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**TRANSITIONAL JUSTICE: THE PATH TO
PEACE
A CASE STUDY OF SIERRA LEONE**

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ABSTRACT

This paper looks at the process of transitional justice in post-conflict Sierra Leone.

It examines whether Sierra Leone, by granting amnesty to all combatants in the Lomé Peace Agreement, infringed a duty under international law to prosecute grave violations of international humanitarian law and international human rights. Considering the particularities of transitional societies emerging from conflict and facing political and social instability, it is ascertained that amnesties should, by way of exception, be allowed in order to ensure peace and stability in a politically fragile post-conflict country.

The paper continues to discuss the legitimacy that conditional amnesties, as opposed to blanket amnesties, have with respect to justice and accountability. It addresses truth and reconciliation commissions as the suitable mechanism to achieve both accountability and reconciliation.

The mandate and the work of the Sierra Leone Truth and Reconciliation Commission as well as its relationship with the subsequently established Special Court for Sierra Leone are discussed. The establishment of the Special Court is regarded as contrary to the Government's amnesty promise under the Lomé Peace Agreement. It is determined that, although there were substantial issues in the relationship between the Truth and Reconciliation Commission and the Special Court, and although the number of perpetrators participating in the truth and reconciliation process was limited, the combined efforts of both the Truth and Reconciliation Commission and the Special Court are capable of bringing justice and lasting peace to Sierra Leone.

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I INTRODUCTION

The past, it has been said, is another country. (...) The spotlight gyrates, exposing old lies and illuminating new truths. As a fuller picture emerges, a new piece of the jigsaw puzzle of our past settles into place.¹

(...)

[T]he future, too, is another country. And we can do no more than lay at its feet the small wisdoms we have been able to garner out of our present experience.²

(...)

We need to know about the past in order to establish a culture of respect for human rights. It is only by accounting for the past that we can become accountable for the future.³

(...)

Having looked the beast of the past in the eye, having asked forgiveness and having made amends, let us shut the door on the past – not in order to forget it but in order not to allow it to imprison us.⁴

Building bridges between a past characterised by human rights violations having occurred under a repressive regime or during a civil war and a future hoped to be designed by a democratically elected government and realised by a local population with full respect for human dignity and fundamental rights is the task of what is called transitional justice.⁵ The concept applies to certain historical situations of political transition, in which past authoritative regimes collapse and are replaced by democratic ones dedicated to promote reconciliation and peace.⁶ It is also applicable to describe post-conflict situations in countries that have been ravaged by a

¹ Desmond Tutu, Chairperson of the Truth and Reconciliation Commission of South Africa *Truth and Reconciliation Commission of South Africa Report Volume One: Chairperson's Foreword* (CTP Book Printers [Pty] Ltd, Cape Town, 1998), para 17.

² Tutu, above n 1, para 19.

³ Tutu, above n 1, para 28.

⁴ Tutu, above n 1, para 91.

⁵ Compare Dr Kristin Henrard "The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law" (1999) 8 *MSU-DCL J Int'l L* 595, 629.

⁶ Compare Antonio Cassese *International Criminal Law* (Oxford University Press, Oxford, 2003), 9; International Center for Transitional Justice (ICTJ) Home <www.ictj.org> (last accessed 03 September 2004).

violent civil war and struggle to find their way to peace.⁷ Transitional Justice has various forms, both judicial and non-judicial.⁸ Truth finding schemes, pursuing justice through prosecution and reparation, institution-building and removing human rights violators from power are answers to previous serious human rights violations.⁹ The New York based International Center for Transitional Justice (ICTJ) mentions, as achievements in the area of transitional justice in recent years, the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the entry into force of the Rome Statute of the International Criminal Court as well as the work of over 20 truth commissions set up in the past 30 years, among others.¹⁰

This paper is going to discuss the various issues that have arisen in the context of transitional justice in Sierra Leone. A decade long civil war has left the country trying to come to terms with a legacy of most serious human rights violations that occurred during the conflict. To end the hostilities, the government offered unconditional amnesty to all armed groups. Simultaneously, a Truth and Reconciliation Commission (TRC) was established to address impunity among the rank and file of the combatants and to produce a comprehensive record of the war with the aim of national healing and reconciliation.¹¹ The TRC published its Final Report in October 2004. After re-eruption of the conflict, a so-called "mixed" criminal tribunal, the Special Court for Sierra Leone (SCSL) was additionally

⁷ See ICTJ, above n 6. The introductory words to the concept of transitional justice are as follows: "As a political transition unfolds after a period of violence or repression, a society is often confronted with a difficult legacy of human rights abuse. Countries as diverse as Bosnia-Herzegovina, Sierra Leone, Peru, and East Timor are struggling to come to terms with crimes of the past. (...)" This general description can be applied to both the – presumably traditional - notion of transition that refers to countries, which have just emerged from an authoritative regime, and to the more recent one of countries that have just negotiated peace to an internal armed conflict. Furthermore, the mandate of the ICTJ covers countries recovering from both situations. <www.ictj.org> (last accessed 22 November 2004).

⁸ ICTJ, above n 6, <www.ictj.org> (last accessed 03 September 2004).

⁹ ICTJ, above n 6, <www.ictj.org> (last accessed 3 September 2004).

¹⁰ ICTJ, above n 6 <www.ictj.org> (last accessed 02 September 2004).

¹¹ In the following, the abbreviation TRC will only be used to refer to the Sierra Leone Truth and Reconciliation Commission. For the generic term "truth and reconciliation commission", which is going to be used for reference to the institution as such, no capital letters will be used.

established to try those most responsible for atrocities committed during the war. Trials began in June 2004.

This paper is going to examine whether the amnesty granted to the combatants in return for peace is reconcilable with the notion of criminal accountability. It is argued that a conditional rather than an unconditional blanket amnesty would have served the concepts of justice and accountability better.

As regards the SCSL, this paper determines the advantages and disadvantages that such a “mixed” tribunal has over international criminal tribunals.

With respect to the relationship between the TRC and the SCSL, this paper ascertains that the establishment of the SCSL was, as far as other armed groups than the RUF are concerned, contrary to the Government’s deal amnesty for peace in the Lomé Peace Agreement. As regards the RUF rebels, their previous breach of the peace agreement required judicial action to bring peace to the country.

The paper further talks about the different mandates of the TRC and the SCSL as well as the discords that have arisen from their co-existence. It is determined that, despite there having been substantial issues arising from the simultaneous operation of two different bodies of transitional justice, their co-existence has the potential to ensure justice and accountability at all levels and bring lasting peace to the country.

Essential to all mechanisms of transitional justice is a contextual approach tailored to the social, historic and political specificities of the country concerned. Each transitional country’s path to peace looks different.¹² This paper looks at issues that have been raised and answers that have been found in Sierra Leone in the various segments of transitional

¹² Erin Daly “Transformative Justice: Charting a Path to Reconciliation” (2001/2002) 12 Int’l Legal Persp 29 (page numbers not available).

justice. It intends to have a holistic view at the path of transition that this particular country is following. In consequence of that, explicit reference to other countries and processes of transition in the past is made in the form of general observations only. However, while being based on the particularities of Sierra Leone, this paper can nonetheless be the source of general conclusions with regard to aspects of transitional justice, namely, that of accountability in post-conflict societies.

II THE CIVIL WAR IN SIERRA LEONE AND THE LOMÉ PEACE AGREEMENT

Ever since gaining independence in 1961, Sierra Leone has been politically unstable and economically weak.¹³ At the beginning of 1991, shortly before the outbreak of the civil war, the rural population was so severely impoverished that the newly formed rebel movement, the Revolutionary United Front (RUF), easily recruited large numbers of people.¹⁴ In March 1991, RUF rebels started the civil war by attempting to overthrow the government. In the eight years that followed brutal and violent fight involving RUF rebels, the army and the government-aligned Civil Defence Force as well as the Economic Community of West African States (ECOWAS) Military Observer Group (ECOMOG) units shattered the country.¹⁵ The fighting was characterised by extreme brutality of the combatants in the form of mass amputations following the destruction of entire communities, systematic rape and sexual slavery and the involvement of great numbers of child soldiers.¹⁶ After numerous unsuccessful attempts to negotiate peace, in July 1999, the Lomé Peace Agreement was signed between RUF and Sierra Leone's president Kabbah. It granted complete

¹³ (Note) Jeana Webster "Sierra Leone – Responding to the Crisis, Planning for the Future: The Role of International Justice in the Quest for National and Global Security" (2001) 11 *Ind Int'l Comp L Rev* 731, 733-735.

¹⁴ Webster, above n 13, 736.

¹⁵ Webster, above n 13, 737; ICTJ Case Study Series "The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year" (2001) <www.ictj.org> (last accessed 31 August 2004), 1.

¹⁶ ICTJ, above n 15, 1.

amnesty to the combatants “in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.”¹⁷

Amnesty can be defined as the exemption from criminal and civil liability.¹⁸ However, it has to be distinguished from the notion of impunity.¹⁹ Impunity has been defined as²⁰

the impossibility, de iure or de facto, of bringing the perpetrators of human rights violations to account – whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried, and if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.

It is understood as not only the absence of investigation and punishment, but as an all-embracing lack of respect for the victims of violations of norms and a consequent absence of ‘lecture’ that such violations are wrongful.²¹ Amnesty is not necessarily equivalent to that wide concept. It is tantamount to impunity only insofar as it averts every form of accountability by denying what has happened.²²

The Lomé Peace Agreement, simultaneously, provided for the establishment of a truth and reconciliation commission that was authorised, among others, to “address impunity” and “facilitate genuine healing and

¹⁷ See (Note) Elizabeth M. Evenson “Truth and Justice in Sierra Leone: Coordination Between Commission and Court” (2004) 104 Colum L Rev 730, 737.

¹⁸ See Promotion of National Unity and Reconciliation Act (1995) (ZA), s 20 (7)(a).

¹⁹ Jeremy Sarkin and Erin Daly “Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies” (2004) 35 Colum Hum Rts L Rev 661, 719.

²⁰ Louis Joinet, Special Rapporteur to the Commission on Human Rights/ Sub-Commission on Prevention of Discrimination and Protection of Minorities *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Definitions para A, Annex II to Revised Final Report Prepared by Mr Joinet pursuant to Sub-Commission Decision 1996/119: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)* (1997) UN Doc E/CN.4/Sub.2/1997/20/Rev.1, <www.unhchr.ch> (last accessed 17 November 2004).

²¹ Sarkin and Daly, above n 19, 719.

