSIL to Guinea.

4. The Lomé Agreement, ECOMOG and UNAMSIL: Multiple Actors Achieving No Solution

a. The Lomé Agreement

The *Lomé Agreement* and its implementation were an attempt by multiple national, regional and international actors to achieve sustainable peace: the negotiations were hosted by the Togolese President in his capacity as ECOWAS chairman.¹⁰² The ECOWAS Executive Secretary, the United Nations Secretary-General’s Special Representative and representatives of the OAU and the Commonwealth provided their good offices. The agreement was further brokered by the United Kingdom and the United States. Likewise, several implementation and conflict resolution mechanisms were put in place in which ECOWAS and the international community had a role to play.¹⁰³ The United Nations and

⁹⁸ S/RES/1181 (1998) of 13 July 1998, operative para. 6.

⁹⁹ Such an agreement is concluded implicitly when the host state accepts the decision by the Security Council, see M. Bothe, “Peace-keeping”, in: Simma, see note 71, marginal note 113. It should not be confused with the status of mission agreement referred to in the *Fifth report of the Secretary-General on the Situation in Sierra Leone*, Doc. S/1998/486 of 9 June 1998, para. 72.

¹⁰⁰ S/RES/1181 (1998) of 13 July 1998, operative para. 6.

¹⁰¹ See above II.

¹⁰² Doc. S/1999/1073 (1999) of 19 October 1999, 3.

¹⁰³ E.g. the “Council of Elders and Religious Leaders” (Lomé Agreement, article VIII), a dispute resolution body composed of five members, of whom

ECOWAS were requested to provide security during the implementation phase.¹⁰⁴ Nevertheless, the *Lomé Agreement* ended up as almost an entire failure. The following analysis of the legal framework of the United Nations and ECOWAS missions as well as of the surrounding circumstances might shed some light on the reasons for this failure.

b. The Mandates of ECOMOG and UNAMSIL

Differences in assessing the situation in Sierra Leone led to different mandates of ECOMOG and UNAMSIL. After the *Lomé Agreement*, ECOWAS adopted a new mandate for ECOMOG on 25 August 1999 in order to put ECOMOG in a position to fulfill its role under the *Lomé Agreement*.¹⁰⁵ Accordingly, ECOMOG was endowed with the tasks to maintain peace and security, including the monitoring of the ceasefire and to afford protection to the authorities of the state, the civilian population, UNOMSIL, refugees, human rights and humanitarian aid workers and the staff of the disarmament program; and to disarm fighters of all factions together with UNOMSIL. The mandate was approved by UN Security Council Resolution 1270.¹⁰⁶ ECOMOG, however, relied heavily on the fragile budgets of the contributing states.¹⁰⁷ This led to the successive withdrawal of ECOMOG troops from the end of 1999¹⁰⁸ and their replacement by UNAMSIL.¹⁰⁹

one was to be appointed by each party to the Agreement, two by the “Inter-Religious Council”, and one by ECOWAS. Implementation should be ensured by the “Joint Implementation Committee” (*Lomé Agreement*, article XXXII), composed of the Committee of Seven on Sierra Leone (West-African States), the moral guarantors of the Agreement, ECOWAS and other international supporters. The ceasefire should be monitored by a “Joint Monitoring Commission” (*Lomé Agreement*, article II), in which the government, the warring factions, UNOMSIL as well as ECOMOG should be represented.

¹⁰⁴ *Lomé Agreement*, arts XIII-XVI.

¹⁰⁵ Cf. Doc. S/1999/1073 of 19 October 1999.

¹⁰⁶ S/RES/1270 (1999) of 22 October 1999, operative para. 7.

¹⁰⁷ Olonisakin, see note 54, 145 et seq. gives a detailed analysis of the operational deficits of the ECOMOG operation in Liberia, which is illustrative of general deficits that were also present during the operation in Sierra Leone.

¹⁰⁸ See *Second report of the Secretary-General Pursuant to Security Council Resolution 1270 (1999) on the United Nations Mission in Sierra Leone*, Doc. S/2000/13 of 11 January 2000, paras 3, 15.

Since the tasks entrusted to UNOMSIL by the *Lomé Agreement* exceeded the mandate and capacities of an observer mission, UNOMSIL was replaced by UNAMSIL. UNAMSIL had a mixed mandate¹¹⁰ featuring traditional consensus-based peace-keeping¹¹¹ and peace-building tasks,¹¹² as well as Chapter VII based enforcement tasks.¹¹³ The part of the mandate which relates to peace-keeping and peace-building finds its basis in the *Lomé Agreement*, in particular its article XIV. Accordingly, UNAMSIL was entrusted, *inter alia*, with assisting the government of Sierra Leone in the disarmament, demobilization and reintegration process; monitoring adherence to the ceasefire; facilitating the delivery of humanitarian assistance; and providing support for elections.

Despite the fragile security situation in Sierra Leone which the Security Council acknowledged when determining that “the situation in Sierra Leone continues to constitute a threat to international peace and security in the region”,¹¹⁴ only one paragraph of Resolution 1270 establishing UNAMSIL was adopted under Chapter VII, which endows UNAMSIL with the task not only to ensure the security of its personnel, but also to “afford protection to civilians under imminent threat of physical violence”.¹¹⁵ Adopting this provision under Chapter VII was not only necessary because these tasks were not covered by the *Lomé Agreement*. It seems that giving UNAMSIL these tasks also had the purpose of preventing a new Rwanda where peace-keepers had to surrender civilians under their care to the rioting mob. At the same time, the application of this paragraph was limited by obliging the mission to take into account “the responsibilities of the Government of Sierra

¹⁰⁹ In fact, some ECOMOG contingents were eventually integrated into UNAMSIL. See *Second report of the Secretary-General Pursuant to Security Council Resolution 1270 (1999) on the United Nations Mission in Sierra Leone*, Doc. S/2000/13 of 11 January 2000, para. 16; *Third report of the Secretary-General on the United Nations Mission in Sierra Leone*, Doc. S/2000/186 of 7 March 2000, para. 19.

¹¹⁰ The taxonomy is taken from J.A. Frowein/ N. Krisch, “Article 42”, in: Simma, see note 71, marginal note 18.

¹¹¹ S/RES/1270 (1999) of 22 October 1999, operative para. 8.

¹¹² This terminology is taken from the Brahimi Report, see note 28, para. 13.

¹¹³ S/RES/1270 (1999) of 22 October 1999, *ibid.*, operative para. 14.

¹¹⁴ S/RES/1270 (1999) of 22 October 1999, fifth recital of the preamble.

¹¹⁵ *Ibid.*, operative para. 14.

Leone and ECOMOG.”¹¹⁶ UNAMSIL’s mandate was thus more restrictive than ECOMOG’s mandate.

In February 2000, the Security Council increased the number of troops to a maximum of 11,100. At the same time, additional parts of the mandate were adopted under Chapter VII to strengthen the peace-enforcement character of UNAMSIL¹¹⁷ in order to prepare it for the drawdown of ECOMOG.¹¹⁸ Accordingly, UNAMSIL was entrusted with providing security at sensitive points, facilitating the free flow of people, goods and humanitarian assistance, providing security to the disarmament program, assisting the law enforcement authorities of Sierra Leone, and guarding and destroying equipment collected from ex-combatants. In spite of the amendment to its mandate, UNAMSIL was still helpless against deployments of the RUF in the area controlled by the RUF.

c. The Failure of the Lomé Agreement: Africa Abandoned?

From the beginning, UNAMSIL had been under attack by the RUF and ex-Sierra Leone Army elements.¹¹⁹ In May 2000, the security situation in Sierra Leone proved to be more than unstable when more than 500 UN peace-keepers were kidnapped by the RUF. At that point, it became obvious that peace needed to be enforced rather than merely kept. The kidnapping should have been reason enough for the United Nations to adopt a stronger mandate, and even more so in the light of the Nigerian announcement to withdraw its contingent. ECOWAS states requested the United Nations to extend the mandate of UNAMSIL and to transform it into a peace-enforcement operation.¹²⁰

¹¹⁶ Ibid.

¹¹⁷ S/RES/1289 (2000) of 7 February 2000, operative para. 10.

¹¹⁸ See the statements by Assistant Secretary-General Annabi as well as the representative of the Netherlands during the session of the Security Council, Doc. S/PV.4098 of 7 February 2000, page 2 (Annabi) and 5 (Netherlands).

¹¹⁹ See, for example, the events reported in the *Third report of the Secretary-General on the United Nations Mission in Sierra Leone*, Doc. S/2000/186 of 7 March 2000, para. 11 et seq.

¹²⁰ See the report about the ECOWAS Abuja summit of 9 May 2000, available at <<http://www.sierra-leone.org/slnews0500-B.html>>.

They even agreed to make troops available for UNAMSIL.¹²¹ During the ensuing debate in the Security Council on 11 May 2000 the Secretary-General, while reiterating that UNAMSIL at present only had a mandate for peace-keeping, did not oppose the upgrading of the mandate in order to enable the mission to actively restore peace, but pointed out that this was subject to the financial contributions states would be willing to make.¹²² However, the representatives of some members of the Security Council, in particular the permanent members, suggested that the operation should not receive a stronger mandate.¹²³ In the end, the Security Council did not change the mandate of UNAMSIL, but increased its strength to 13,000 troops on 19 May 2000.

d. The Failure of the Lomé Agreement: Almost a Predictability?

From an *ex post* perspective, a number of factors indicate that the *Lomé Agreement* and the framework for its implementation were based on feet of clay. Those factors are, principally, the lack of a true will to peace on the part of the RUF, difficulties of the government of Sierra Leone, as well as operational shortcomings of UNAMSIL and ECOMOG.

aa. No Peace to Keep

The most obvious reason why UNAMSIL encountered difficulties was that there had been few signs of a true commitment to achieving sustainable peace on the part of the warring factions, in particular the RUF. As in the past, the RUF did not show genuine interest in peace, but rather used the brief respite to recover militarily.¹²⁴ For Sankoh and his fellows, the *Lomé Agreement* seems to have been just another treaty which they intended to break. Once the transitional government had been set up, Foday Sankoh showed no real interest in exercising power through legitimized institutions.¹²⁵ For example, while Sankoh voiced complaints about obstacles which the Kabbah administration allegedly

¹²¹ See statement in the Security Council on 11 May 2000 by the representative of Algeria, Doc. S/PV.4139 (2000), 5.

¹²² Ibid., 3.

¹²³ Ibid., United Kingdom, 6-8, United States, 11, Russia, 16; see however the statement of the representative of Algeria who considered the mandate to be insufficient (ibid., 5).

¹²⁴ Dobbins et al., see note 41, 133.

¹²⁵ Sawyer, see note 6, 451.

put in operation in order to prevent the RUF from participating in the government,¹²⁶ he engaged in illicit diamond trade.¹²⁷ What made things even worse was that by the time of the *Lomé Agreement* Sankoh and the political branch of the RUF had begun to lose control over the combatant cadres.¹²⁸

In addition to this there were the shortcomings of the government and the administration of Sierra Leone. The police had been incapacitated during “Operation No Living Thing”, and corruption was endemic.¹²⁹ And, as has been stressed above,¹³⁰ Sierra Leone could not be considered as a strong democracy.