²² Sarkin and Daly, above n 19, 719.

reconciliation.”²³

It is debatable whether the amnesty clause in the Lomé Peace Agreement laid the foundation for impunity or whether, considering the establishment of the Sierra Leone Truth and Reconciliation Commission, accountability is provided for. The following section is going to elaborate on the role of amnesty and accountability in post-conflict Sierra Leone.

III AMNESTY AND ACCOUNTABILITY: RECONCILABLE NOTIONS?

This section is going to examine the implications of the amnesty provision in the Lomé Peace Agreement. To establish if the amnesty clause caused impunity, it first has to be determined what scope the amnesty provision had and whether Sierra Leone had an obligation under international law to prosecute and punish the perpetrators of serious violations of international humanitarian law and human rights. To this extent, conventional as well as customary international law is going to be assessed. In this analysis, particular emphasis is put on the special circumstances transitional societies find themselves in. Subsequently, it is ascertained that a truth and reconciliation commission that is authorised to grant conditional amnesty and works alongside a criminal tribunal is the most adequate mechanism to address human rights violations that previously occurred during an internal armed conflict and to reconcile amnesty and accountability.

A The Legality of Amnesties under International Law

1 The Scope of the amnesty provision in the Lomé Peace Agreement

²³ *Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone* Lomé, Togo 07 July 1999, article XXVI(1) <www.sierra-leone.org> (last accessed 09 September 2004).

The amnesty provision in the Lomé Peace Agreement, article IX (2) and (3) reads as follows:

2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.

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

When the Lomé Peace Agreement was signed, the Special Representative of the UN Secretary-General added, on behalf of the United Nations, the disclaimer that the United Nations regarded the amnesty clause to be inapplicable with regard to violations of international humanitarian law.²⁴ As a consequence, the amnesty clause only applies to crimes committed under Sierra Leonean law, not to violations of international law. The United Nations reservation does not alter the amnesty for crimes under domestic law as stipulated by the agreement. Since the United Nations is a mere moral guarantor to the agreement, not a party,²⁵ its reservation is not applicable with regard to national prosecution of violations of international law either. The relationship between the government and the rebels, both being the sole parties to the agreement,²⁶ is not affected by the United

²⁴ Kofi Annan, United Nations Secretary-General *Report of the Secretary-General on the establishment of a SCSL for Sierra Leone S/2000/915*, para 9 www.un.org (last accessed 02 September 2004).

²⁵ Celina Schocken "The Special Court for Sierra Leone: Overview and Recommendations" (2002) *Berkeley J Int L* 436, 451; *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Lomé Accord Amnesty) (Judgment)* (13 March 2004) SCSL-2004-15-PT-060 para 41 (Appeals Chamber, SCSL), <www.sc-sl.org> (last accessed 29 November 2004).

²⁶ *Lomé Accord Amnesty*, above n 25, para 41.

Nations reservation.²⁷ The amnesty clause is therefore invalid with respect to international prosecution and trial under United Nations auspices, but remains effective in relation to national prosecution of violations of international humanitarian law and to national trial of violations of domestic law.

The scope of the amnesty under the Lomé Peace Agreement can be depicted as follows:

	<i>Violation of international law</i>	<i>Violation of domestic law</i>
<i>National prosecution</i>	Amnesty	Amnesty
<i>International prosecution</i>	No amnesty/ UN reservation effective	Amnesty

As far as the amnesty with regard to the national trial of violations of international humanitarian law is concerned, it is debatable whether the granting of amnesty violates obligations that the government might have under international law. The amnesty granted to the combatants for violations of international law constitutes a blanket amnesty, granted without any condition other than the one that the acts had to be committed by the combatants in pursuance of their objectives. That means that atrocious violations of fundamental norms of international humanitarian law might go unpunished.²⁸

However, one could argue that the duty to prosecute has to be balanced with political necessity, namely inciting the combatants to negotiate peace in return for amnesty.²⁹ An assessment of the legality of the amnesty provision therefore entails, first, the examination of whether there is an obligation under international law to prosecute serious offences of international humanitarian law. Second, the existence of such a duty provided, it has to be investigated whether this duty has to be mitigated in

²⁷ Schocken, above n 25, 451.

²⁸ (Note) Karen Gallagher "No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone" (2000) 23 *Jefferson L Rev* 149, 151.

²⁹ See Diane F. Orentlicher "Settling Accounts: The Duty to Prosecute the Human Rights Violations of a Prior Regime" (1991) *Yale L J* 2357, 2595.

consideration of the particularities of transitional societies.

2 *Obligations under International Law to Prosecute Serious Violations of International Humanitarian Law and Human Rights*

(a) Obligations to prosecute in conventional international law

(i) The Geneva Conventions

Articles 49, 50 of the first Geneva Convention stipulate an explicit obligation to prosecute grave breaches of its provisions, namely “wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”³⁰ The High Contracting Parties have to either try those persons alleged to have committed these breaches before their own courts or hand them over to other countries (which is described by the principle of *aut dedere aut iudicare*). However, the first Geneva Convention is only applicable in cases of international armed conflict and thus cannot be invoked in the case of amnesty being granted to rebels in an internal conflict like that in Sierra Leone.³¹

Article 3 common to the Geneva Conventions addresses internal conflicts and sets up a minimum standard of rules to abide by, but does not contain an explicit obligation to prosecute violations of its provisions.³² Since article 3 stands by itself as a ‘miniature convention’, subsequent provisions stipulating a duty to prosecute cannot be related to article 3.³³

Article 6(5) of the Additional Protocol II to the Geneva Conventions, relating to non-international armed conflict, encourages governments to “grant the broadest possible amnesty to persons who have participated in the armed conflict.” The provision was designed to “encourage gestures of

³⁰ Convention (I) for the Amelioration of the Confederation of the Wounded and Sick in Armed Forces in the Field (12 August 1949), article 50.

³¹ Convention (I) for the Amelioration of the Confederation of the Wounded and Sick in Armed Forces in the Field (12 August 1949), article 2: “...the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties...”; Henrard, above n 5, 617.

³² Henrard, above n 5, 617.

³³ Gallagher, above n 28, 176.

reconciliation, which can contribute to re-establishing normal relations” in a post-conflict society.³⁴ However, the granting of amnesty is seen as a matter of domestic discretion.³⁵

(ii) Specific international human rights instruments

A specific international convention relevant in the examination of whether there is an obligation to prosecute under international law in the present case of Sierra Leone is the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.³⁶ It does not require a link to an international armed conflict and is, therefore, applicable in the case of Sierra Leone. At the time of signing the Lomé Peace Agreement, in 1999, Sierra Leone had only ratified the Geneva Conventions and its Additional Protocols.³⁷ It had signed the Convention against Torture in 1985, thus prior to the Lomé Peace Agreement, but did not ratify it before 2001.³⁸ However, while not yet establishing the consent to be legally bound by the provisions of the treaty,³⁹ the signature does entail the obligation to refrain from any acts that might compromise the object and purpose of the treaty.⁴⁰ Article 4 of the Convention against Torture sets up the State parties’ obligation to make all acts of torture a criminal offence under their domestic criminal law and to establish appropriate penalties.⁴¹ Considering the abovementioned obligation arising from the signature, it is ascertained in

³⁴ International Committee of the Red Cross *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Eds Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, Martinus Nijhoff Publishers, Geneva 1987), para 4618.

³⁵ International Committee of the Red Cross *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Eds Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, Martinus Nijhoff Publishers, Geneva 1987), para 4617.

³⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85; Karen Gallagher “No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone” (2000) 23 *Jefferson L Rev* 149, 171-172; Henrard, above n 5, 618.

³⁷ United Nations Treaty Collection: Multilateral Treaties Deposited with the Secretary-General: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.

³⁸ United Nations Treaty Collection: Multilateral Treaties Deposited with the Secretary-General: Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.

³⁹ Ian Brownlie *Principles of Public International Law* (5th Edition, Oxford University Press, Oxford, 1998), 610-611.

⁴⁰ Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, article 18.

⁴¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, article 4.

this paper that the duty under article 4 to prosecute acts of torture constitutes an essential duty that contributes to the realisation of the objectives and the purpose of the Convention. To comply with it is therefore included in the duty under the Vienna Convention not to defeat the aims of the treaty prior to ratification. An obligation to prosecute acts of torture and other cruel, inhuman or degrading treatment or punishment is therefore effectively established for Sierra Leone under the Convention against Torture.

The views expressed by the Committee Against Torture (CAT) in *O.R., M.M. and M.S. v Argentina* do not impact on this finding.⁴² In this communication, the Committee concluded that no obligations (other than a moral one to provide remedy) would arise for Argentina under the Convention against Torture with respect to a law precluding prosecution for alleged acts of torture that had occurred before Argentina signed and ratified the convention and before it entered into force for Argentina, yet before it was even drafted. In both Argentina and Sierra Leone the acts of torture happened before the Convention entered into force for the respective country. Also, the amnesty laws were enacted before the Convention became effective. However, while in Argentina the acts of torture occurred prior to signing the Convention, the war in Sierra Leone, in which acts of torture occurred happened after Sierra Leone, had signed the Convention. The abovementioned legal effects of the signature were therefore effective at the time of the acts of torture. There is not just a mere "moral" obligation to offer a remedy to the victims as the Committee had established for Argentina.⁴³ The link to the duty to prosecute these acts as established under the Convention is thus more express in the case of Sierra Leone. The communications regarding Argentina can thus not be invoked to deny a duty to prosecute, which exists for Sierra Leone.

(iii) General international human rights instruments: The International Covenant on Civil and Political Rights

⁴² *O.R., M.M. and M.S. v Argentina* Communications Nos. 1/1988, 2/1988, and 3/1988 CAT/C/3/D/1, 2, and 3/1988, Annex, para 9 cited in Diane F Orentlicher « Settling Accounts : The Duty to Prosecute the Human Rights Violations of a Prior Regime » (1991) 100 Yale L J 2537 footnote 128 (not available online).

⁴³ Cited in Orentlicher, above n 29, 2537, footnote 128 (not available online).

Furthermore, general international and regional human rights instruments have to be scrutinised as to whether they contain obligations to prosecute serious human rights violations.⁴⁴ Article 2(3) of the International Convention on Civil and Political Rights (CCPR) requires State parties to offer effective remedies to victims of violations of Covenant rights.⁴⁵ When read in conjunction with article 7, the prohibition of torture, article 2(3) sets up the obligation to undertake investigation of alleged acts of torture, guarantee freedom of such acts, and offer effective remedies.⁴⁶ Under the CCPR, providing effective remedies against acts violating Covenant rights embraces taking measures to prevent the reoccurrence of such acts in the future, in particular, through bringing to justice those who committed them.⁴⁷ As the Human Rights Committee, later in the same Comment, refers to the issue of impunity, one can deduce from the Committee's words that 'bringing to justice' means prosecution and punishment.⁴⁸ More specifically, according to the Human Rights Committee, amnesties are generally incompatible with the requirements of investigation and providing remedies.⁴⁹

The previous examination of various sources of conventional international law that are relevant to Sierra Leone does not present a uniform picture of international law with respect to the existence of a duty to prosecute serious violations of international humanitarian law and human rights. While the Second Protocol to the Geneva Conventions allows for amnesties as a means to achieve peace, the Convention against Torture contains an explicit obligation to punish acts of torture. The Human Rights Committee considers amnesties to be impermissible with the CCPR. To

⁴⁴ Henrard, above n 5, 616.