Thus, in the course of the events of spring 2000 the *Lomé Agreement* finally proved to be of no practical impact on the conduct of the warring factions, just like any preceding agreement. In fact, all factions share the responsibility for this. The *Lomé Agreement* was only concluded because there was no other option for Kabbah. He could not gain support for a military solution, so the military stalemate situation made an end of the conflict by military victory of either side unlikely.¹³¹ The RUF’s consent to peace was bought at the price of giving it access to the resources necessary to resume war.¹³² The Truth and Reconciliation Commission (see below) reproached Kabbah that, by concluding the *Lomé Agreement*, he helped to protract the war.¹³³

bb. Difficulties of UNAMSIL and ECOMOG at the Operational Level

The fragile security situation in the country as well as difficulties in co-ordination impaired the operation of the two parallel missions. The last straw was that each mission had its own operational shortcomings.

¹²⁶ See Sankoh’s letter to the guarantors of the Lomé Agreement, available at <<http://www.sierra-leone.org/rufp022400.html>>

¹²⁷ Anthony, see note 8, 146.

¹²⁸ Report of the Sierra Leone Truth and Reconciliation Commission of 5 October 2004, available at <http://www.nuigalway.ie/human_rights/publications.html>, Volume Two, Chapter Two, para. 159.

¹²⁹ Dobbins et al., see note 41, 131 et seq.; Akinrinade, see note 8, 435.

¹³⁰ See above VI. 2.b.

¹³¹ Akinrinade, see note 8, 437; Francis, see note 40, 364.

¹³² Francis, see note 40, 365, compares the Lomé Agreement to the 1991 Bicesse Accord in Angola, which left the UNITA in possession of diamond mining fields and thus enabled them to resume war.

¹³³ *Ibid.*, e.g. paras 278 and 291.

Many ECOMOG contingents faced serious material shortcomings. The troops were insufficiently equipped and often paid irregularly.¹³⁴ UNAMSIL was not much better. Serious shortcomings, ranging from insufficient equipment to an inconsistent understanding of the purpose of the mission, as well as coordination problems between the military and civilian components were reported.¹³⁵ UNAMSIL thus lacked a clear, credible and achievable mandate. As the Brahimi Report pointed out, this was a structural problem of peace-keeping operations at the time.¹³⁶

Apart from the aforementioned difficulties, UNAMSIL and ECOMOG did not cooperate as much as one may have wished. No joint command was established for UNAMSIL and ECOMOG.¹³⁷ Perhaps this explains some of the difficulties in communication and coordination between UNAMSIL and ECOMOG.¹³⁸ Allegedly, Nigeria was unwilling to accept two peace-keeping forces in one country, a fact which contributed to its decision to withdraw in 2000. There is extensive anecdotal evidence of the hostility between ECOMOG and UNAMSIL commanders about the way control was exercised over the Nigerian contingent.¹³⁹ The withdrawal of the Indian contingent might even be related to that rift.¹⁴⁰ The source of the difficulties seems to have been the introduction of UNAMSIL alongside ECOMOG without a clear division of competencies, yet with different mandates.

cc. Insufficient International Efforts

One may speculate why UNAMSIL had not been given the mandate and the strength in order to prevent a situation like the May 2000 crisis

¹³⁴ For a detailed account of the shortcomings of the ECOMOG troops deployed to Liberia, which were later transferred to Sierra Leone, see Olonisakin, see note 54, 145 et seq.

¹³⁵ *Fifth report of the Secretary-General on the United Nations Mission in Sierra Leone*, Doc. S/2000/751 of 31 July 2000, para. 54.

¹³⁶ Brahimi Report, see note 28, paras 56-64.

¹³⁷ On similar problems between NATO and UNMIK in Kosovo see J. Friedrich, in this Volume.

¹³⁸ Instructive on this is the *Fifth report of the Secretary-General on the United Nations Mission in Sierra Leone*, see note 135, paras 53-55. Those failures found specific mention in the Brahimi Report, see note 28, para. 267.

¹³⁹ Abass, see note 29, 192.

¹⁴⁰ *Ibid.*, 199.

in the first place, and why it took so long to endow it with a sufficient mandate. Maybe the historic context of the entire situation provides an answer. The NATO states had been involved in other conflict arenas. In particular, large contingents were bound by the Kosovo crisis and the 1999 war against the Former Yugoslavia. Therefore the international community, especially the United Kingdom and the United States, pressured Kabbah to negotiate an unfavorable agreement.¹⁴¹ By contrast, Liberia was much more in the focus of the international community. Large contingents had been deployed there. With hindsight, another reason for the failure seems to lie in a wrong assessment of the security situation. With the *Lomé Agreement* in place, the UN mission was not expected to face a violent environment calling for a strong mandate.¹⁴²

The events in Sierra Leone of May 2000 cannot be compared to the Rwandan catastrophe. Neither did the United Nations completely withdraw, nor was the number of troops deployed a *quantité négligeable*. Nevertheless, the case of Sierra Leone features exactly those mistakes of which a few months later the “Brahimi Report” would accuse the United Nations, that is, to send under-equipped peace-keeping missions into conflicts where the parties were not seriously committed to peace.¹⁴³

5. Relief at the Last Minute: The British Intervention

On 7 May 2000, the British government decided to intervene in Sierra Leone with military force outside of the UNAMSIL framework. Initially, the purpose of the operation was to rescue British nationals.¹⁴⁴ It is doubtful whether, under international law, this constitutes a legitimate reason to use force and to intervene on the territory of another state. Some argue that attacks on nationals could be equated with an at-

¹⁴¹ See above note 131, see also P. Williams, “Fighting For Freetown: British Military Intervention in Sierra Leone”, *Contemporary Security Policy* 22 (2001), 140 et seq. (148 et seq.).

¹⁴² This was expressed during a debate in the Security Council, see Doc. S/PV.4139 (2000) of 11 May 2000, 10 (Malaysia) and 12 (Bangladesh). See also Bernath/ Nyce, see note 28.

¹⁴³ Brahimi Report, see note 28, paras 20-22.

¹⁴⁴ *Fourth report of the Secretary-General on the United Nations Mission in Sierra Leone*, Doc. S/2000/455 of 19 May 2000, para. 69; Williams, see note 141, 154, 156.

tack on the territory of the state and conclude that an intervention would be justified as self-defense.¹⁴⁵ However, it is unclear how an attack on nationals by another state should impair the territorial integrity or political independence of the state, this being a condition for the existence of a right to self-defense.¹⁴⁶

After rescuing British nationals, British troops, however, remained in the country in order to help rescue the UNAMSIL troops taken hostage by the RUF. Among other factors, the pressure created by the presence of British troops prompted the release of most hostages after intense negotiations. Nevertheless, British troops became involved in the hostilities. In September 2000 a British patrol was even taken hostage by the West Side Boys. The United Kingdom justified these continued operations on humanitarian grounds, as well as by the need to defend democracy.¹⁴⁷ The first justification raises the issue of the admissibility of a humanitarian intervention involving the use of force. This controversial question cannot be discussed here in all detail.¹⁴⁸ It seems, however, that the better reasons speak against its admissibility, namely the fact that it might lead to abuse and could thus destabilize the existing worldwide framework for peace and security. As imperfect as this framework is, should it be further destabilized increasing anarchy would most probably ensue. The same reasons militate against admitting a right to intervene in defense of democracy.¹⁴⁹

However, the government of Sierra Leone did not object to the British intervention. On the contrary, it had its army trained by British troops.¹⁵⁰ Therefore, as with the Nigerian intervention in 1997, only the (implicit) agreement of Sierra Leone can serve as a legal basis for this intervention.¹⁵¹

¹⁴⁵ Y. Dinstein, *War, Aggression and Self-Defence*, 3rd edition 2001, 203 et seq.; L. Doswald-Beck, "The Legality of the US-Intervention in Grenada", *NILR* 31 (1984), 355 et seq. (361).

¹⁴⁶ N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, 1985, 11.

¹⁴⁷ Williams, see note 141, 156 et seq.

¹⁴⁸ For an extensive discussion see Dahm/ Delbrück/ Wolfrum, see note 77, Vol. I/3, 2002, 825-830.

¹⁴⁹ On this see also above note 84 and accompanying text.

¹⁵⁰ Cf. *Sixth report of the Secretary-General on the United Nations Mission in Sierra Leone*, Doc. S/2000/832 of 24 August 2000, para. 12.

¹⁵¹ Instructive on the relationship between the United Kingdom and Sierra Leone is C. Barnes/ T. Polzer, "The Sierra Leone Peace Process: Learning

6. The Success of a Coordinated Solution by Multiple Actors

In 2000 Kosovo was largely secured,¹⁵² so that Sierra Leone could gain the attention of decision-makers in the United Kingdom and the United States. These two states, alongside various other actors made large diplomatic, military and economic efforts to stabilize the country, eventually with success.

In August 2000, the Security Council eventually recognized the need for a forceful intervention and further strengthened the mandate. By resolution 1313 it endowed UNAMSIL with a number of “priority tasks” and requested it to “decisively counter the threat of RUF attack by responding robustly to any hostile actions or threat of imminent or direct use of force”.¹⁵³ It is interesting to note that the Security Council does not explicitly refer to Chapter VII of the UN Charter. Nevertheless, the Security Council includes a reference to the previous resolutions which defined the UNAMSIL mandate and which were both partially adopted under Chapter VII.¹⁵⁴ It could therefore be argued that the extension of the mandate occurred under Chapter VII, although implicitly. It seems less probable that the Security Council wanted to rely on the consent of the Government of Sierra Leone. It is said that the “views” of the Government of Sierra Leone were taken into account,¹⁵⁵ but that is quite a weak formulation which does not seem to reflect an underlying consensus as a basis for the extended mandate.

British troops provided key assistance to the Sierra Leone Army. Troops were trained in order to be able to confront the RUF. Although the British contingents were not integrated in UNAMSIL, coordination was facilitated by British commanders within the ranks of UNAMSIL.¹⁵⁶

from the Past to Address Current Challenges”, Report presented at an Expert Seminar by Conciliation Resources held in London on 27 September 2000, available at <http://www.c-r.org/pubs/occ_papers/slsemreport.shtml> (last access on 23 June 2005).

¹⁵² See J. Friedrich, in this Volume.

¹⁵³ S/RES/1313 (2000) of 4 August 2000, operative para. 3, quotation from operative para. 3(b). Strengthening the mission had been suggested by the Secretary-General beforehand, see *Fifth report of the Secretary-General on the United Nations Mission in Sierra Leone*, see note 135, para. 65.

¹⁵⁴ S/RES/1313 (2000) of 4 August 2000, operative para. 3.

¹⁵⁵ Ibid.

¹⁵⁶ Dobbins et al., see note 41, 148.

The combined and coordinated efforts of UNAMSIL and the Sierra Leone Army, as well as British forces acting independently, eventually succeeded in fighting off the RUF offensive.¹⁵⁷ This paved the way for the conclusion of the *Abuja Cease-Fire Agreement*, facilitated by ECOWAS.¹⁵⁸ On 30 March 2001, UNAMSIL was increased to its maximum strength of 17,500 military personnel,¹⁵⁹ thus making it the largest peace-keeping operation of its time.