⁴⁵ International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, article 2(3).

⁴⁶ *General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7): 10/03/92, CCPR General Comment No. 20*, (General Comment No. 20) para 14 <www.unhchr.ch> (last accessed 6 November 2004).

⁴⁷ *General Comment No. 31 Nature of the General Legal Obligations Imposed on States Parties to the CCPR: 26/05/2004 CCPR/C/21/Rev.1/Add.13* (General Comments), para 18.

⁴⁸ Contrast Emily W Schabacker "Reconciliation or Justice and Ashes: Amnesty Commission and the Duty to Punish Human Rights Offences" (1999) 12 NY Int L Rev 1, 25, 36.

⁴⁹ *General Comment No. 20, above n 46*, para 14.

determine whether international law allows for amnesties, it is therefore necessary to look at customary international law.

(b) Obligations to prosecute in customary international law

Customary international law consists of two elements: a uniform and general State practice and the recognition by the States concerned of this practice as arising from a legal duty, the *opinio iuris*.⁵⁰

(i) Conclusion of treaties as evidence of State practice

Treaties may give evidence of the formation of custom.⁵¹ Their conclusion and the contents of their provisions, as seen in their evolution over time, are illustrative of what States regard to be sufficiently relevant to be put into legally binding words within the framework of an international treaty. Arguably even more than policy statements or diplomatic correspondence,⁵² the fact that States sign an international convention can be regarded as a clear evidence of legal motivation based on a sense of legal duty, thus of *opinio iuris*.⁵³ A number of multilateral treaties establish a duty to prosecute those who have committed serious human rights violations.⁵⁴ By way of example, the Genocide Convention requires in article IV the punishment of acts of genocide,⁵⁵ so does the Convention against Torture and the Draft Code of Crimes against the Peace and Security of Mankind.⁵⁶

(ii) State practice

⁵⁰ Brownlie, above n 39, 5 -7.

⁵¹ Brownlie, above n 39, 3.

⁵² See Brownlie, above n 39, 5.

⁵³ *General Comment No. 20*, above n 46, para 14 in contrast to the previous *General Comment No. 07: Torture or Cruel, Inhuman, or Degrading Treatment or Punishment (Art 7): 30/05/82*, *CCPR General Comment No 7*, para 1, which does not address the issue of amnesties, but simply calls on State parties to investigate alleged acts of torture, hold perpetrators responsible and provide remedies for the victims. <www.unhchr.ch> (last accessed 19 November 2004).

⁵⁴ John Dugard "Conflicts with Truth Commissions" in Antonio Cassese, Paola Gaeta, John R W D Jones *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002), 693, 696.

⁵⁵ Convention on the Prevention and Punishment of the Crime of Genocide (09 December 1948) 78 UNTS 277, article IV.

⁵⁶ International Law Commission *Draft Code of Crimes against the Peace and Security of Mankind* (48th session) (1996), UN Doc A/48/10, article 3, <www.un.org> (last accessed 01 December 2004).

It is crucial to also investigate the actual practice of those States that are directly affected by the question of whether or not to grant amnesty to rebels, that is those that have found themselves in a post-conflict situation.⁵⁷ Practice of these States in recent years cannot be said to be uniform in prosecuting and punishing those responsible for grave human rights violations; it is rather the absence of prosecution that seem to have emerged as a rule.⁵⁸ There is hence a discrepancy between States' obligations as established in conventional international law and their actual compliance with these.⁵⁹ It is questionable what impact this lack of congruence between what States sign in international treaties and what they abide by in political reality has on the determination of a rule of customary international law. Some have argued that the divergence between the legal norms and the factual practice behind it hinders the development of a rule of customary law.⁶⁰ Others have stated that custom can nonetheless be established due to the abovementioned repeated incorporation of the duty to prosecute into international treaties.⁶¹ International law seems to be going towards the prohibition of amnesties, which is illustrated by the preamble of the Rome Statute as the most recent instrument established in international criminal law and that requires prosecution and punishment of the most serious crimes at the national level.⁶² As a result, it is ascertained that a duty to prosecute human rights atrocities is at least emerging as a rule of customary international law based on increasing consideration in conventional international law,⁶³ while it has not yet been established as such.⁶⁴ Diane Orentlicher, amicus curiae to the SCSL, finds the following words to

⁵⁷ Emily W Schabacker "Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offences" (1999) 12 NY In L Rev 1, 38.

⁵⁸ Dugard, above n 54, 698; Schabacker, above n 57, 44; Gallagher, above n 28, 181 (listing a number of countries that have recently granted amnesty).

⁵⁹ Schabacker, above n 57, 47.

⁶⁰ Steven R Ratner "New Democracies, Old Atrocities: An Inquiry into International Law" (1999) 87 Geo L J 707, 726.

⁶¹ Schabacker, above n 57, "47 referring to Orentlicher, above n 29, 2585 (with respect to grave violations of physical integrity)

⁶² The Rome Statute of the International Criminal Court (17 July 1998) UNDCPEICC, UN Doc A/CONF/183/9, <www.icc-cpi.int> (last accessed 6 November 2004); Dugard, above n 54, 698.

⁶³ Orentlicher, above n 29, 2585 (with respect to grave violations of physical integrity).

⁶⁴ Cassese, above n 6, 315; Ratner, above n 60, 716; Jessica Gavron "Amnesties in the Light of Development in International Law and the Establishment of the International Criminal Court" (2002) 51 ICLQ 91, 92.

describe the uncertain legality of amnesties: "An amnesty that encompasses crimes against humanity, serious war crimes, genocide or torture would be of doubtful validity under international law."⁶⁵

3 *Particularities of Transitional Societies*

However, despite such rule of customary international law condemning amnesties emerging, amnesties have to be evaluated in the light of the particular circumstances they were granted in. Political reality and necessity might prevail over norms of international law. A contextual approach to every individual amnesty is required to determine the demands of reality that impacted on the government's decision to exempt the opposing rebels from prosecution.⁶⁶ In Sierra Leone, amnesty was given within the framework of a peace agreement. This raises the question whether the particularities of transitional societies emerging from conflict and searching for peace, reconciliation and stability, not have to be considered in the sense that the duty to prosecute, if one regards such to exist, has to be mitigated or modified. This question is going to be addressed in the following.

(a) Political and social instability

Several arguments in favour of prosecution of serious human rights violations that occurred during a previous conflict have been raised. Thus, it has been said that trials represent a clear cut with the past of a country. They would foster stabilisation and credibility of the new regime just as deter future human rights violation.⁶⁷

On the other hand, it has been presumed that the newly established governmental institutions might be destabilised by the issues trials bring about. Judicial institutions might still be fragile, society be divided over support for the accused, both factors potentially threatening the consolidation of the government and the recovery of the society from

⁶⁵ *Lomé Accord Amnesty*, above n 25, para 34.

⁶⁶ Henrard, above n 5, 639; Priscilla B Hayner "Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal" (1996) 59 *Law & Contemp Prob* 173, 175.

⁶⁷ Henrard, above n 5, 634.

conflict.⁶⁸ Mere political convenience does certainly not exempt governments from prosecuting members of the previous regime or rebels who are responsible for most serious violations of international humanitarian law and human rights.⁶⁹ However, this essential duty should not put a newly established democratic regime's survival or post-conflict consolidation at risk. If the country's political and social stability is severely at stake, the government should be exempt from the duty to prosecute.⁷⁰ International treaties determining the duty to prosecute should hence be interpreted in a way that does not impose obligations on governments, which would prove to be disadvantageous for the country's vital interests.⁷¹ Thus, one of the reasons to set up the TRC of South Africa, empowered to grant amnesty, instead of establishing a criminal tribunal, was the belief that the security establishment would not have contributed to the peace negotiations had they had reason to fear to be brought to trial.⁷² The creation and consolidation of peace would have therefore been compromised by the decision to prosecute the perpetrators of human rights violations. Similarly, many transitional Latin American countries faced the realistic threat of the military reclaiming power, which made abstaining from criminal prosecution and granting amnesty to the members of the previous regime the only viable way to secure stability and ultimately survival of the new government.⁷³ Likewise, in Sierra Leone, amnesty was granted to the combatants in hope for consolidation of the peace and national reconciliation after a decade-long brutal war.⁷⁴

The Sierra Leone Truth and Reconciliation Commission considers amnesty granted under these prerequisites "the least bad of available alternatives."⁷⁵ Considering the positive impact amnesties potentially have

⁶⁸ Henrard, above n 5, 635.

⁶⁹ Henrard, above n 5, 636.

⁷⁰ Orentlicher, above n 292648; Henrard, above n 5, 644.

⁷¹ Orentlicher, above n 29, 2600.

⁷² Tutu, above n 1, para 22.

⁷³ Schabacker, above n 57, 15.

⁷⁴ *Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone* Lomé, Togo 07 July 1999, Article IX(3) <www.sierra-leone.org> (last accessed 09 September 2004).

⁷⁵ Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 2: Findings: Findings in*

on peace negotiations, the Commission strongly criticises the establishment of the SCSL, which entails criminal prosecution despite the previously granted amnesty, indicating that this has signalled to combatants in conflicts to come that they cannot trust amnesty clauses.⁷⁶

(b) Need for understanding and reconciliation

There is another crucial reason that can be mentioned to support the view that prosecution by the help of criminal trials is not necessarily the best option to address human rights violations that occurred during a civil war. Post-internal-conflict societies need to understand their past and learn what issues caused the conflict and how these can be tackled in order to prevent confrontation to reoccur in the future. This seems especially true in the case of civil wars that targeted and involved many civilians, as was the case in Sierra Leone,⁷⁷ and that were not a mere struggle for power carried out by rebel groups against the government in power. Citizens wish to find out why certain groups of society became involved in the conflict, whether their neighbour played a role in the killings, why their family was targeted. In other words, they strongly desire to learn about the truth behind the atrocities in the hope to be able to come to terms with what has happened, to forgive and thus find their inner peace.⁷⁸ At a communal and national level, this forgiveness will lead to mutual approach and reconciliation. Reconciliation is the precondition for the country's and society's rebirth as it embodies a collective forward-looking positively restorative attitude rather than a backwards-looking punitive one.⁷⁹ Punishment as the last stage of a criminal trial seems less capable of reunite society than reconciliation

Respect of the TRC and the SCSL for Sierra Leone, para 553, 562, <www.ictj.org> (last accessed 11 November 2004).

⁷⁶ Sierra Leone TRC *Findings: Findings in Respect of the TRC and the SCSL for Sierra Leone*, above n 75, para 553, 562.

⁷⁷ See Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 2: Findings: Findings on the Nature and Characteristics of the Conflict*, para 75, 76, <www.ictj.org> (last accessed 11 November 2004).

⁷⁸ See Alex Boraine "Truth and Reconciliation in South Africa: The Third Way" in Robert Rotberg and Dennis Thompson (Eds) *Truth v Justice: The Morality of Truth Commissions* (Princeton University Press, Princeton, 2000), 141, 150.

⁷⁹ Sarkin and Daly, above n 19, 693.

as it entails a less positive and 'creative' psychology.⁸⁰

Erin Daly uses the term "transformation" to appropriately describe the process of society changing from one that has experienced, even condoned, oppression to one that values and protects human rights and the principles of democracy.⁸¹ According to her, transformation is equivalent to the reinvention of society through dealing with past abuses and promulgating new values in order to deter future human rights violations.⁸² She considers criminal trials to be inappropriate for transformative societies, saying that they are designed for stable societies, where, as opposed to those in transition, crimes are an exception rather than the rule.⁸³ Criminal trials of those responsible for violations of human rights and humanitarian law do not have the potential to initiate a transformative healing process of society as a whole that is required to establish long-lasting peace and reconciliation. They seek to establish guilt or innocence and do not question the causes and history of the conflict.⁸⁴ They are characterised by formalistic procedures and happen in an environment detached from and inhibiting the active involvement of society.⁸⁵ However, to achieve national reconciliation, the active participation of as many individuals as possible in the truth finding process is desirable and required.⁸⁶ People have to work closely together to achieve national reconciliation.⁸⁷ Only in that way can the full picture of the past be composed and the full lesson for the future be learnt.

(c) Importance to ensure alternative accountability

In light of this reasoning, refraining from formal prosecution and punishment of those responsible for serious human rights violations during

⁸⁰ See Orentlicher, above n 29, "2550; Boraine, above n 78, 141, 147.

⁸¹ Daly, above n 12.

⁸² Daly, above n 12

⁸³ Daly, above n 12

⁸⁴ See Martha Minow "The Hope for Healing: What Can Truth Commission Do?" in Robert Rotberg and Dennis Thompson (Editors) *Truth v Justice: The Morality of Truth Commissions* (Princeton University Press, Princeton, 2000), 238; Sarkin and Daly, above n 19, 716.

⁸⁵ See Minow, above n 84, 238.

⁸⁶ Sarkin and Daly, above n 19, 693; Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 2: Findings: Primary Findings*, para 38, <www.ictj.org> (last accessed 11 November 2004).

⁸⁷ Daly, above n 12.

an internal conflict and granting amnesty to the combatants instead is an appropriate and desirable answer to a country's wish to come to terms with its past and to step into the future in unity and reconciliation. Thus, the Sierra Leone Truth and Reconciliation Commission finds the amnesty granted in the Lomé Peace Agreement "well intentioned" "given the reality of the conflict", as it was "meant to secure peace."⁸⁸ However, to achieve successful transformation, it is vital to find alternative and inclusive methods of dealing with the past and to hold those responsible accountable.

The work of a truth and reconciliation commission can reach the aims of learning about the past through comprehensive truth finding and of achieving healing transformation of society. As an alternative means of finding justice, this type of commission is capable of holding human rights violators accountable in a manner different from traditional criminal trials and tailored to the specific needs of transitional societies, thus ensuring that serious violations of human rights do not go unpunished. The nature and advantages of truth commissions are going to be examined in the following section.

B Ensuring Accountability: Truth and Reconciliation Commissions and the Advantages They Have over Criminal Tribunals

Truth commissions have been said to be a middle way between prosecution, which would potentially destabilise the country, and amnesty, which would be contrary to obligations under international law and none of which are desirable for the national reconciliation process.⁸⁹ A truth and reconciliation commission seeks and examines what is vital for the country's backwards-looking understanding of its past and its forward-looking rebuilding of society and values: the truth. It encourages victims and perpetrators to look each other into the eye and get together in a mutual effort to reunite society and thus initiates reconciliation. Although differing

⁸⁸ Sierra Leone TRC *Findings: Findings in Respect of the TRC and the SCSL for Sierra Leone*, above n 75, para 553, 553-559.

⁸⁹ Henrard, above n 5, 637, 639.

one from another in an attempt to reach a highest possible degree of contextuality and adaptation to the requirements of each particular country,⁹⁰ truth and reconciliation commissions have a number of advantages compared to criminal tribunals in the settling of a transitional society. These are going to be elaborated on in the following.

1 Truth finding as the primary concern

Truth and reconciliation commissions are conceptualised to disclose the truth. Trials, on the contrary, only disclose as much truth as is required to determine the guilt or innocence of the accused.⁹¹ They do not aim at drawing a comprehensive picture of the events and their interrelationship as truth and reconciliation commissions do, but offer what Madeline H. Morris has called a “patchwork” of records.⁹² Truth finding is a secondary objective of a criminal procedure,⁹³ whereas it is the primary purpose of the work of a truth and reconciliation commission. In transitional societies, establishing what has happened to whom by whom and why, or to make the people who are generally already known to have committed particular acts acknowledge these acts is the pivotal concern and should be the principal endeavour.⁹⁴ In contrast to criminal trials that focus on a particular individual, truth commissions that are capable of questioning systems, which is crucial in the examination of the antecedent of an internal conflict.⁹⁵

2 Focus on the victim

Truth and reconciliation commission proceedings are victim-centred. They place the victim’s personal story and fate at the centre of attention.⁹⁶ The less formal atmosphere, free from rules of procedure and potentially intimidating legal language, provides a much more personal and considerate

⁹⁰ Daly, above n 12

⁹¹ Minow, above n 84, 238.

⁹² Madeline H. Morris “International Guidelines Against Impunity: Facilitating Accountability” (1996) 59-AUT Law & Contemp Probs 29, 33.

⁹³ Daly, above n 12.

⁹⁴ Hayner, above n 66, 607.

⁹⁵ See Donald W. Shriver, Jr “Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?” (2001) 16 J L & Religion 1, 10.

⁹⁶ Mariah Jackson Christensen “The Promise of Truth Commissions in Times of Transition” (2002) 23 Mich J Int L 695, 702, reviewing Priscilla B. Hayner *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge, New York and London, 2001).

environment.⁹⁷ That makes it likely to produce the desired broad historical record of incidents and their connections.

As opposed to a criminal trial, where victims function as witnesses and have to abide by rules of evidence, in a truth and reconciliation commission hearing, the victim has the unique chance to give a personal narrative of his/her experiences to a degree that he/she considers appropriate to feel relieved from the burden of memory and to add his/her piece to the mosaic. No trial would allow for this type of narrative truth that gives the victim the freedom to decide what to tell in which manner and when instead of being interrogated conforming to rules of taking evidence.⁹⁸ By giving his/her account of the events, the victim changes from the former, passively suffering person to one that actively contributes to the truth finding process. Instead of enduring, he/she can create. The hearings therefore have the wonderful potential of giving the victims back their dignity.⁹⁹ It is the view of this paper that the personal and encouraging atmosphere that responds to the needs of those who speak out and that distinguishes truth commission hearings from ordinary criminal trials is the crucial factor in achieving the principal aim of establishing the truth.

3 *Scope for Forgiveness*

Hearings also allow for personal encounter between victims and their perpetrators. Often victims feel the wish to meet those who have inflicted harm on them or their family. Some feel the desire to forgive that person and,¹⁰⁰ even more, to be forgiven, while often not knowing for what to be pardoned. Thus, in a TRC of South Africa hearing, a woman called Beth expresses her feelings towards the man who threw a grenade towards her at a Christmas party and badly injured her in the following words:¹⁰¹ "It is not important for me, but I would really, really like this, I would like to meet

⁹⁷ Minow, above n 84, 246.

⁹⁸ Minow, above n 84, 238; Sarkin and Daly, above n 19, 716.

⁹⁹ Shriver, above n 95, 14.

¹⁰⁰ Boraine, above n 78, 150.

¹⁰¹ Beth Savage in Truth and Reconciliation Commission of South Africa *Truth and Reconciliation Commission of South Africa Report Volume Five Chapter Nine: Reconciliation* (CTP Book Printers [Pty] Ltd., Cape Town, 1998), 39.

this man that threw that grenade in an attitude of forgiveness and hope that he could forgive me, too, for whatever reason. But I would very much like to meet him." Following an actual meeting with the man after his amnesty hearing, she stopped having nightmares about the attack.¹⁰² These encounters also help the perpetrator to accept what he/she has done, to apologise and benefit from the victim's desire to meet and approach each other in the sense that they realise they are not confronted with feelings of hatred and vengeance for what they have done.

4 *Disseminating the stories and adopting recommendations*

Wide publication of the stories of both victims and perpetrators as uncovered in commission hearings enable the wider public to share the stories and, with them, the truth. Getting every member of society involved in this process of finding and learning the truth can launch truth finding and reconciliation initiatives at every level of society and in various informal ways and thus contribute to the consolidation of peace. It also makes impossible any further denial of the events in the war or, as in South Africa, the violence during the apartheid era.¹⁰³

The findings can be the basis for comprehensive recommendations for the government on how to mend the wounds of the war and prevent grave human rights violations from reoccurring in the future. The Sierra Leone Truth and Reconciliation Commission submitted comprehensive recommendations over a length of 100 pages in its final report, addressing the issues of impunity, prevention of future conflict, and reparations for the victims, as well as healing and reconciliation.¹⁰⁴ It must be said, though, that, due to their lack of implementing power, the commissions depend on the will of the governments to see their advice become reality.¹⁰⁵ The Sierra

¹⁰² Truth and Reconciliation Commission of South Africa *Truth and Reconciliation Commission of South Africa Report Volume Five Chapter Nine: Reconciliation* (CTP Book Printers [Pty] Ltd., Cape Town, 1998), 40.

¹⁰³ Daly, above n 12.; Boraine, above n 78, 152.

¹⁰⁴ Sierra Leone TRC *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter: Recommendations*, <www.ictj.org> (last accessed 11 November 2004).