In addition, what contributed substantially to attenuating the conflict in Sierra Leone were the steps that the international community undertook against Charles Taylor. Apart from supporting the RUF, his activities were a continuous source of trouble in the entire region.¹⁶⁰ The travel bans the Security Council imposed on him limited his ability to participate in the diamond trade.¹⁶¹ Under international pressure he was eventually forced to resign in 2003. Since then, the security situation by and large has been an uphill struggle.¹⁶²

The civilian component of UNAMSIL was further crucial for ensuring the return of government officials to their posts. It also facilitated the solution of disputes between the government and the RUF over a number of issues. UNAMSIL activities to improve the country's infrastructure helped to create goodwill among the population. Nevertheless, UNAMSIL rather assumed a mediating role, not a guiding one.¹⁶³

7. Conclusion

The achievements of UNAMSIL and ECOMOG are undisputed: the disarmament, demobilization and reintegration program was successfully concluded in January 2002, elections on the national level could be held in May of the same year, and in September 2004 the security situa-

¹⁵⁷ L.R. Hall/ N. Kazemi, "Prospects for Justice and Reconciliation in Sierra Leone", *Harv. Int'l L. J.* 44 (2003), 287 et seq. (289 note 8).

¹⁵⁸ Doc. S/2000/1091 of 14 November 2000.

¹⁵⁹ S/RES/1346 (2001) of 30 March 2001, operative para. 2.

¹⁶⁰ See above note 37.

¹⁶¹ S/RES/1343 (2001) of 7 March 2001.

¹⁶² *Twenty-second report of the Secretary-General on the United Nations Mission in Sierra Leone*, Doc. S/2004/536 of 6 July 2004, paras. 2 et seq., *Twenty-fourth report of the Secretary-General on the United Nations Mission in Sierra Leone*, Doc. S/2004/965 of 10 December 2004, paras. 2 et seq.

¹⁶³ Dobbins et al., see note 41, 143 et seq.

tion had improved to an extent that it was possible to pass over control to Sierra Leonean forces.

Thus, punctual assistance to national efforts of reconstruction and reconciliation had sufficed. The international participants did not determine the direction and speed of that process, but it is undisputed that their provision of security to the process was crucial. Nation-building did not seem to stand high on the task list of the international community. Of course, events facilitated by the international forces like the solemn ceremonies marking the end of the war in which the last weapons to be surrendered under the disarmament program were buried,¹⁶⁴ might have positive effects on nation-building. But no strategic efforts were undertaken in that direction. Arguably, the United Nations “light footprint” approach in Afghanistan¹⁶⁵ was to some extent anticipated in Sierra Leone.

It becomes apparent that in the case of Sierra Leone, the lessons from the Brahimi Report as well as from past failures were apprehended rather quickly: full-scale harmonized efforts are needed to solve such an intrinsic situation, not half-hearted symbolic missions.¹⁶⁶ In this context it is interesting to note that UNAMSIL changed from a neutral intermediary force with a predominantly peace-keeping mandate conceptualized to implement the *Lomé Agreement* into an operation with a strong enforcement mandate. The British intervention showed that the United Nations cannot and should not carry out certain peace-enforcement operations.¹⁶⁷ It was further realized that the country needed to be provided with support on a long-term basis. This appears to be a general tendency of peace-keeping operations since the late 1990.¹⁶⁸

Sierra Leone is a case in point for another observation of the Brahimi Report, namely that in a conflict-prone region, a solution is necessary that also encompasses neighboring states.¹⁶⁹ In this respect the new ECOWAS Mechanism for Conflict Prevention, Management, Resolu-

¹⁶⁴ *Thirteenth report of the Secretary-General on the United Nations Mission in Sierra Leone*, Doc. S/2002/267 of 14 March 2002, para. 12.

¹⁶⁵ Cf. E. Afsah/ A.H. Guhr, in this Volume.

¹⁶⁶ See Brahimi Report, see note 28, para. 51.

¹⁶⁷ Cf. the Brahimi Report, see note 28, Executive Summary: “There are many tasks which United Nations peacekeeping forces should not be asked to undertake and many places they should not go.”

¹⁶⁸ Dobbins et al., see note 41, XXI.

¹⁶⁹ Brahimi Report, see note 28, para. 23.

tion, Peacekeeping and Security should be welcomed.¹⁷⁰ However, such regional solutions alone are hardly sufficient because of the economic and political constraints of the states in the West-African sub-region. African solutions are usually not enough to solve such grave African problems, and the world community would do well to devote to this continent the attention it needs.

V. Post-Conflict Justice in Sierra Leone: A Mixed Solution or No Solution at All?

1. The Role of Post-Conflict Justice in State-Building and Nation-Building

Sierra Leone lends itself to studying the impact of post-conflict justice mechanisms on state-building as well as nation-building, since two very different institutions were charged with the task to render justice for past atrocities and expected to contribute to peace-building by national reconciliation: the Truth and Reconciliation Commission and the Special Court for Sierra Leone. Sierra Leone provides a test tube for studying the relationship between restorative and retributive justice, as well as the advantages and disadvantages of each. At the same time, both institutions feature an interesting mix of national and international elements. The two institutions will be examined in the following. For that purpose, particular attention will have to be paid to how these institutions foster efforts to find a way to deal with the past, e.g. by acts and symbols of reconciliation or the formation of a common account of national history, as well as to what extent they might have a positive impact on the present situation in the country.

¹⁷⁰ Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security of 10 December 1999, text in Ayissi, see note 55, 111, hereinafter referred to as “ECOWAS Mechanism”.

2. The Truth and Reconciliation Commission

a. Overview of the TRC and its Objectives

The Truth and Reconciliation Commission (TRC) was envisaged by article XXVI of the *Lomé Agreement*. It was intended to provide a forum for people to tell their story and produce a historic record which, it was believed, would contribute to the reconciliation process.¹⁷¹ Since mechanisms of retributive (i.e. criminal) justice seemed to be out of the question in light of the amnesty granted by article IX of the *Lomé Agreement*,¹⁷² the choice was made to set up an institution endowed with the task of rendering restorative justice. As only some meager provisions of the *Lomé Agreement* deal with the TRC one has the impression that the TRC only had the function of a fig leaf in order to respond in advance to criticism of the amnesty provision.¹⁷³ It was therefore left to the TRC Act 2000, which establishes the TRC as an institution under national law, to set out the Commission's mandate.¹⁷⁴

Article 6 (1) of the TRC Act outlines five objectives for the Commission. Accordingly, the Commission was endowed with the task to "create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; [...]"¹⁷⁵ Moreover, the TRC was expected to address impunity, respond to the needs of victims, promote healing and reconciliation, and to prevent a repetition of past atrocities.¹⁷⁶

The TRC was vested with extensive investigative powers, including the issuance of summons and subpoenas, which do not fall short of the powers of judicial authorities.¹⁷⁷ In this respect the TRC Act compen-

¹⁷¹ Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of 7 July 1999, Doc. S/1999/777, article XXVI para. 1.

¹⁷² See below V. 3. b. aa.

¹⁷³ Gallagher, see note 24, 164.

¹⁷⁴ The Truth and Reconciliation Commission Act 2000 of 22 February 2000, CXXXI Sierra Leone Gazette, No. 9, available at <www.sierra-leone.org/trcact2000.html>, hereinafter referred to as "TRC Act".

¹⁷⁵ Clause 6 (1) TRC Act.

¹⁷⁶ Ibid.

¹⁷⁷ Clause 8 TRC Act.

sated a serious shortcoming of the *Lomé Agreement* where it was not specified that anyone would be compelled to appear before the Commission. The Commission also had the right not to disclose information which it received on a confidential basis.¹⁷⁸ By contrast to the Special Court for Sierra Leone, the TRC was in a position to treat cases of minors under 15 years of age.¹⁷⁹ The TRC further differs from the Special Court in that its territorial competence was unlimited,¹⁸⁰ and in that the TRC could also examine the responsibility of groups as such.

A remarkable feature of the TRC Act is that the Commission was entitled to make recommendations. The TRC Act requires the government to give follow-up to these recommendations and to take all reasonable steps to implement them. Although the TRC had no financial means to compensate victims it could make recommendations regarding the Special Fund for War Victims established pursuant to article XXIX of the *Lomé Agreement*.¹⁸¹

International participation ranged from the appointment of three out of seven members of the TRC by the Secretary-General and the High Commissioner for Human Rights,¹⁸² to financing by way of voluntary contributions, and technical assistance.¹⁸³ The Moral Guarantors of the *Lomé Agreement* are represented in the Follow-up Council which has the task to monitor the implementation of the TRC's recommendations.¹⁸⁴ Although the TRC Act was adopted in 2000, it took the Commission two years to set up, and it began its work only in the second half of 2002. Internal difficulties impacted on the work of the Commission and resulted in this slow take-off.¹⁸⁵ Those difficulties made the Commission lose credibility, which in turn worsened its funding situation. Originally budgeted at US\$ 10 million, poor donor response eventually forced the TRC to administer a microscopic budget

¹⁷⁸ Clause 7 (3) TRC Act.

¹⁷⁹ The members of the Security Council emphasized the special responsibility of the TRC for trying minors. See *Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General*, Doc. S/2000/1234 of 22 December 2000, para. 1.

¹⁸⁰ See by contrast article 1 (1) of the Statute of the Court (see below).

¹⁸¹ Clause 15 (2) TRC Act. This was required by article XXVI (2) of the *Lomé Agreement*.

¹⁸² Article XXVI (3) *Lomé Agreement*, clause 3 (1) TRC Act.

¹⁸³ Clause 12 TRC Act.

¹⁸⁴ Clause 18 TRC Act.

¹⁸⁵ *Africa Week*, October 2004, 23-25.

of US\$ 4million, a negligible amount compared to the US\$ 30 million annual budget of the Special Court.

In December 2002 a four-month period began during which the Commission took more than 6,000 written statements. Afterwards hearings were held throughout the entire country. The TRC released its final report in October 2004.¹⁸⁶ The report is not shy about naming and blaming those responsible for the atrocities. All factions get their share of responsibility, although the Commission highlights that the RUF bears the most. Some popular myths about the Sierra Leone conflict were confirmed, while others received clarification. For example, the report states that diamonds were fuel for the conflict rather than its source. Considerable efforts have been undertaken to publish the report widely.

b. The TRC's Impact on State-Building and Nation-Building

In this section the extent to which the TRC had a positive impact on state-building and nation-building will be looked into. In this respect, the effects of its report need to be examined. The TRC achieved its objective to create an impartial historical record of the civil war in Sierra Leone. A particular strength of the report is its comprehensiveness. This is due to a number of factors. First, the members of the Commission interpreted the Commission's temporal jurisdiction extensively, which finds support in article 6 (2)(a) TRC Act obliging the commission to investigate the "antecedents" of the conflict.¹⁸⁷ Similarly, while the TRC's mandate did not determine what needs to be understood as "human rights and international humanitarian law",¹⁸⁸ the TRC decided to adopt a broad understanding of "human rights", as is reflected in the African Charter on Human and People's Rights.¹⁸⁹ Furthermore, the report is more insightful than any judgment of a court could ever be

¹⁸⁶ *Report of the Sierra Leone Truth and Reconciliation Commission of 5 October 2004*, available at <http://www.nuigalway.ie/human_rights/publications.html>, hereinafter referred to as "TRC Report".