¹⁰⁵ Priscilla B Hayner "Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal" (1996) 59 *Law & Contemp Prob* 173, 175.

Leone TRC, therefore, emphasises its confinement to recommendations that it considers to be realisable with a view to government funds and capacity-building ability.¹⁰⁶

C Conditional Amnesty as a Means to Achieve Justice and Accountability

1 Conditional and blanket amnesty

As far as amnesty is concerned, truth and reconciliation commissions can operate in different ways. By way of example, the TRC of South Africa granted amnesty only when a number of requirements were fulfilled. Perpetrators had to formally apply with the TRC's amnesty committee for amnesty in respect of any act, omission or offence associated with a political objective committed between March 1960' and 10 May 1994.¹⁰⁷ Amnesty was thus granted on an exclusively individual basis based on applications that had to relate to a particular type of offence committed during a particular period of time and that had to be submitted by a certain closing date and on the condition of full disclosure of the truth in a public hearing.¹⁰⁸ It was a conditional, thus individual amnesty. The application process did not automatically lead to amnesty; the Committee could refuse to grant amnesty where there was a disproportion between the act and the political objective pursued. Those whose applications were refused or who did not apply for amnesty could be prosecuted and brought before criminal tribunals.¹⁰⁹

In Sierra Leone, on the contrary, the Lomé Peace Agreement granted blank and global amnesty to all combatants without any conditions to be fulfilled other than that their acts had to be committed in pursuit of their objectives.

¹⁰⁶ Sierra Leone TRC *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter: Recommendations: Approach of the Commission*, para 13, <www.ictj.org> (last accessed 11 November 2004).

¹⁰⁷ Promotion of National Unity and Reconciliation Act (1995) (ZA), s 18(1).

¹⁰⁸ Promotion of National Unity and Reconciliation Act (1995) (ZA), s 20(1).

¹⁰⁹ Schabacker, above n 57, 19.

2 *The notions of justice and accountability in transitional societies*

This section is going to examine these two fundamentally different types of amnesty with respect to the notion of justice. The idea of justice embodies the concepts of, in the negative, retribution, and, in the positive, compensation or balancing. It has been said that amnesty provisions cause an inequality of sacrifice as they exempt the perpetrator from judicial consequences for his wrongdoings while the victim is left with his/her grief and suffering.¹¹⁰ In other words, amnesty can be equalled with impunity and impunity with injustice.¹¹¹ This is not true with regard to conditional amnesty, though. Justice can be said to be achieved by the fact that the perpetrator and applicant for amnesty has to reveal the full truth in a public hearing and has to admit responsibility for his acts.¹¹² In a way, public shaming is thus provoked.¹¹³ Neighbours, friends and family either learn for the first time that someone in their middle committed atrocities or now know for sure what they have long been guessing.¹¹⁴ From the part of the perpetrator, it is either admittance or acknowledgement of his/her wrongdoings.¹¹⁵ These circumstances embrace a notion of justice that has nothing to do with retribution or punishment. Justice as pursued by truth and reconciliation commissions is a more forward-looking concept that seeks healing and reconciliation. In contrast to the traditional notion of retributive justice, it has been called restorative justice.¹¹⁶

By publicly assuming responsibility, the perpetrator is also held accountable. These two essential concepts of criminal law, justice and accountability, therefore have to be assessed under a different perspective with respect to transitional societies. As the term "*transitional justice*" illustrates itself, justice in this settling is a distinctive form of justice. It has to take into account the particularities of transition and transformation of the country concerned. Retributive justice has no place in the concept of

¹¹⁰ See Tutu, above n 1, para 35.

¹¹¹ Daly, above n 12.

¹¹² Tutu, above n 1, para 35.

¹¹³ Tutu, above n 1, para 35.

¹¹⁴ Tutu, above n 1, para 35.

¹¹⁵ See Minow, above n 84, "247.

¹¹⁶ See for example Sarkin and Daly, above n 19, 692.

transition.¹¹⁷ The notion of transitional justice goes beyond the established understanding of retribution.¹¹⁸ Instead, it touches values such as harmonisation, reconciliation and reunion.¹¹⁹ Consequently, amnesty granted as response to full disclosure of the truth to someone who held him-/herself accountable for serious crimes is a just response.

Things are different with respect to blanket amnesty, such as the one granted in Sierra Leone. Amnesty is given without the perpetrators having to do anything in return. Their appearance in commission hearings is purely voluntary and they are not required, only asked and expected, to reveal the full truth. If they do not do so, no legal consequences will arise. Linking this back to the primary objective of commission hearings, establishing the truth, it is questionable whether the hearings in the case of blanket amnesty having previously been granted, reveal an identical degree and a similar quality of truth as hearings that are part of an application for amnesty procedure.¹²⁰ The case of blanket amnesty can therefore illustrate, in reverse conclusion, the value of a conditional amnesty and the fact that the perspective of amnesty and amnesty actually being granted are an integral part of the quest for truth. Truth as sought by societies in transformation and as told by perpetrators with the aim to be pardoned leads to justice.¹²¹

3 Cooperation of a truth and reconciliation commission with a criminal tribunal

Conditional amnesty, however, seems to be only truly effective when the possibility of being tried by a criminal tribunal in fact exists, that is when a truth and reconciliation commission and a criminal tribunal work alongside each other. Without criminal trials being a realistic factor in the minds of the perpetrators, the latter do not have any legal constraint to appear in hearings and reveal their stories.¹²² The situation would thus be similar to a blanket amnesty. In both cases, the only incentive that

¹¹⁷ Daly, above n 12.

¹¹⁸ Daly, above n 12; Tutu, above n 1, para 36.

¹¹⁹ Tutu, above n 1, para 36.

¹²⁰ See Daly, above n 12.

¹²¹ Daly, above n 12.

¹²² Daly, above n 12; Shriver, above n 95, 18.

perpetrators have to speak out before the commission and the general public is one that might be simply described as personal: They either carry the burden of guilt and hope for relief after having spoken, or they have realised the effects of their wrongdoings on the country as a whole and wish to apologise. In South Africa, criminal trials were held parallel to the TRC hearings for those, whose application for amnesty had not been granted. In Sierra Leone, the SCSL was authorised to try those bearing the greatest responsibility for serious violations of international human rights and the laws of Sierra Leone.¹²³ The jurisdiction of the SCSL is going to be examined in detail in Section V.

As a result, one can ascertain that the preferable approach to transitional justice is a conditional amnesty, granted only in return for full disclosure of the truth in a public hearing and only for a specific type of crimes. A formal application procedure involving standardised application forms and closing dates makes the amnesty procedure uniform and credible. For its lack of incentive to contribute to the national truth finding process and its lack of 'equality of sacrifice' and justice, blanket amnesty is to be rejected as being an inappropriate tool in the quest for justice and reconciliation.

D Reparations as an Integral Part of Accountability

It has further been argued that full effectiveness of the amnesty process can only be achieved if reparation for the victims is provided for.¹²⁴ Reparation can be financial or purely symbolic.¹²⁵ Financial compensation is usually granted on an individual basis while symbolic reparations are provided collectively.¹²⁶ It can be based on both legal and moral arguments.

¹²³ Article 1(1) Statute of the SCSL for Sierra Leone (annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a SCSL for Sierra Leone) <www.sc-sl.org> (last accessed 05 September 2004).

¹²⁴ Minow, above n 84, 252; Madeline H Morris "International Guidelines Against Impunity: Facilitating Accountability" (1996) 59-AUT Law & Contemp Probs 29, 29.

¹²⁵ See Truth and Reconciliation Commission of South Africa *Truth and Reconciliation Commission of South Africa Report Volume Five Chapter Five: Reparation and Rehabilitation Policy* (CTP Book Printers [Pty] Ltd., Cape Town, 1998), paras 23 – 32.

¹²⁶ Joinet, above n 20, para C.40. and 41.

Given the concern about an equality of sacrifice, reparation seems to be an indispensable contribution to the quest for restorative justice and reconciliation, particularly in those cases where amnesty also exempts from civil liability.¹²⁷ The duty to provide reparation as a form of remedy for human rights violations can be found in international and regional human rights instruments. By way of example, the Human Rights Committee has just determined in its General Comment on the Nature of the General Legal Obligations Imposed on State Parties that the CCPR contains a general duty to provide compensation for violations of the rights set up therein that goes beyond the specifically established duties to compensate.¹²⁸ According to the Committee, reparation can involve, among others, financial restitution and satisfactory measures such as apologies in public or the creation of public memorials.¹²⁹

In view of that, the TRC of Sierra Leone suggests in its final report as measures of reparations, among others, the improvement of national health services for war victims and lifelong free health care and prosthetic devices as well as monthly pensions for amputees.¹³⁰ It further recommends symbolic reparations, especially, the erection of memorials as places for acknowledgement and interactive dialogue.¹³¹

¹²⁷ Minow, above n 84, 252; Truth and Reconciliation Commission of South Africa *Truth and Reconciliation Commission of South Africa Report Volume Five Chapter Five: Reparation and Rehabilitation Policy* (CTP Book Printers [Pty] Ltd., Cape Town, 1998), paras 2, 3.

¹²⁸ *General Comment No. 31 Nature of the General Legal Obligations Imposed on States Parties to the CCPR*: 26/05/2004 CCPR/C/21/Rev.1/Add.13 (General Comments), para 16.

¹²⁹ *General Comment No. 31 Nature of the General Legal Obligations Imposed on States Parties to the CCPR*: 26/05/2004 CCPR/C/21/Rev.1/Add.13 (General Comments), para 16.

¹³⁰ Sierra Leone TRC *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 3: Recommendations: Reparations*, paras 482, 485-487, 492, <www.ictj.org> (last accessed 11 November 2004). Having in mind its condition that recommendations should be realistic in terms of the government's financial and human resources, see above section II B, the Commission suggests the cooperation with the international community in order to allocate sources for the implementation of its recommendations, in particular, those entailing substantive expenses such as lifelong free health care. National sources should be the exploitation of mineral sources, taxes, and the recovery of assets removed from the country, paras 505-506.

¹³¹ Sierra Leone TRC *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter: Recommendations: Reparations*, paras 499-503, <www.ictj.org> (last accessed 11 November 2004).