¹⁸⁷ W. Schabas, "The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone", *HRQ* 25 (2003), 1035 et seq. (1040-1041).

¹⁸⁸ Clause 6 (1) TRC Act.

¹⁸⁹ *ILM* 21 (1982), 58 et seq. See Schabas, see note 187, 1046.

since it investigates the causes and reasons for the various events,¹⁹⁰ as required by the TRC's mandate.¹⁹¹ In contrast to the narrow visual field of criminal proceedings, the TRC thus sheds light on a "wider truth", based on broad participation of both victims and perpetrators. In the discharge of its mandate the TRC also paid special attention to sexual abuses and the experience of children in armed conflict, as required by its mandate.¹⁹²

The TRC Act does not indicate how the report is expected to contribute to state-building and nation-building. Perhaps the underlying idea is that, once the "truth" is brought to the light, in particular through the voluntary participation of perpetrators, it will evoke reconciliation. Reconciliation might be essential for nation-building. Such a concept, however, originates in the predominantly Christian idea that confession is a precondition for contrition, which will lead to catharsis and thus to reconciliation.¹⁹³ Yet it appears that there is a difference between "confession" in a religious context and "truth-telling" in a court-like procedure without reference to metaphysics. In case of the latter, there is not necessarily a causal relationship with reconciliation.¹⁹⁴ Rather, if the truth is not revealed to the satisfaction of the victim such procedures bear the risk of victimizing the victim for a second time,

¹⁹⁰ On the importance of such "why-questions" see P. B. Hayner, *Unspeakable Truths*, 2001, 81.

¹⁹¹ Clause 6 (2)(a) TRC Act.

¹⁹² Cf. clause 7 (4) TRC Act

¹⁹³ Although the idea of reconciliation features in many religions, the concept of reconciliation by confession seems to be typical of Christian belief. The concept finds its clearest expression in 1 John 1:8-10. The scope of what needed to be confessed was extended by Abelard's teachings as to include not only morally bad deeds, but also "bad intentions". See P. Abaelardus, *Ethica*, before 1140, t.II c.3, text available in: D.E. Luscombe, *Peter Abelard's Ethics. An Edition with Introduction*, 1971. This led to detailed inquisition manuals in order to give guidance to the practice of confession and reconciliation. Cf. the inquisition manual by Raymond of Peñafort, *Summa de paenitentia*, 1225-1235, para. 802, text available in: J. Ochoa Sanz/ L. Diez Garcia (eds), *S. Raimundus de Pennaforte*, Vol. 3 (*Summa de paenitentia*), 1976; on the entire issue see A. Hahn, "Identität und Selbstthematisierung", in: A. Hahn/ V. Kapp (eds), *Selbstthematisierung und Selbstzeugnis: Bekenntnis und Geständnis*, 1987, 20 et seq.

¹⁹⁴ This has been observed in relation to South Africa, see F. Van Zyl Slabbert, "Truth without Reconciliation, Reconciliation without Truth", in: W. James/ L. van de Vijver, *After the TRC: Reflections on Truth and Reconciliation in South Africa*, 2000, 62 (65).

which is detrimental to reconciliation.¹⁹⁵ Moreover, it seems that in Sierra Leone techniques of dealing with past atrocities other than speaking about it have deep cultural roots.¹⁹⁶ And indeed, reports indicate that perpetrators did not always tell the truth before the TRC, and that the truth did not always lead to reconciliation.¹⁹⁷ By contrast, the ceremonies concluding TRC hearings, during which perpetrators asked the community for forgiveness in the presence of traditional authorities, seem to have had a positive effect on reconciliation.¹⁹⁸ Such clearing ceremonies were indeed covered by the mandate of the TRC.¹⁹⁹ However, it should be stressed that in such instances it was not the truth as established by the TRC Report that triggered reconciliation, but rather ceremonies and ritual.

What then might be the value of the impartial historical record for state-building or nation-building? Some argue that this kind of official truth-telling provided for some sort of justice in itself,²⁰⁰ which might make it easier for people to identify with their state and their nation. Furthermore, the TRC Report might support the country in finding a common account of national history, which might contribute to the formation of a nation.²⁰¹ Such a common account might also provide political guidance to future elites.

The TRC Report could also help to prevent the reoccurrence of past atrocities, because it allows Sierra Leoneans to examine their past deeply and to learn lessons from it.²⁰² It is crucial for the achievement of

¹⁹⁵ See F. Neubacher, "Der Internationale Strafgerichtshof in Den Haag-Ein Plädoyer für kriminologische Einmischung", *Neue Kriminalpolitik* 17 (2005), forthcoming manuscript on file with the author.

¹⁹⁶ T. Kelsall, "Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone", *HRQ* 27 (2005), 361 et seq. (383-384).

¹⁹⁷ *Ibid.*, 371-373.

¹⁹⁸ *Ibid.*, 378-380.

¹⁹⁹ Clause 7 (2) TRC Act.

²⁰⁰ Hayner, see note 190, 106.

²⁰¹ On the importance of common accounts for nation-building see Utz, see note 50; M. Imbleau, "Initial Truth Establishment by Transitional Bodies and the Fight Against Denial", in: W.A. Schabas/ S. Darcy (eds), *Truth Commissions and Courts*, 2004, 159 et seq. (161 et seq.). A critical position regarding the impact of truth commission reports on nation-building is taken by T. Hunt, "Whose Truth? Objective Truth and a Challenge for History", *ibid.*, 193 et seq.

²⁰² See TRC Report, Volume Two, Chapter Two, para. 38.

sustainable peace to go back to the pre-conflict situation in Sierra Leone and examine the failures of the country's elite that made the country prone to the outbreak of violence. It might contribute to stabilizing the Sierra Leonean state more than any judgment by a criminal court could ever do, if it is stated in an official record that it was "years of bad governance, endemic corruption and the denial of basic human rights that created the deplorable conditions that made conflict inevitable."²⁰³

Furthermore, the recommendations to the government of Sierra Leone made by the TRC are certainly a powerful means of policy review, which might contribute to stabilizing the new Sierra Leone. The Commission was very outspoken as to what the government needs to improve in its view. For example, it recommended that the judiciary and the rule of law be strengthened, including changes of the regime governing public emergencies. It also advocated fostering democracy by providing for a strong Parliament and a reinforced electoral system. It stressed the need for the creation of a transparent regime in which the citizens are entitled to know about the financial interests of senior officials and government spending on amenities. In line with its policy-review mandate, the TRC admonished that the problem of bad governance still needed to be addressed.²⁰⁴ The Commission also recommended that all those held in "safe custody detention" be released. The TRC further made recommendations to counter the marginalization of women in public as well as in social life, including quotas for public office and minimum numbers of women candidates for elections.²⁰⁵ In making these recommendations the Commission was mindful not to encroach upon governmental discretion and political debate, but rather to confine itself to making recommendations that aim at safeguarding rights and are thus consistent with the Commission's mandate. If all these recommendations receive follow-up, the TRC will certainly have contributed to state-building in Sierra Leone.

In addition to this the TRC tried to make an important contribution to nation-building through its program called "A National Vision for Sierra Leone".²⁰⁶ It invited people to think of the kind of society they wished for their country and to submit contributions to that end. The Commission's call received an overwhelming response. Individual and

²⁰³ TRC Report, Overview, 4.

²⁰⁴ TRC Report, Volume Two, Chapter Two, para. 37; *ibid.*, Volume Two Chapter Three paras 207 et seq.

²⁰⁵ TRC Report, Volume Two, Chapter Three, paras 316 et seq.

²⁰⁶ TRC Report, Overview, paras 51 et seq.

group contributions of all kinds express the concerns, hopes and visions of Sierra Leoneans for their country. It can only be wished that the political elite will jump on the bandwagon of this bottom-up approach to nation-building. In that way it might, in the long run, contribute to the identification of the people of Sierra Leone with their state and its institutions.

At present, only few months after the release of the TRC's final report, it is certainly difficult to predict the Commission's long-term impact on state-building and nation-building in Sierra Leone. Nevertheless, as this section has tried to demonstrate, there is the potential that its impact will be a positive one.²⁰⁷

3. The Special Court for Sierra Leone

a. Overview of the Special Court for Sierra Leone²⁰⁸

After the continued attacks from the RUF even after the conclusion of the *Lomé Agreement* and the associated ceasefire agreement, in particular after peacekeepers had become victims of the RUF in May 2000, it was generally felt that recourse to retributive justice should be taken. Most members of the Security Council did not want to charge the United Nations with the burden of an additional tribunal to be financed by the assessed contributions. Therefore the United States suggested that a court be established based on a treaty between Sierra Leone and the United Nations. On 12 July 2000, the President of Sierra Leone expressed his support for the idea in a letter to the UN Secretary-General and suggested a concept for a mixed court.²⁰⁹ With its Resolution 1315, the Security Council requested the Secretary-General to negotiate an agreement with the Sierra Leonean government to create an independent Special Court, which should have jurisdiction over crimes against

²⁰⁷ For a less optimistic view on the TRC see Anthony, see note 8, 147.

²⁰⁸ The literature on the Special Court has reached an inflationary level. Comprehensive descriptions are provided by S. Muller/ A.S. Beresford, "The Special Court for Sierra Leone: An Initial Comment", *LJIL* 14 (2001), 635 et seq.; R. Cryer, "A 'Special Court' for Sierra Leone?", *ICLQ* 50 (2001), 435 et seq.; C. Schocken, "The Special Court for Sierra Leone: Overview and Recommendations", *Berkeley Journal of International Law* 20 (2002), 436 et seq.

²⁰⁹ Doc. S/2000/786 (Annex) of 10 August 2000.

humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.²¹⁰ The outcome of these negotiations was the “Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone”,²¹¹ concluded on 16 January 2002. The Statute of the Special Court is annexed to the Agreement and forms an integral part of it.²¹²

Being based on an international agreement, the legal nature of the Special Court is that of an international organization. It enjoys primacy over Sierra Leonean courts.²¹³ Its legal status is commonly referred to as a “sui generis court of mixed jurisdiction and composition”.²¹⁴ The Court is formally independent from its founding entities, although the United Nations and the Government of Sierra Leone have considerable influence on administrative aspects of the Court, such as the appointment of its senior officers.²¹⁵ Its statute has been implemented in Sierra Leone in order to give effect to it in the law of Sierra Leone, in accordance with the regular procedure for the founding treaty of any international organization.

The Special Court for Sierra Leone has jurisdiction *ratione materiae* over crimes against humanity, serious violations of article 3 common to the Geneva Conventions and of Additional Protocol II. Other serious violations of international humanitarian law, as well as some crimes under Sierra Leonean law.²¹⁶ The latter category includes the abuse of girls and malicious arson, both very typical of the conflict in Sierra Leone.

²¹⁰ S/RES/1315 (2000) of 14 August 2000, operative paras 1-2.

²¹¹ Doc. S/2000/915 of 4 October 2000, 15 et seq.

²¹² The statute can be found under <<http://www.sc-sl.org/scsl-statute.html>>.