E Summary and Interim Conclusion

While State practice with respect to the granting of amnesties has been inconsistent in the past years,¹³² it is ascertained that, due to the increasing incorporation in international treaties,¹³³ a duty to abstain from amnesties and to prosecute serious violations of international humanitarian law and international human rights is at least emerging as a rule of customary international law.¹³⁴ Particularities of transitional societies, trying to end a violent conflict or recovering from one, have nonetheless to be taken into account in the evaluation of their duty to prosecute war criminals.¹³⁵

In Sierra Leone, the political reality demanded amnesty to be granted as a promise for the parties to the conflict to lay down their weapons and end the decade long brutal fighting. Although the amnesty granted was regrettably a blanket one, the concurrent establishment of the Sierra Leone TRC provided, at least partly, for the possibility to achieve justice and accountability. The TRC proceedings were flawed by the fact that perpetrators had no incentive to appear before the Commission as they had already been granted unconditional amnesty.¹³⁶ Despite this, the TRC was able to set up a comprehensive record, based on thousands of statements, of what had happened during the war and why. The work of the TRC as well as facts and issues of its co-existence with the SCSL for Sierra Leone is going to be discussed in the following sections.

IV THE TRUTH AND RECONCILIATION COMMISSION OF SIERRA LEONE

Each person's story is a part of the truth. Each story is like a piece of a very large puzzle. Nobody can tell the truth alone. At first, when you collect the stories from many different people, it is only a jumble of separate pieces. But when the pieces

¹³² Above A 2 (c) (ii).

¹³³ Above A 2 (b) (ii), (iii), (v) and (c) (i).

¹³⁴ Above A 2 (c) (ii).

¹³⁵ Above A 3.

¹³⁶ Above C 2.

are arranged together and put into place, then the whole picture can be seen. ... Just imagine that every one of us carries in our pocket one small treasure. ... That is our very own story to tell. It will be most precious, and it may be very painful to recall. Only when we collect the stories together will we begin to see the whole truth, which is as vast and as infinite as the night sky. If we study the truth very carefully, we will come to understand each other, and we will come to understand what happened in our country. ... Once the stories are all collected together in one place - in one book - then we will share the book for everyone to read. We will be able to understand what happened and what went wrong. We will learn from the story how to make sure that the war never happens again. ... When all has been told, we will work together to repair the wrong and build a just and fair future. Together we will create a vision of a peaceful Sierra Leone.¹³⁷

A The Mandate and Composition of the TRC

By virtue of the Lomé peace agreement, the Commission was endowed with the power to¹³⁸

address impunity, break the cycle of violence, provide for both the victims and the perpetrators of human rights violations to tell their story, [and] get a clear picture of the past in order to facilitate genuine healing and reconciliation.

The Truth and Reconciliation Act 2000 converted this mandate into domestic Sierra Leonean law. This act substantiates the mandate by instructing the Commission to draw up¹³⁹

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; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.

¹³⁷ Sierra Leone Truth and Reconciliation Commission *Truth and Reconciliation Commission Report For the Children of Sierra Leone: Child-Friendly Version 2004*, 1-2, <www.unicef.org> (last accessed 3 November 2004)

¹³⁸ *Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone* Lomé, Togo 07 July 1999, Article XXVI(1) <www.sierra-leone.org> (last accessed 09 September 2004).

¹³⁹ Truth and Reconciliation Act 2000 Article 6(1) <www.sierra-leone.org> (last accessed 04 September 2004).

In sum, the Commission was entrusted with the tasks of establishing the roots and the context of the conflict, promoting reconciliation and submitting recommendations to the government on preventing future human rights violations.¹⁴⁰

The TRC consisted of seven members, four from Sierra Leone besides three international commissioners, proposed by the United Nations Office of the High Commissioner for Human Rights (OHCHR). The Sierra Leonean Bishop Joseph Humper chaired the TRC.¹⁴¹ The commissioners from Sierra Leone were Laura Marcus-Jones, a former judge at the Sierra Leone High Court, who acted as Deputy Chair, Professor John Kamara, a college principal, and Professor of public administration Sylvanus Torto. The international members were Satang Jow, a former Minister of Education of the Gambia, William Schabas, a human rights expert from Canada and currently head of the Irish Centre for Human Rights, and Yasmin Sooka, a human rights lawyer from South Africa.¹⁴²

Ongoing violence delayed the start of the TRC's work for a couple of years, and internal problems caused a decrease in credibility in its first months of operation.¹⁴³ It eventually started operating in late 2002. In October 2003, President Kabbah extended its initial one-year mandate for six months.¹⁴⁴ The TRC officially closed its office 31 March 2004.¹⁴⁵ The final report of the Commission was published 5 October 2004.¹⁴⁶ An

¹⁴⁰ See TRC Documents 20 *Questions and Answers on the TRC No. 19 and 20* <www.sierra-leone.org> (last accessed 09 September 2004).

¹⁴¹ ICTJ, above n 15, 2.

¹⁴² ICTJ, above n 15, 2.

¹⁴³ Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Overview: Getting Started*, para 4, 4, 6, <www.ictj.org>(last accessed 11 November 2004); Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 10.

¹⁴⁴ Article XXVI (3) Lomé Peace Agreement <www.sierra-leone.org> (last accessed 06 September 2004); ICTJ, "The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year" (2001) <www.ictj.org> (last accessed 31 August 2004), 1.

¹⁴⁵ Panafrican News Agency (PANA) Daily Newswire "Sierra Leone TRC Report due 30 August" 11 August 2004.

¹⁴⁶ Marian Samu *Truth and Reconciliation Commission Presents Report* <www.statheouse-sl.org> (last accessed 28 October 2004); ECOSOC Press Release ECOSOC/6140 <www.un.org >(last accessed 28 October 2004).

overview, the findings as well as the recommendations are publicly available at this stage.¹⁴⁷ The complete report will not be released until early 2005.¹⁴⁸

B The Work of the TRC: Establishing the Truth and Initiating Reconciliation

The Commission looked into the past in order to tell the story of civil war and to make recommendations to prevent a repetition of conflict. The Commission also looked to the future for the purpose of describing the kind of future post-conflict society that the recommendations were designed to achieve. (...)

1 Establishing the truth

In order to draw a complete and true picture of Sierra Leone's recent past, the TRC adopted several approaches: Firstly, staff was sent around the country over a period of four months, from December 2002 to March 2003, to collect statements.¹⁴⁹ Following this, some people were invited to testify in hearings.¹⁵⁰ Hearings were held across the country from April to August 2003, those addressing rape and sexual abuse being closed to the public.¹⁵¹ Some of them were thematic, dealing with topical issues like children, women, or management of mineral resources.¹⁵² Public hearings were broadcasted entirely via radio and, as a 30minute summary, on television each night.¹⁵³ In total, about 13 percent of the 8,000 individual statements come from perpetrators.¹⁵⁴ One third of those who appeared in hearings admitted their own wrongdoings.¹⁵⁵ Over the entire time, research and investigation was undertaken all over the country to collect further

¹⁴⁷ ICTJ New Reports: Sierra Leone Truth and Reconciliation Commission Final Report <www.ictj.org> (last accessed 11 November 2004).

¹⁴⁸ According to Email from Jake Wadland, Communication Associate at the ICTJ, from 11 November 2004.

¹⁴⁹ Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 10.

¹⁵⁰ Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 12.

¹⁵¹ Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 10; ICTJ, above n 15, 4.

¹⁵² ICTJ, above n 15, 4.

¹⁵³ ICTJ, above n 15, 4.

¹⁵⁴ ICTJ, above n 15, 4.

¹⁵⁵ ICTJ, above n 15, 4.

information.¹⁵⁶

Particular consideration was given to the stories of the children. Up to 10,000 children were abducted and forcefully recruited into the armed forces, all of which deliberately used children as soldiers.¹⁵⁷ When fighting, they were often heavily drugged to overcome their fear and their guilt.¹⁵⁸ Half of them were under the age of 13.¹⁵⁹ Another 10,000 children were abducted for sexual slavery and forced labour.¹⁶⁰ There was widespread abduction, rape and sexual slavery of girls.¹⁶¹

Having been abducted and forced to commit horrible crimes, the child soldiers were both perpetrators and victims.¹⁶² All children had lost their identity, their memory of the past and their hopes for the future during the war. Some were so young; all they could remember was war and the use of violence.¹⁶³

It has been said that how society responds to the child combatants may influence the future stability of the country.¹⁶⁴ Children were given special attention throughout the truth and reconciliation process. They were regarded as witnesses in all TRC hearings, so that there was no need to separate them into groups of perpetrators and victims.¹⁶⁵ Hearings with children were confidential such that their name and identity were kept hidden and no information was passed to authorities outside the TRC.

¹⁵⁶ Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 11.

¹⁵⁷ Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 15, 16.

¹⁵⁸ Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 15.

¹⁵⁹ Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 2: Findings: Findings in Respect of Children*, 465, 465, <www.ictj.org> (last accessed 11 November 2004).

¹⁶⁰ Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 15, 26.

¹⁶¹ Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 17.

¹⁶² Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 2: Findings: Findings in Respect of Children*, 465, 469, <www.ictj.org> (last accessed 11 November 2004).

¹⁶³ Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Report for the Children of Sierra Leone: Child-Friendly Version 2004*, 25, 26 <www.unicef.org> (last accessed 3 November 2004).

¹⁶⁴ Laura R Hall, Nahal Kazemi "Prospects for Justice and Reconciliation in Sierra Leone" (2003) 44 Harv Int'l L J 287, 291.

¹⁶⁵ Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 12.

Children could give their statement or testimony in the presence of a social worker; only women would conduct girls' hearings.¹⁶⁶ Children were actively involved in the reporting procedure, and a child-friendly version of the TRC's Final Report was published.¹⁶⁷

2 *Initiating reconciliation and follow-up measures*

In its Final Report, the TRC suggests a variety of activities to initiate and enhance reconciliation. It recommends an official apology from all actors in the conflict, the diffusion of its report, the creation of a national peace day, and other symbolic activities as well as traditional and communal events.¹⁶⁸ A nationwide project called "National Vision for Sierra Leone" invited all citizens to communicate their vision for a peaceful future of the country. A large collection of drawings, poems, essays and other mediums of creativity were assembled as a result. The TRC suggests this to be transformed into a permanent exhibition and to be shown to as many people as possible by way of a national, even international tour or a publication.¹⁶⁹

The TRC suggests the future independent national Human Rights Commission to act as the follow-up body to observe the implementation of its recommendations as was determined by the Truth and Reconciliation Act 2000.¹⁷⁰ Under the Act, the government is required to submit a report detailing the progress of implementation three times a year, which then has

¹⁶⁶ Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 12.

¹⁶⁷ Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, *Methodology*.

¹⁶⁸ Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 3: Recommendations: Reconciliation*, paras 513, 518, 522, <www.ictj.org> (last accessed 11 November 2004).

¹⁶⁹ Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 3: Recommendations: National Vision for Sierra Leone*, paras 524, 525-527, <www.ictj.org> (last accessed 11 November 2004).

¹⁷⁰ Truth and Reconciliation Act 2000, Article 18(1), <www.sierra-leone.org> (last accessed 26 November 2004); Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 3: Recommendations: Follow-Up Committee*, para 548, 548, <www.ictj.org> (last accessed 11 November 2004).

to be published by the Committee.¹⁷¹ The TRC further recommends that the Committee produce an annual report evaluating the government's performance.¹⁷²

The work of the TRC enjoyed general support from society and NGOs and the government. It is looked upon as playing a crucial role in the country's coming to terms with its most recent past.¹⁷³ In total, the Sierra Leone TRC operated over a period of almost two years, which seems reasonable when balancing the need for a thoroughly conducted research on the one hand and for a publication of the findings that ought to be close to the actual events on the other. With 8,000 statements collected, the TRC has reached a considerable number of people. With only 13% of these being former offenders, only a small number of perpetrators came forward, though. Considering that not all of them appeared in hearings and of those who did only a third admitted their wrongs, one can support the case made above that conditional amnesty, which requires the perpetrator to admit his wrongs in a public hearing, contributes significantly more to accountability than blanket amnesty where participation in the truth finding process is merely voluntary.

V THE SPECIAL COURT FOR SIERRA LEONE (SCSL)

A *The Situation after the Conclusion of the Lomé Peace Agreement*

Despite the conclusion of the Lomé Peace Agreement in 1999, fighting resumed in 2000. RUF rebels took hostage 500 peacekeepers of the United Nations Mission in Sierra Leone (UNAMSIL), which had been set up in

¹⁷¹ Truth and Reconciliation Act 2000, Article 18(2) and (3), <www.sierra-leone.org> (last accessed 26 November 2004); Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 3: Recommendations: Follow-Up Committee*, paras 548, 552, 553, <www.ictj.org> (last accessed 11 November 2004).

¹⁷² Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 3: Recommendations: Follow-Up Committee*, para 548, 554, <www.ictj.org> (last accessed 11 November 2004).

¹⁷³ ICTJ, above n 15, 6.

1999 to help implementing the Lomé Peace Agreement.¹⁷⁴ Consequently, the United Nations Security Council's authorised a significant increase in the number of peacekeeping military personnel.¹⁷⁵ UN involvement helped to end the fighting and move the country towards stabilisation and peace through disarmament, demobilisation, reconstruction of infrastructure, and realisation of democratic elections.¹⁷⁶

By Security Council resolution 1562, in September 2004, the mandate of UNAMSIL was extended till 30 June 2005.¹⁷⁷ The mandate comprises, among other tasks, monitoring the security situation in the country as well as watching over the reintegration of former combatants, the observance of human rights and the re-establishment of the government's authority.¹⁷⁸ Military and civilian police tasks focus on support and assistance of Sierra Leonean military and police forces.¹⁷⁹ Concurrently, the Security Council urges the Government to take steps to develop its police and armed forces as well as its criminal law system and to establish a functioning independent judiciary in order to be able to take over, as soon as possible, full responsibility from UNAMSIL for the maintenance of law and security in the country.¹⁸⁰

B The Establishment of the SCSL and its Specificity

¹⁷⁴ ICTJ Activity in Sierra Leone: Background to this Country <www.ictj.org>, last accessed 22 November 2004); United Nations Peacekeeping: UNAMSIL: Background, <www.un.org> (last accessed 02 September 2004).

¹⁷⁵ ICTJ Case Study Series "The SCSL for Sierra Leone: The First Eighteen Months" <www.ictj.org> (last accessed 31 August 2004), 1. The mission reached its maximum strength in military personnel with 17,500 in March 2001, thus being the largest peacekeeping mission at the time and to date (United Nations Peacekeeping: UNAMSIL: Background, <www.un.org> [last accessed 02 September 2004]).

¹⁷⁶ United Nations Peacekeeping: "What are some recent successful peacekeeping operations? Sierra Leone", <www.un.org> (last accessed 05 September 2004).

¹⁷⁷ UNSC Resolution 1562 (5037) (17 September 2004), S/RES/1562 (2004), para 1, <www.un.org> (last accessed 23 November 2004).

¹⁷⁸ UNSC Resolution 1562 (5037) (17 September 2004), S/RES/1562 (2004), para 2, <www.un.org> (last accessed 23 November 2004).

¹⁷⁹ UNSC Resolution 1562 (5037) (17 September 2004), S/RES/1562 (2004), para 2, <www.un.org> (last accessed 23 November 2004).

¹⁸⁰ UNSC Resolution 1562 (5037) (17 September 2004), S/RES/1562 (2004), para 6, <www.un.org> (last accessed 23 November 2004).

After hostilities re-erupted in 2000, the Government of Sierra Leone approached the United Nations, asking for assistance in trying those responsible for the atrocities during the civil war.¹⁸¹ By Resolution 1315, the Security Council requested “the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent Special Court for Sierra Leone [...]”¹⁸² That agreement was signed on the 16 January 2002 and provided for the establishment of the SCSL for Sierra Leone. According to the Statute of the Court, it has personal and subject matter jurisdiction over persons bearing “the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996 [...]”¹⁸³ As a starting date for the temporal jurisdiction, a date had to be chosen that included the most serious human rights violations while, at the same time, reasonably limited the jurisdiction so that the Court would not be overloaded and marked the beginning of a new phase in the war.¹⁸⁴ 30 November 1996 was chosen as it coincided with the signing of the Abidjan Peace Agreement, the first peace accord between the Government and the RUF, after the conclusion of which hostilities re-erupted.¹⁸⁵

Being set up to try those bearing greatest responsibility for the atrocities, a very limited number of defendants is going to appear before the Court. As of November 2004, indictments against eleven individuals have been issued, two of which have been withdrawn due to the death of the accused.¹⁸⁶ Among the individuals are three leaders of the former Civil Defence Force (CDF), three of the former Revolutionary United Front (RUF), and three of the former Armed Forces Revolutionary Council (AFRC). Trials against the CDF accused began 3 June 2004, trials against the RUF leaders 5 July 2004.

¹⁸¹ ICTJ, above n 175, 1; Daryl A. Mundis “New Mechanisms for the Enforcement of International Humanitarian Law” (2001) 95 AJIL 934, 935.

¹⁸² United Nations Security Council Resolution 1315 (2000) S/RES/1315 (2000) <www.un.org> (last accessed 02 September 2004).

¹⁸³ Statute of the SCSL for Sierra Leone (annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a SCSL for Sierra Leone), article 1(1), <www.sc-sl.org> (last accessed 05 September 2004).

¹⁸⁴ Kofi Annan, above n 24, para 25.

¹⁸⁵ Kofi Annan, above n 24, para 26 (a).

¹⁸⁶ Foday Sankoh and Sam Bockarie died in 2003. SCSL for Sierra Leone: Cases: The RUF Accused: Background, <www.sc-sl.org> (last accesses 23 November 2004).

The trials against the AFRC leaders are scheduled to begin later this year.¹⁸⁷

The Statute determines, as subject matter jurisdiction of the SCSL, the prosecution of crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other violations of international humanitarian law as well as of certain crimes under Sierra Leonean law, namely offences relating to the abuse of girls and the wilful destruction of property as established in the respective Sierra Leonean acts.¹⁸⁸ This subject matter jurisdiction By doing so, they made the subject matter jurisdiction of the Court reflect the particularities of the conflict in Sierra Leone, where abuse of girls and the destruction of entire villages were widespread and relate the jurisdiction to domestic criminal law norms that were already in existence.¹⁸⁹

By virtue of its being established by an agreement between the United Nations and the Government of Sierra Leone, the Court, in its legal nature and in composition and jurisdiction, differs from those criminal courts that were established in the 1990s to address regional serious violations of international humanitarian law on the Balkans and in Africa, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹⁹⁰ As the first tribunal of its kind,¹⁹¹ the SCSL for Sierra Leone is a “treaty-based sui generis court

¹⁸⁷ SCSL for Sierra Leone: Cases: Background, <www.sc-sl.org> (last accessed 22 November 2004).

¹⁸⁸) Statute of the SCSL for Sierra Leone (annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a SCSL for Sierra Leone), articles 2-5, <www.sc-sl.org> (last accessed 05 September 2004). The abuse of girls relates to the Prevention of Cruelty to Children Act, 1926 (Cap.31), the wanton destruction of property to the Malicious Damage Act, 1861.

¹⁸⁹ Nicole Fritz and Alison Smith “Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone” (2001) 25 *Fordham Int'l L J* 391, 408-409; see Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 17; Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 2: Findings: Findings on the Nature and Characteristics of the Conflict*, para 75, 87, <www.ictj.org> (last accessed 11 November 2004).

¹⁹⁰ Kofi Annan, above n 24, para 9; Amnesty International “Establishing a SCSL for Sierra Leone” <www.amnesty.org> (last accessed 31 August 2004); Schocken, above n 25, 443.

¹⁹¹ ICTJ, above n 175, 2; While the United Nations Transitional Administration in East Timor (UNTAET) and the United Nations Interim Administration Mission in Kosovo (UNMIK) had established tribunals in East Timor and Kosovo respectively in 2000 and 1999 already, the SCSL is the first court that was set up with the consent of a fully

of mixed jurisdiction and composition”,¹⁹² that is a “mixed” tribunal. This hybrid character makes it different from the two International Criminal Tribunals in several respects.¹⁹³ Among the distinguishing positive aspects are the following.

The SCSL has a much closer connection to the country where the violations of humanitarian law took place: it is situated in Freetown, the capital of Sierra Leone, and thus benefits from the identification of the local population that was affected by the crimes. People in Rwanda, on the other hand, do not necessarily feel that the tribunal (located in Tanzania) is related to their history.¹⁹⁴ Locating a criminal tribunal in the country where the crimes were committed, not only conveys to the people a sense of association of their destiny with the trials, it is also designed to impact on the development of the local judiciary, still in its infancy after a change of regime.¹⁹⁵ Most importantly, the Court has a mixed staff, consisting of local and international judges, prosecutors, head of registry and other staff members.¹⁹⁶ While the presence of international personnel ensures respect for international procedural standards, the involvement of local and expatriated legal experts helps building bridges between the international dimension of the work and local customs, language, and mentalities. Including both these perspectives seems crucial for the outcome in the pursuit of truth and justice after an internal conflict.¹⁹⁷

functional national government. In East Timor and Kosovo, on the contrary, it was the UN mission that had authority to exercise all legislative, administrative and judicial powers (Daryl A. Mundis, above n 27, 943 and 945).

¹⁹² Kofi Annan, above n 24, para 9.

¹⁹³ ICTJ, above n 175, 2.

¹⁹⁴ ICTJ, above n 175, 8.

¹⁹⁵ ICTJ, above n 175, 8.