²¹³ Article 8 of the Statute.

²¹⁴ Doc. S/2000/915 of 4 October 2000, para. 9. Extensively on the Court’s legal nature S.M. Meisenberg, “Die Anklage und der Haftbefehl gegen Charles Ghankay Taylor durch den Sondergerichtshof für Sierra Leone”, *Humanitäres Völkerrecht* (2004), 30 et seq. (36-37).

²¹⁵ In the same sense H.B. Jallow, “The Legal Framework of the Special Court for Sierra Leone”, in: K. Ambos/ M. Othman (eds), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia*, 2003, 149 et seq. (151).

²¹⁶ Articles 2-5 of the Statute of the Court.

Ratione personae the Court is held to focus on “those persons who bear the greatest responsibility”.²¹⁷ Thus, not only the gravity of the alleged acts, but also the leadership position of a person will be taken into account by the Prosecutor when exercising his discretion as to whether to indict a person or not. Persons with leadership are defined as “including those leaders who [...] have threatened the establishment of and implementation of the peace process in Sierra Leone.” This language heavily points to the leaders of the main rebel factions. The decision to extend the Court’s jurisdiction over children is not in line with the foregoing. Many atrocities had been committed by often forcefully recruited child combatants who had thus become both victim and perpetrator.²¹⁸ After much debate, the position of the Sierra Leonean government prevailed over concerns raised by NGOs, and the Court was given jurisdiction over juveniles who were of 15 years or more of age at the time of the alleged acts, but provisions were made to ensure that their particular situation is respected (arts 7, 15 (5), 19 of the Statute).²¹⁹ With regard to acts committed by United Nations peacekeepers, the Special Court’s jurisdiction is only complementary to the sending state’s, and subject to authorization by the Security Council.²²⁰

The Court is competent for acts committed after 30 November 1996, the day of the conclusion of the *Abidjan Accord*.²²¹ *Ratione loci* it might have been more appropriate to the Sierra Leonean conflict not to limit the Court’s jurisdiction to crimes committed in Sierra Leone, but to adopt the formula developed for the International Criminal Tribunal for Rwanda (ICTR), that is to include crimes committed by Sierra Leoneans in neighboring countries.²²²

The Special Court receives international support at different levels. Sponsoring, judges, staff members and much additional assistance are provided from abroad. Of particular concern is the reliance of the Special Court on voluntary contributions since the Security Council re-

²¹⁷ Article 1 of the Statute of the Court.

²¹⁸ B.K. Dougherty, “Right-Sizing International Criminal Justice: the Hybrid Experiment at the Special Court for Sierra Leone”, *Int’l Aff.* 80 (2004), 311 et seq. (322).

²¹⁹ Cf. Doc. S/2000/915 of 4 October 2000, paras 32-38. For a critique of the adopted solution A. McDonald, “Sierra Leone’s shoestring Special Court”, *Int’l Rev. of the Red Cross* 84 (2002), 121 et seq. (133 et seq.).

²²⁰ Article 1 (2) and (3) of the Statute of the Court.

²²¹ See note 18.

²²² Muller/ Beresford, see note 208, 644.

fused to put the financial burden of an additional *ad hoc* tribunal on the United Nations. Mindful of the risk it poses for the functioning and independence of an organization deemed to render justice to be financed solely by voluntary contributions, the UN Secretary-General insisted that the Special Court began its operation only after receiving its first-year budget and pledges for the next two years.²²³

b. The Court's Impact on State-Building and Nation-Building

The Special Court was set up for the specific purpose to end impunity for the serious crimes committed in Sierra Leone and to contribute to the process of national reconciliation and to the restoration and maintenance of peace.²²⁴ When discussing the possible impact of a criminal court on state-building and nation-building it should be mentioned that the controversy about the impact of criminal prosecution for national reconciliation still deserves further study. While some consider criminal prosecution as a precondition for reconciliation,²²⁵ others argue that criminal prosecutions might rather divide than unite a country in a post-conflict situation.²²⁶ Although such considerations should not be lost sight of this is not the right place to engage in that debate. Instead it seems to be more fruitful for the purpose of this article to focus on the implications of some concrete features of the legal framework of the

²²³ Doc. S/2001/40 of 12 January 2001.

²²⁴ S/RES/1315 (2000) of 14 August 2000, seventh recital of the preamble.

²²⁵ This position seems to enjoy wide adherence within the UN (Annan: "[R]econciliation must go hand in hand with justice", Press Release SG/SM/9006 of 14 November 2003) and among interested NGOs, which is reflected in the name of one organization ('No Peace Without Justice'). The position was also referred to in President Kabbah's speech given at the occasion of the conclusion of the disarmament process on 18 January 2002: "We must recognize that justice and reconciliation are major components of peace." (<<http://www.sierra-leone.org/kabbah011802.html>>. A good overview on the theoretical foundations of this position is given by P. Akhavan, "Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal", *HRQ* 20 (1998), 737 et seq.

²²⁶ For an overview of the arguments brought forward by proponents of this position see M.J. Osiel, "Why Prosecute? Critics of Punishment for Mass Atrocity", *HRQ* 22 (2000), 118 et seq. Empirical data is generally lacking. A first study exploring the effects of the ICTY is J. Meernik, "Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia", *Journal of Peace Research* 42 (2005) 271 et seq.

Special Court which will most probably play a pertinent role in assessing the Court's impact.²²⁷ However, a final assessment of the Court's impact on the situation in Sierra Leone will only be possible in the future.

aa. Overruling the Lomé Agreement Amnesty

Article IX of the Lomé Agreement granted amnesty to Foday Sankoh as well as all combatants and collaborators of the warring rebel factions. This was a precondition for the commencement of negotiations.²²⁸ Article 10 of the Statute of the Special Court provides for the irrelevancy of any amnesty for crimes under international law. For crimes under the law of Sierra Leone, the amnesty however remains applicable. Since the establishment of the Special Court the amnesty and article 10 have been a continuous source of controversy. In a decision of 13 March 2004 the Special Court ruled that the amnesty did not create an obstacle for prosecutions.²²⁹ Had the amnesty barred all prosecutions the Special Court would of course have become meaningless for state-building and nation-building in Sierra Leone. As will be shown in the following, there were, however, different legal solutions to overcome the amnesty. Therefore a policy analysis seems appropriate to inquire which solution

²²⁷ I try to follow the approach devised for the ICTR by J.M. Kamatali, "The Challenge of Linking International Criminal Justice and National Reconciliation: the Case of the ICTR", *LJIL* 16 (2003), 115 et seq.

²²⁸ Cf. *Sixth report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, Doc. S/1999/645 of 4 June 1999, para. 6. Instructive for the RUF's position is its statement "*Lasting Peace in Sierra Leone: The Revolutionary United Front Sierra Leone (RUF/SL) Perspective and Vision*" of 11 May 1999 (<<http://www.sierra-leone.org/ruf051199.html>> "We do believe that an important first step in the process of the peace we are inaugurating would be the immediate and unconditional release of the RUF/SL leader, Cpl. Foday Saybana Sankoh. All charges against him should be dropped, thus signposting a move away from the path of politics of revenge and recrimination into the highway of healing and national reconciliation. In the same vein, there shall be a blanket amnesty for all AFRC personnel and so-called sympathizers or collaborators, and all combatants with effect from the signing of the Agreement."

²²⁹ Case No. SCSL-2004-15-AR72(E) (*Prosecutor v. Kallon et al.*), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004. For a critique of the decision see A. Cassese, "The Special Court and International Law. The Decision Concerning the Lomé Agreement Amnesty", *Journal of International Criminal Justice* 2 (2004), 1130 et seq.

might have best served the Court's mandate to fight impunity and to contribute to national reconciliation.

In its decision, the Special Court reasoned first, that it could not review the legality of article 10 of its Statute.²³⁰ It proceeded by stating that the crimes under arts 2 to 4 of the Court's Statute were subject to universal jurisdiction. Therefore national amnesties did not prevent

²³⁰ See note 229, para. 61 et seq. The Special Court argues that it does not have the power to revise the terms of an international treaty unless specifically empowered to do so, or unless the treaty was in violation of *ius cogens*. It would be absurd if the Court was called to render a binding decision whether it could render binding decisions at all, i.e. whether it was a court. Note that the decision deviates here from the jurisprudence of the ICTY in the Case No. IT-94-1 (*Prosecutor v. Tadić*), Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 6 (hereinafter "Tadić-Decision"). The Special Court justifies this divergence by the fact that the ICTY did not review the validity of a treaty, but the extent of the powers of the Security Council (see note 229, para. 62). In the view of the author, this is not convincing for three reasons: first, the extent of the powers of the Security Council can also only be established by way of treaty interpretation, that is, by way of interpretation of the UN Charter, the treaty from which the ICTY ultimately derives its powers (cf. Tadić-Decision para. 7 et seq.). Secondly, unlike in the Tadić-Decision, it was not the existence of the Court as such and its capacity to render binding decisions that were called into question, but only the validity of one of the provisions of its statute. And thirdly, the argument submitted in the Tadić-Decision (para.6), that "[...] a body that judges the criminality of this behavior should be viewed as legitimate" indeed has much bite and could be applied *mutatis mutandis* to article 10 of the Statute of the Special Court. See also S.M. Meisenberg, "Legality of amnesties in international humanitarian law. The Lomé Amnesty decision of the Special Court for Sierra Leone", *Int'l Rev. of the Red Cross* 86 (2004), 837 et seq. (843 et seq.). – Meisenberg however errs when he accuses the Special Court of acting *ultra vires*, arguing that, by virtue of article 14 (1) of the Special Court's Statute, the Special Court is bound by the ICTR *jurisprudence* concerning the Rules of Procedure and Evidence. Article 14 (1) incorporates only the text of the ICTR Rules of Procedure, not the relating jurisprudence. Article 20 (3), which states that the Appeals Chamber of the Special Court should be "guided" by the jurisprudence of the ICTY/ICTR Appeals Chamber, would have been the correct point of reference. If the term "guided" is understood as anything but binding the Special Court by the ICTR/ICTY Appeals Chamber's jurisprudence, then the Special Court acted in conformity with article 20 (3), because it made explicit the reasons for its deviation.

proceedings before an international tribunal.²³¹ This did not amount to an abuse of process, either.²³² The Court could have confined itself to decide not to review article 10 of its Statute. From a policy perspective, that alone would have been quite unsatisfactory, because the Court's judgments would have seemed to be based on Sierra Leone's breach of the *Lomé Agreement* and therefore borne the semblance of illegality. This could have been detrimental to efforts to foster the rule of law in Sierra Leone. Therefore the Court's additional reasoning regarding the admissibility of the amnesty needs to be welcomed. By doing so the Court took up a debate of immediate relevance for the peace process.

Yet the Court did not go as far as to declare amnesties for the international crimes under its jurisdiction null and void. And it is doubtful whether it could have done so at all. Scholars heavily debate the question for what crimes national amnesties are illegal under international law.²³³ There seems to be agreement that the answer depends on whether there is an international obligation to extradite or prosecute those suspected of the commission of the crime in question.²³⁴ For the crime of genocide and grave breaches of the 1949 Geneva Conventions as well as Additional Protocol I such an obligation enjoys wide acceptance.²³⁵ But concerning war crimes in non-international armed conflicts, which are of particular interest here, some deny that there is sufficient state practice establishing a duty to extradite or prosecute.²³⁶ Others consider amnesties an indispensable device for reconciliation in post-conflict situations.²³⁷ Others again, however, rely on the advance of the fight against impunity over the last decade and see a crystallizing duty to extradite or to prosecute persons suspected of crimes against humanity and war crimes, regardless of whether the conflict was international or non-international.²³⁸

²³¹ Ibid., paras 69-71.

²³² Ibid., paras 75 et seq.

²³³ See the comprehensive analysis by A. Seibert-Fohr, in this Volume.

²³⁴ See Dahm/ Delbrück/ Wolfrum, see note 77, Vol. I/3, 2nd edition 2002, 1017; A. Cassese, *International Criminal Law*, 2003, 315.

²³⁵ L. Reydam, *Universal Jurisdiction*, 2003, 47-56; Dahm/ Delbrück/ Wolfrum, see note 77.

²³⁶ Cassese, see note 234; Gallagher, see note 24, 178-186.

²³⁷ M.P. Scharf, "The Amnesty Exception to the Jurisdiction of the International Criminal Court", *Cornell Int'l L. J.* 32 (1999), 507 et seq. (514-521).

²³⁸ Cf. M.C. Bassiouni, *Aut Dedere Aut Judicare*, 1995; id., "Searching for Peace and Achieving Justice: The Need for Accountability" *Law & Con-*

Be that as it may, instead of discussing the issue head on, the Court avoids this ultimate question by stating that, in any event, the Court was competent for the crimes under its jurisdiction since they were subject to universal jurisdiction. Indeed, whether the amnesty was illegal under international law or not, the Special Court, having an international legal capacity of its own which is distinct from that of the government of Sierra Leone, is by no means bound by anything stipulated in an international treaty²³⁹ to which it is not a party.²⁴⁰ However, uni-

temp. Probs 59 (1996), 9 et seq. (17); J.E. Méndez, “Accountability for Past Abuses”, *HRQ* 19 (1997), 255 et seq.; D.F. Orentlicher, “Settling Old Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, *Yale L. J.* 100 (1991), 2537 et seq. Orentlicher argues, however, that it would suffice to prosecute those most responsible (*ibid.*, 2599); J. Dugard, “Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?”, *LJIL* 12 (1999), 1001 et seq.; A. Seibert-Fohr, “The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions”, *Max Planck UNYB* 7 (2003), 553 et seq. (586); B. Chigara, *Amnesty in International Law. The Legality under International Law of National Amnesty Laws*, 2002, 163-166 bases his conclusion on a different reasoning.

²³⁹ The Special Court does not see the Lomé Agreement as an international treaty because it was concluded by two institutions under national law, namely the government and the RUF, see Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, see note 229. However, a strong indicator for the international character of the Lomé Agreement is that it was subjected to the ratification procedure designed for international treaties provided for in article 40 (4) of the 1991 Constitution of Sierra Leone (Supplement to the Sierra Leone Gazette Extraordinary Vol. CXXII, No. 59 of 25 September 1991). The international legal capacity of the RUF depends on the degree of organization and effective control it exercises on part of the territory (cf. A. Cassese, *International Law*, 1st edition 2001, 67; I. Brownlie, *Principles of Public International Law*, 6th edition, 2003, 63). The duration of the conflict and the fact that the RUF exercised authority over large parts of Sierra Leone make it difficult to deny that the RUF had some treaty-making capacity, at least as far as the conflict it was involved in is concerned. The Lomé Agreement therefore is an international treaty. Additional indicators for this are the circumstances of the conclusion of the agreement, namely the good offices of a number of states and international organizations and their functioning as moral guarantors. For additional arguments see Cassese, see note 229, 1134.

²⁴⁰ In this context, it was rightly observed that the parties to the Special Court Agreement could confer upon the Special Court only jurisdictional powers which they had themselves, be those crimes subject to universal jurisdiction or not (Meisenberg, see note 230, 846). The Special Court took a contrary

versal jurisdiction for war crimes committed in internal conflicts might not be more than a developing norm.²⁴¹ The Special Court does not provide enough material to corroborate its conclusion that each crime under arts 2 to 4 of its Statute is subject to universal jurisdiction.²⁴² Nevertheless, the purpose of any limitations on criminal jurisdiction is to protect the sovereignty of states having a closer link to the crime.²⁴³ In the case at hand, Sierra Leone is the state with the closest link to the crimes, thus the one to be most protected by the Special Court's jurisdiction. And it consented to the Special Court's exercise of jurisdiction. The amnesty established by another international treaty did not prevent it from doing so.²⁴⁴

In the result, not in its line of argument, the Special Court's reliance on its jurisdictional basis thus deserves approval. However, it leaves open the question whether amnesties are permissible and thus, implicitly, whether Sierra Leone breached the amnesty provision of the *Lomé Agreement* by ratifying the Special Court Agreement.²⁴⁵ Of course,

view in its Decision on the Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, 25 May 2004, Case No. SCSL-2004-15-PT (*Prosecutor v. Augustine Gbao*), para. 6, arguing that the Special Court did not exercise the jurisdiction of the Special Court but that of the "international community". But by founding international organizations (like the Special Court), states (and other international organizations like the UN) must not bypass the jurisdictional limits of their own jurisdiction. The "international community" as such (on the notion see A. Paulus, *Die Internationale Gemeinschaft*, 2001) does not have the necessary legal capacity to exercise jurisdiction or create international organizations for that purpose.

²⁴¹ Meisenberg, see note 230, 845.

²⁴² Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, see note 229, paras 69-71. In Particular, para. 61 of the judgment of the International Court of Justice in the *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium) of 14 February 2002, ICJ Reports 2002, 1 et seq., to which reference is made by the Special Court in this respect, does not address the issue of universal jurisdiction.

²⁴³ M.N. Shaw, *International Law*, 4th edition 1997, 452 et seq.

²⁴⁴ The rule *pacta tertiis nec nocent nec prosunt*, cf. article 34 of the 1969 Vienna Convention on the Law of Treaties, UNTS Vol. 1155 No. 18232, applies *mutatis mutandis* to international organizations.

²⁴⁵ Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, see note 229, para. 84.

whether the Special Court Agreement violated Sierra Leone's other international obligations or its internal law is not of concern to the Special Court as long as Sierra Leone obeys its obligations to co-operate with the Court and not any other contrary international or national obligations.²⁴⁶ From a policy perspective, however, this solution raises some doubts since it would give the proceedings the aura of being in breach of the *Lomé Agreement*. That does not help to foster understanding for the rule of law in Sierra Leone.

One way out of the dilemma could have been to give a narrow interpretation to the amnesty provision, which extends to acts committed "in pursuit of [a combatant's] objective". Since assaults on civilians never were officially endorsed by any party to the civil war or formed part of their official strategy, they could be excluded from the scope of the amnesty.²⁴⁷ However, that would have conflicted with the common understanding of the parties to the *Lomé Agreement* that there should be absolute impunity.²⁴⁸ Such a solution might appear in public as too shifty as to foster trust in the rule of law.

Alternatively, one could rely on the RUF's repeated breaches of the *Lomé Agreement* and the related ceasefire agreement.²⁴⁹ The amnesty might be considered void for these reasons.²⁵⁰ Indeed, there are indications that the RUF and AFRC continued to fight in the expectation that another amnesty would be granted.²⁵¹ That additional argument would make the above line of reasoning more tenable. As regards the accused of the other rebel factions, the government is under no international obligation to grant amnesty to them. Any amnesty granted to them by na-

²⁴⁶ Disagreeing Meisenberg, see note 230, 847.

²⁴⁷ Gallagher, see note 24, 163.

²⁴⁸ This understanding can be inferred mainly from the precedent set by the 1996 Abidjan Peace Agreement.

²⁴⁹ Cf. above II.

²⁵⁰ Cf. article 60 (1) of the 1969 Vienna Convention on the Law of Treaties, see note 244. This argument was indeed invoked by President Kabbah in his letter of 10 August 2000, see annex to Doc. S/2000/786 of 10 August 2000. On the consequences of a recall of the amnesty for the entire agreement cf. D.J. 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", *Brook. J. Int'l L.* 27 (2001), 347 et seq. (372 et seq.); cf. also the evidence for a termination of the Lomé Agreement provided by Cassese, see note 229, 1135-1138.

²⁵¹ Akinrinade, see note 8, 437.

tional law²⁵² can be considered abrogated by the law ratifying the Special Court Agreement.²⁵³ Such a line of argument might however be in violation of rule of law principles, namely the protection of the accused's confidence in the amnesty. Nevertheless, such concerns could be rebutted by the argument that the factions of those accused, the Civil Defense Forces (CDF) and the AFRC, did not prove to be all too peace loving in the time after the conclusion of the *Lomé Agreement*,²⁵⁴ and that the accused are therefore estopped from claiming that they had confidence in the amnesty.

The solution adopted by the Special Court was certainly better than letting the amnesty prevail. Although the amnesty might have provided some short-term advantage in order to achieve an immediate cessation of hostilities, it prevented the removal from power and public office of those most responsible for past atrocities. Their participation in the peace process was rather part of the problem than an indispensable factor for the construction of a new state organization.²⁵⁵ Thus, overriding the amnesty in any way whatsoever could hardly be detrimental for state-building efforts.

bb. Prosecuting those "who bear the greatest responsibility"?

Before and after Nuremberg, history provides us with abundant evidence that it has always been easier to accuse the private than the general, or the guard at the "anti-fascist protection wall" than the Secretary-General of the ruling party. But trials against the heads of a fallen medusa necessarily fail to shed light on the entirety of the monster, which must be named and described for society to come to terms with the past. Therefore, article 1 of the Statute of the Special Court gives the court the jurisdiction and its Prosecutor the mandate to prosecute those who bear the greatest responsibility for the crimes committed during the conflict. Considerations of procedural economy corroborate the decision to focus on the masterminds of the atrocities. Whether the mas-

²⁵² I.e. the law ratifying the Lomé Agreement, Law No. 3 of 1999, Lomé Peace Agreement (Ratification) Act, available at <<http://www.sierra-leone.org/Laws/1999-3.pdf>>

²⁵³ Law No. 9 of 2002, Special Court Agreement, 2002 (Ratification) Act, 2002, Supplement to the Sierra Leone Gazette Vol. CXXXIII, No. 22 of 25 April 2002.

²⁵⁴ See TRC Report, Chapter Two, Volume Two, paras 255 and 361.

²⁵⁵ See above IV. 4. d. aa.

terminals are actually prosecuted thus becomes the litmus test for ending a culture of impunity, one of the purposes of the Special Court.²⁵⁶ Certain legal and operational obstacles might hamper the Court in fulfilling its mandate.

Legal obstacles seemed to prevent the prosecution of Charles Taylor, former Liberian President. The question was whether he enjoyed personal immunity under international law for acts committed in his official capacity. Since the Pinochet²⁵⁷ and Yerodia²⁵⁸ cases much ink has been spilled on the question of immunities for perpetrators of crimes against international law. The Special Court decided that the indictment and arrest warrant against Charles Taylor were in conformity with international law.²⁵⁹ It essentially relied on the argument that the Special Court was one of those “certain international tribunals” which the ICJ in the Yerodia case had considered not bound by immunities.²⁶⁰ The decision is somewhat unsatisfactory because the Special Court fails to give meaning to the word “certain” in the quote from the Yerodia judgment referred to above. The ICJ only referred to such international tribunals whose structure respects the sovereignty of the state of origin of persons enjoying immunities under international law.²⁶¹ That is the case with tribunals established by the Security Council by means of a resolution under Chapter VII, which is binding on all states, or with tribunals whose creation the state concerned has consented to, like the ICC.²⁶² In the case at hand, Liberia did in no way consent to the creation of the Special Court, nor was there a Security Council resolution

²⁵⁶ S/RES/1315 (2000) of 14 August 2000, seventh recital of the preamble.

²⁵⁷ *R. v. Bow Street Metropolitan Stipendiary magistrate and others, ex parte Pinochet Ugarte*, [1999] 2 WLR 827, HL.

²⁵⁸ ICJ, *Case Concerning the Arrest Warrant of 11 April 2000*, see note 242.

²⁵⁹ SCSL Appeals Chamber, Decision on Immunity from Jurisdiction, SCSL-2003-01-AR72(E) of 31 May 2004.

²⁶⁰ ICJ, *Case Concerning the Arrest Warrant of 11 April 2000*, see note 242, para. 61.

²⁶¹ On the concept of the sovereign equality of states as the basis for immunities under international law see Dahm/ Delbrück/ Wolfrum, see note 77, 1018.

²⁶² Note that the International Criminal Court (ICC) can refrain from requesting the surrender of a national of a non-State Party which enjoys immunities under international law, see article 98 (1) of the Rome Statute of the International Criminal Court. The ICC is therefore unlikely to be confronted with difficulties relating to immunities. This aspect is however not reflected in the ICJ judgment (see above).

adopted under Chapter VII. The Special Court's argument that it nevertheless derived its powers from Chapter VII of the UN Charter is unconvincing: the Agreement on which it is based was not concluded by the Security Council,²⁶³ but by the United Nations.²⁶⁴ And an agreement concluded by the United Nations as a distinct subject of international law with Sierra Leone is not an agreement "between *all* members of the United Nations and Sierra Leone".²⁶⁵ It is therefore not binding for Liberia.²⁶⁶

Instead, the Special Court could have taken advantage of the fact that the decision of the ICJ not to recognize any exception to personal immunities by virtue of customary international law in case of certain crimes against international law has been highly disputed.²⁶⁷ Some argue that the interdiction to commit crimes against humanity and serious violations of core provisions of international humanitarian law, like article 3 common to the Geneva Conventions, has the status of a peremptory norm of international law and therefore overrides immunities.²⁶⁸ Others take the view that the spread of prosecutions for crimes against international law during the last decade has led to the emergence of a customary exception to immunities,²⁶⁹ or that the ratification of human

²⁶³ SCSL, Decision on Immunity from Jurisdiction, see note 259, para. 37.

²⁶⁴ This is correctly reflected in para. 38 of the same decision.

²⁶⁵ So the SCSL, Decision on Immunity from Jurisdiction, see note 259, para. 38.

²⁶⁶ Cf. A. Cassese, "The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality", in: C.P.R. Romano/ A. Nollkaemper/ J.K. Kleffner, *Internationalized Criminal Courts*, 2004, 3 et seq. (9). This is only a brief critique of the decision. For detailed analyses see M. Frulli, "The Question of Charles Taylor's Immunity", *Journal of International Criminal Justice* 2 (2004), 1118 et seq. (1122-1123); Z. Deen-Racsmany, "Prosecutor v. Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity", *LJIL* 18 (2005), 299 et seq. (307 et seq.).

²⁶⁷ See the separate opinion of Judge *ad hoc* Van den Wyngaert, para. 27.

²⁶⁸ Cassese, see note 234, 316 with further references; J. Bosch, *Immunität und internationale Verbrechen*, 2004, 106.

²⁶⁹ Cassese, see note 234, 267 et seq.; Dahm/ Delbrück/ Wolfrum, see note 77, 1018-1019; C. Kreß, "Der Internationale Gerichtshof im Spannungsfeld von Völkerstrafrecht und Immunitätsschutz", *Goldammer's Archiv* (2003), 25 et seq. (33); A. Winants, "The Yerodia Ruling of the International Court of Justice", *LJIL* 16 (2003), 491 et seq. (498); S. Wirth, "Immunity for Core Crimes? The ICJ's Judgement in the *Congo v. Belgium*

rights and humanitarian law treaties contains an implicit waiver of immunities.²⁷⁰

A compromise position would have been to argue that immunities under international law do not apply to tribunals like the Special Court, which do not form part of the legal order of a state, have an independent prosecutor and judges, and guarantee the accused a fair trial.²⁷¹ Nevertheless, in the end, the Special Court neutralized immunities as a potential bar to the prosecution of Charles Taylor.

What remains is the problem that Nigeria, where Charles Taylor went into exile, is not obliged to extradite him to the Special Court. Right from the start the absence of Chapter VII powers of the Special Court, as proposed by the UN Secretariat,²⁷² were considered a potential impediment to the Court's work.²⁷³ The suggestion to apply the ECOWAS Convention on Mutual Legal Assistance *mutatis mutandis* has so far not proved to be a fruitful way out of the dilemma.²⁷⁴ The unwritten code of courtesy between African heads of states not to do to another one what might happen to you seems to prevail.²⁷⁵

With the death of Foday Sankoh and Sam Bockarie, two important trials against the main RUF accused could not take place for reasons that are obviously beyond the responsibility of the Court. The same

Case", *EJIL* 13 (2002), 877 et seq. (884 et seq.), confines the exception to immunities *ratione materiae*.

²⁷⁰ Bosch, see note 268, 90 et seq. In theory, the SCSL could also have rejected the idea to consider international crimes as official acts and rely on the ICJ's ruling that no immunity needs to be granted for private acts of former state officials (see ICJ, see note 242, para. 61). The viability of the Court's distinction between private and official acts has however been strongly criticized by i.e. A. Cassese, "When may Senior State Officials be tried for International Crimes?", *EJIL* 13 (2002), 853 et seq. (867 et seq., especially 870). It is also highly questionable whether the commission of international crimes, which in most cases involves the use of the entire state machinery, can be labeled a *private* act. See Cassese, *ibid.*, 870; Winants, see note 269, 499; Bosch, see note 268, 89.

²⁷¹ This is the interpretation given to the term "certain international tribunals" by Meisenberg, see note 214, 37 et seq.

²⁷² Dougherty, see note 218, 319, with a detailed policy analysis, 321.

²⁷³ Jallow, see note 215, 152.

²⁷⁴ As suggested by Jallow, see note 215, 152.

²⁷⁵ P. Penfold, "Limits to transitional justice", *Africa Week Special Print Edition* of February 2005, 24-25.

goes for Johnny Paul Koroma, who seems to be in hiding.²⁷⁶ However, RUF commanders and commanders of other factions, who seem to bear such great responsibility that the TRC found it necessary to mention them specifically, do not face trial.²⁷⁷ By contrast, some who hold that Sam Hinga Norman's acts were not grave enough to justify his trial conclude that the Court was trying the wrong people.²⁷⁸ It should be better left to the Court to determine the responsibility of an accused. However, the TRC Report reveals that the selection of only very few people for trial is not commensurate to the number of people involved in the Commission of atrocities at command level. Not will all of those "who bear the greatest responsibility" be accused. This might cause public opinion to overrate the role of some and to underrate that of others. It also deprives the Court of the possibility to create a more or less complete record of the events of the past, which might have been instrumental for the discharge of its task to contribute to reconciliation.

cc. Problems Deriving from the Special Court's Temporal Jurisdiction

What might also negatively influence the impact of the Court on reconstruction and reconciliation is that its temporal jurisdiction does not reach back further than 30 November 1996. Hence, the situation and developments in Sierra Leone before 1991 which made it prone to an outbreak of violence beyond control are considered decisive for the course of the conflict.²⁷⁹ Practical reasons required such a limit to the Court's jurisdiction *ratione temporis*. The United Nations saw the date of the *Abidjan Agreement* as the politically least controversial solution, since all the different factions to the conflict had committed their worst atrocities afterwards.²⁸⁰ But it was argued that the United Nations might have wanted to avoid extending the Court's jurisdiction to the time before the *Abidjan Agreement*, which contained an amnesty provision to which it had not objected.²⁸¹ Yet the temporal limit on the

²⁷⁶ International Crisis Group, *Liberia and Sierra Leone: Rebuilding Failed States*, Africa Report No. 87 of 8 December 2004, 7.

²⁷⁷ TRC Report, Volume Two, Chapter Two paras 145 et seq., especially 172.

²⁷⁸ A.R. Lamin, "Building peace through accountability in Sierra Leone: the Truth and Reconciliation Commission and the Special Court", *Journal of Asian and African Studies* 38 (2003), 295 et seq.; Penfold, see note 275.

²⁷⁹ Anthony, see note 8, 147; cf. also Reno's analysis, see note 4, 113 et seq.

²⁸⁰ Doc. S/2000/915 of 4 October 2000, para. 27.

²⁸¹ Cf. Schabas, see note 187, 1042.

Court's jurisdiction does not mean that events before 30 November 1996 need to be completely neglected by the Court. According to the jurisprudence of the ICTR²⁸² the temporal limit should not prevent the court from considering events prior to 30 November 1996 insofar as they are relevant circumstantial facts.²⁸³ This will enable the court to draw a more complete picture of the conflict in its judgments, which is much needed for any successful nation-building.²⁸⁴

c. Conclusion

As has been shown, some doubts arise from the legal framework of the court as to whether it will really be able to make a substantial contribution to state-building and nation-building. Having its seat in the country of the site of the crimes and with judges from Sierra Leone sitting alongside international judges the Court was expected to be more relevant to the lives of ordinary people of Sierra Leone. Whether mere geographic proximity is sufficient to appease a starving population with a costly high-tech court remains doubtful.²⁸⁵ What is surprising is the suggestion that the Special Court would be in a better position to discharge its mandate if it received funding from the United Nations, had a broader personal jurisdiction, a less restrictive timeframe, and Chapter VII powers.²⁸⁶ Exactly those features distinguish the Special Court from the often-shunned *ad hoc* tribunals. At the end of the day it appears that the Special Court, although featuring some important innovations, is not a great improvement on *ad hoc* tribunals, but that justice and reconciliation cost their price.

²⁸² The underlying idea of article 20 (3) of the Special Court's Statute, although not being directly applicable in each and every case, is that there should be coherence between the jurisdiction of the *ad hoc* tribunals and the Special Court.

²⁸³ ICTR Trial Chamber I, Case No. ICTR-98-41-T (*Prosecutor v. Théoneste Bagosora et al.*), Decision on Admissibility of Proposed Testimony of Witness DBY (TC), 18 September 2003, para. 10.

²⁸⁴ See above note 201 and accompanying text.

²⁸⁵ Cf. Penfold, see note 275.

²⁸⁶ Dougherty, see note 218, 328; Beresford/ Muller, see note 208, 640-641 and 648; A. Tejan-Cole, "The Special Court for Sierra Leone: Conceptual Concerns and Alternatives", *African Human Rights Law Journal* 1 (2001), 107 et seq. (115); N. Fritz/ A. Smith, "Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone", *Fordham Int'l L. J.* 25 (2001-2002), 391 et seq. (415, 418).

4. The Relationship Between the TRC and the Special Court: Restorative v. Retributive Justice?²⁸⁷

a. Difficulties in the Relationship Between the TRC and the Special Court

The different mandates of the TRC, intended to render restorative justice as a substitute for criminal proceedings in the light of the amnesty granted by the *Lomé Agreement*, and the Special Court whose mandate swept away the amnesty bore a potential for conflict: although the establishment of the TRC and the Court had different objectives, the jurisdiction of the latter overlaps with the competence of the former. As regards personal jurisdiction, the only difference was that the TRC had competence over juvenile offenders under 15 years of age at the time of the commission of the alleged acts, and that the Special Court was to concentrate mainly on the leaders.

During the set-up phase of both institutions several meetings of experts were held in order to prevent any potential splits, at which areas of potential conflict and cooperation were identified.²⁸⁸ However, apart from issues of mere technical cooperation, for example in the field of witness protection, the interplay of both institutions was put at risk immediately by their clashing legal conceptions: the TRC relied essentially on the amnesty granted by the *Lomé Agreement*. Consequently, perpetrators were expected to testify voluntarily, to show remorse and to confess, bearing in mind that they face no criminal prosecution. In contrast to the South African TRC,²⁸⁹ Sierra Leonean perpetrators had to be afraid of their testimonies being used for subsequent criminal proceedings against them before the Special Court.

It was unclear whether even confidential testimonies of perpetrators given to the TRC would not be safe from the Special Court's orders. Article 17 of the Agreement between the United Nations and Sierra Leone establishing the Special Court obliges the government to produce any information which the former may wish. The mere wording of article 17, which refers to the "government" and not to "Sierra

²⁸⁷ See also the contribution by A. Seibert-Fohr, in this Volume.

²⁸⁸ Jallow, see note 215, 170; full details are provided by Schabas, see note 187, 1047 et seq.

²⁸⁹ Promotion of National Unity and Reconciliation Act of 26 July 1995, Section 31(3), available at <http://www.fas.org/irp/world/rsa/act95_034.htm>.

Leone”, does not seem to exempt the TRC from orders of the Court.²⁹⁰ The reason for the referral to the government might be that the government is the responsible organ for the execution of the Court’s orders. Article 17 (1) is not limited to documents which the government has in its possession or can obtain access to. Matters of internal law do not provide for an excuse for non-compliance.²⁹¹ However, article 17 of the Special Court Agreement should be interpreted in the context of the circumstances of the creation of the Special Court: the Special Court was not established to replace or prime the TRC, but as a complementary institution, a view which finds vast documentary confirmation.²⁹² Special Court President Robertson’s ruling that the Special Court had primacy appears to miss the point since the question of “primacy” only arises in a case of concurrent jurisdiction.²⁹³ Article 8 of the Court’s Statute, on which he relies, is not instructive as such, since the TRC is not a national court of Sierra Leone.²⁹⁴ Therefore, article 17 should be brought in harmony with the essential needs of the TRC. That means understanding it as being without prejudice to the TRC’s right not to disclose confidential information. It must however be noted that the wide use of confidential hearings in order to protect perpetrators from the Special Court would have had a negative impact on the TRC’s ability to fully discharge its mandate to “foster constructive interchange between victims and perpetrators”.²⁹⁵

That these considerations were not only academic in nature was first demonstrated by the negative impact which concerns about the Special Court had on the RUF’s initial receptiveness towards the TRC. It might have helped that it became clear that low-level perpetrators

²⁹⁰ Dissenting Schabas, see note 187, 1058.

²⁹¹ Cf. article 27 VCLT.

²⁹² See e.g. S/RES/1315 (2000) of 14 August 2000, fourth recital of the preamble; S/RES/1370 (2001) of 18 September 2001, para. 17; *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, Doc. S/2000/915 of 4 October 2000, para. 8; *Letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council*, Doc. S/2002/246 of 8 March 2002, para. 53.

²⁹³ W. Schabas, “Internationalized Courts and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone”, in: C.P.R. Romano/ A. Nollkaemper/ J.K. Kleffner (eds), *International Criminal Courts and Tribunals*, 2004, 157 et seq. (173).

²⁹⁴ Case No. SCSL-2003-08-PT (*Prosecutor v. Norman*), Decision on Appeal of 28 November 2003, para. 4.

²⁹⁵ TRC Act, clause 6 (2)(b).

would never be confronted with an indictment, and that the Prosecutor of the Special Court publicly declared that he did not intend to use TRC materials – although his declaration only had the value of a gentlemen’s agreement.²⁹⁶ Schabas had the impression that perpetrators seem to have different incentives for testifying, like the wish to explain their motives or to show remorse.²⁹⁷ However, in its final report the TRC complains that some perpetrators indeed stayed away from testifying before the TRC or were unwilling to reveal the truth for fear of prosecutions.²⁹⁸

More serious problems arose when SCSL detainees on their own initiative volunteered to testify before the TRC. This triggered the Special Court to issue a Practice Direction in order to give a legal basis for TRC interviews with detainees.²⁹⁹ Accordingly, interviews were subject to the agreement of the detainee who had to be warned about the consequences of his testimony.³⁰⁰ After protests by the TRC, provision was made for confidential hearings. But the record of such confidential hearings would have to be disclosed if it were deemed to be in the interest of justice.³⁰¹ Nevertheless, the Prosecutor was concerned that the testimony could deter witnesses from testifying against the accused and submitted that public testimony might put the fragile peace in Sierra Leone at risk.³⁰² The Special Court rejected two requests of the TRC to publicly interview an accused. In the case of Augustine Gbao the pre-trial judge considered the accused’s agreement to the TRC hearing as

²⁹⁶ Special Court OTP Press Release of 10 December 2002.

²⁹⁷ Schabas, see note 293, 169.

²⁹⁸ TRC Report, Volume Two, Chapter Two, para. 568; see also Kelsall, see note 196, 381.

²⁹⁹ Practice Direction on the Procedure Following a Request by a State, the Truth and Reconciliation Commission, or other Legitimate Authority to Take a Statement from a Person in the Custody of the Special Court for Sierra Leone, adopted on 9 September 2003, amended on 4 October 2003, available at <<http://www.sc-sl.org/practicedirection-090903.html>>.

³⁰⁰ Section 5 of the Practice Direction.

³⁰¹ Section 4 (c) of the Practice Direction.

³⁰² Case No. SCSL-2003-08-PT (Prosecutor v. Norman), Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman, 29 October 2003, para. 3.

questionable,³⁰³ and in the case of Sam Hinga Norman the appeals judge believed that public hearings before the conclusion of trial would severely weaken the position of an accused pleading not guilty and might end up in a “spectacle” detrimental to the proper administration of justice.³⁰⁴ He held that sworn written statements and confidential hearings were sufficient. The ensuing debate³⁰⁵ demonstrated the potential for conflict owing to such a lack of coordination of the institutions’ legal settings. Losing the possibility to publicly interview some key figures of the conflict certainly constituted a severe limitation on the work of the TRC. The judges did sufficiently weight Norman’s right to a fair trial against his freedom of expression and the interest of the people of Sierra Leone to know the truth.³⁰⁶ Whether the Court has a legitimate interest in preventing a “spectacle” which is unconnected to its own case against Norman remains doubtful.

b. Lessons to be Learned

What becomes clear from the preceding is that truth commissions and criminal prosecution can only go hand in hand.³⁰⁷ They require a monolithic legal framework with a clear repartition of personal jurisdiction and an interdiction for criminal justice to use self-incriminating testimonies rendered before the Commission. A “relationship agreement” as suggested in the case of Sierra Leone would have to be concluded by the creators of the two bodies, since neither the Court nor the TRC would have had the competence to conclude this. By that, a

³⁰³ Case No. SCSL-2003-09-PT (Prosecutor v. Gbao), Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with the Accused, 3 November 2003.

³⁰⁴ Case No. SCSL-2003-08-PT (Prosecutor v. Norman), Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone (“TRC” or “The Commission”) and Chief Samuel Hinga Norman JP Against the Decision of His Lordship, Mr. Justice Bankole Thompson Delivered on 30 October 2003 to deny the TRC’s Request to Hold a Public Hearing With Chief Samuel Hinga Norman JP, 28 November 2003, para. 17 and 30 respectively.

³⁰⁵ Cf. Schabas, see note 293, 168; id., “Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court”, *Journal of International Criminal Justice* 2 (2004), 1082 et seq.

³⁰⁶ N. Boister, “Failing to get to the Heart of the Matter in Sierra Leone?”, *Journal of International Criminal Justice* 2 (2004), 1100 et seq. (1110).

³⁰⁷ See also Schocken, see note 208, 459.

repetition of a decision like the one by which the Special Court unilaterally declared itself superior to the TRC³⁰⁸ could be avoided.³⁰⁹

What the controversy between the Special Court and the TRC reveals is that the needs of judicial and non-judicial institutions for post-conflict justice and reconciliation clash. Although the long-term goals of both bodies do not differ that much, their ways of operation do. The framework that needs to be put in place should meet the needs of each institution in such a way that the effect on state-building and reconciliation will overall be maximized. But only substantial empirical research on the long-term effects of post-conflict justice institutions like the TRC and the SCSL will enable us to better draw the line between the needs of both types of institution.³¹⁰

VI. Conclusion

In reiteration of the preceding conclusions, the case of Sierra Leone provides us with important lessons for peace-keeping and peace-building in Africa, in particular for the need for a holistic approach involving regional actors and addressing regional problems, as well as with a field test of putting in place different post-conflict justice mechanisms alongside each other.

The people of this war-ravaged country deserve peace and stability more than anybody else. Whether reality will comply with their hopes still remains to be seen. Economic hopelessness,³¹¹ the corruption that thrives and prospers,³¹² as well as other shortcomings of the Kabbah government³¹³ still need to be addressed. Eventually, the young people, many of whom look back on a career as a child soldier, need to be repatriated and given a different perspective.³¹⁴ Otherwise a repetition of the past would be an easy game for any new malicious warlord. The

³⁰⁸ See above note 294 and corresponding text.

³⁰⁹ As to the details for such a relationship agreement see E.M. Evenson, "Truth and Justice in Sierra Leone: Coordination between Commission and Court", *Colum. L. Rev.* 104 (2004), 730 et seq. (759 et seq.).

³¹⁰ Boister, see note 306, 1116.

³¹¹ International Crisis Group, see note 276, 12-16.

³¹² See the 2002 report of the Anti-corruption Commission, available at <<http://www.sierra-leone.org/ACCreport2002.html>>.

³¹³ Jalloh, see note 16, 167; Sawyer, see note 6, 451.

³¹⁴ International Crisis Group, see note 276, 11.

state of this “African problem” therefore calls for further international as well as “African solutions” in order to preserve past achievements and enhance future progress.