¹⁹⁶ From the three judges in the Trial Chamber, two are appointed by the UN Secretary-General, one by the Government of Sierra Leone; from the five Appellate Judges, three are nominated by the UN Secretary-General and the remaining two by the Government of Sierra Leone. The presidents of both Chambers, respectively, are both appointed by the Secretary-General. The Prosecutor, David Crane, United States of America, was appointed by the UN Secretary-General, the Deputy Prosecutor, Desmond da Silva QC, Sri Lanka/United Kingdom, by the Government of Sierra Leone. The head of Registry, Robin Vincent, was appointed by the UN Secretary General. See <www.sc-sl.org> (last accessed 05 September 2004).

¹⁹⁷ ICTJ, above n 175, 9; Hall and Kazemi, above n 164, 299.

The following aspects are disadvantageous for the SCSL. Unlike the two international tribunals that were established by Security Council Resolutions,¹⁹⁸ the Court has no formal link to the UN system. As a result, the Court functions on voluntary contributions and financial shortages are frequently faced.¹⁹⁹ With regard to enforcement of its mandate, the Court lacks the crucial UN Charter Chapter VII powers that the two International Criminal Tribunals possess by virtue of their having been established under Chapter VII. Consequently, the Court depends on States' voluntary cooperation in matters of arrest, extradition and detention.²⁰⁰

Having presented the two institutions separately, the next chapter is going to examine the interrelationship between the Commission and the Court.

VI COMPLEMENTARY ACCOUNTABILITY:²⁰¹ ISSUES AND ACHIEVEMENTS OF THE INTERRELATIONSHIP BETWEEN THE COMMISSION AND THE COURT

The SCSL was established after the TRC, while the two institutions operated simultaneously,²⁰² which gave rise to a number of legal and practical questions of cooperation, which neither the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a SCSL nor the Statute of the Court regulated. This chapter is going to present these issues and answer the question of whether the cooperation has been satisfactory, based on the Sierra Leone TRC Final

¹⁹⁸ ICTY: Security Council Resolution 827 (1993) S/RES/827 (1993) <www.un.org> (last accessed 05/092004), ICTR: Security Council Resolution 955 (1994) S/RES/988 (1994) <www.un.org> (last accessed 05 September 2004).

¹⁹⁹ Schocken, above n 25, 444; ICTJ, above n 175, 10.

²⁰⁰ ICTJ, above n 175, 10-11.

²⁰¹ ICTJ (Marieke Wierda, Priscilla Hayner and Paul van Zyl) "Exploring the Relationship Between the SCSL and the Truth and Reconciliation Commission of Sierra Leone" Executive Summary <www.ictj.org> (last accessed 31 August 2004).

²⁰² With respect to the TRC, statements were taken from December 2002 to March 2003, followed by hearings from April to August 2003, Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 10.. As for the SCSL, indictments were issued throughout the year 2003, SCSL for Sierra Leone: Cases, <www.sc-sl.org> (last accessed 23 November 2004).

Report as far as the available chapters provide relevant information.²⁰³

A *The Complementary Character of Accountability*

At first glance, the co-existence of a truth commission and a criminal court seems to compromise the task of each of these two institutions, for their mandates appear mutually exclusive. While a truth commission seeks to find the truth about the past in order to achieve healing and reconciliation among perpetrators and victims, a criminal tribunal is set up to convict those responsible for serious crimes. One could thus express concerns about the possibility of ex-combatants being unwilling to testify before the truth commission for fear of then being prosecuted by the court.²⁰⁴

However, in Sierra Leone, the SCSL was set up to try those who bear “greatest responsibility” for the crimes.²⁰⁵ The defendants are therefore persons formerly in a very high position in the military, numbering nine as of November 2004.²⁰⁶

The TRC, on the other hand, was brought to life to set up a broad historical record of the human rights violations by listening to the voices of the victims and the perpetrators, the vast majority of whom are not prosecuted by the Court. In particular, the Prosecutor has made clear that he would not indict any children, that is anyone under the age of 18, of whom there were thousands in the armed forces during the war.²⁰⁷ Their part in the conflict can therefore be adequately examined in hearings before the TRC.

²⁰³ The Report contains a chapter called “Transitional Justice in Sierra Leone”, which addresses the co-existence of the TRC and the SCSL, Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Overview of the Sierra Leone Truth and Reconciliation Commission Report*, 8, <www.ictj.org> (last accessed 11 November 2004). Unfortunately, this chapter has not been published yet.

²⁰⁴ See Evenson, above n 17, 755.

²⁰⁵ Statute of the SCSL for Sierra Leone (annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a SCSL for Sierra Leone), article 1(1), <www.sc-sl.org> (last accessed 05 September 2004).

²⁰⁶ Above section V B.

²⁰⁷ SCSL for Sierra Leone Public Affairs Office “SCSL Prosecutor Says He Will not Prosecute Children” (02 November 2002) Press Release <www.sc-sl.org> (last accessed 08 September 2004).

The Commission thus has, as President Kabbah put it in its speech at the launch of public hearings in April 2003, a “therapeutic” effect on the national reconciliation process.²⁰⁸

Accountability for the atrocities committed is sought at different levels and with different intentions. This concept embraces well the approach of transitional justice, that is promoting understanding of society through comprehensive truth finding projects. Notwithstanding this clear separation of the mandates, in the public opinion, confusion regarding the tasks of the two institutions was prevailing.²⁰⁹ Many people who might have been willing to give statements or appear in a hearing decided not to participate in the truth finding process because they feared their information might be transferred to the SCSL.²¹⁰ This was especially the case among former perpetrators.²¹¹ Plus, while resource sharing would have been practicable and financially desirable, the closer the two bodies are operationally interrelated, the more the different mandates will be blurred in the impression of the public.²¹²

B The Amnesty Provision in the Lomé Peace Agreement

As discussed in part II and III, the Lomé Peace Agreement, in combination with the establishment of the TRC, granted full amnesty to the combatants in return for peace. When the SCSL for Sierra Leone was set up in 2002, this approach had to be re-considered, as full amnesty would have made the operation of the Court impossible. When the Lomé Peace

²⁰⁸ Address by the President His Excellency Alhaji Dr Ahmad Tejan Kabbah at the Start of Public Hearing of the Truth and Reconciliation Commission, Freetown 14 April 2003 <www.sierra-leone.org> (last accessed 06 September 2004)

²⁰⁹ Sierra Leone TRC Findings in Respect of the TRC and the SCSL for Sierra Leone, above n 75, paras 553, 555, 567.

²¹⁰ Sierra Leone TRC Findings in Respect of the TRC and the SCSL for Sierra Leone, above n 75, paras 553, 555, 568.

²¹¹ Sierra Leone TRC Findings in Respect of the TRC and the SCSL for Sierra Leone, above n 75, paras 553, 555, 568.

²¹² Abdul Tejan-Cole “The Complementary and Conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission” (2003) 6 Yale Hum Rts & Dev L J 139, 158.

Agreement had been signed, though, the Special Representative of the UN Secretary-General had added, on behalf of the United Nations, the disclaimer that the United Nations regarded the amnesty clause to be inapplicable with regard to violations of international humanitarian law.²¹³ On adopting Resolution 1315 (2000), the Security Council referred to the reservation made upon signing the Peace Agreement in the preamble. Furthermore, the Statute of the Court states in article 10 that²¹⁴

[a]n amnesty granted to any person falling within the jurisdiction of the SCSL in respect of the crimes referred to in articles 2 to 4 of the present Statute [violations of international humanitarian law as opposed to violations of Sierra Leonean law in article 5] shall not be a bar to prosecution.

As a consequence, the amnesty clause does not apply to international prosecution of violations of international law. The overlap of the jurisdiction of the SCSL with the mandate of the TRC thus presents itself as follows: International crimes committed prior to Lomé and after 1991 are covered by the mandate of the TRC, those committed after 1996 are also covered by the jurisdiction of the SCSL. International crimes committed after Lomé are only covered by the jurisdiction of the Court. Domestic crimes committed between 1991 and 1999 fall under the mandate of the TRC, but are exempt from prosecution and trial before the Court as the amnesty clause in the peace agreement prevails. Domestic crimes committed after 1999 can be prosecuted under article 5 of the Statute of the Court if applicable. They are not covered by the mandate of the Commission.²¹⁵ As a table, the interrelated mandates of the TRC and the SCSL can be depicted as follows:²¹⁶

²¹³ Kofi Annan, above n 24, para 23.

²¹⁴ Statute of the SCSL for Sierra Leone (annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a SCSL for Sierra Leone), article 10, <www.sc-sl.org> (last accessed 05 September 2004).

²¹⁵ Overview in ICTJ above n 201, 3.

²¹⁶ ICTJ, above n 201, 3.

	<i>International crimes (prior to Lomé)</i>	<i>International crimes (after Lomé)</i>	<i>Domestic crimes (prior to Lomé)</i>	<i>Domestic crimes (after Lomé)</i>
<i>TRC</i> <i>(article 6(1) TRC Act 2000)</i>	Mandate from 1991 onwards	No mandate	Mandate from 1991 onwards	No mandate
<i>SCSL</i>	Mandate from 30 November 1996 (article 1(1) Statute)	Mandate (articles 2-4 Statute)	No mandate (amnesty clause prevails) (article 10 Statute)	Mandate if crime falls under article 5 Statute

The power of the SCSL to exercise jurisdiction over combatants who allegedly committed crimes prior to the Lomé Peace Agreement was challenged by a preliminary motion filed on behalf of the defendants Kallon and Bazy Kamara.²¹⁷ They argued that the Government of Sierra Leone was bound by the amnesty provision in Lomé. As the SCSL was a “hybrid” court, not a purely international one, established with the consent of the Government, the amnesty provision had a legal effect on the jurisdiction of the SCSL such that it was not authorised to assert jurisdiction over crimes committed before the granting of amnesty.²¹⁸

The Appeals Chamber finds that the Lomé Peace Agreement does not have the quality of an international treaty and therefore has effects only on Sierra Leonean domestic law. Regardless of its effects on prosecution in national courts, it would not affect the jurisdiction of an international court such as the SCSL.²¹⁹ The Chamber emphasises that the SCSL, although being a “mixed” tribunal, is not part of the Sierra Leonean legal system, and the Prosecutor acts in complete independence.²²⁰ This was further elaborated on in the decision on a preliminary motion on the invalidity of the agreement establishing the SCSL. The Appeals Chamber characterises

²¹⁷ *Lomé Accord Amnesty*, above n 25,

²¹⁸ *Lomé Accord Amnesty*, para 1, 55.

²¹⁹ *Lomé Accord Amnesty*, above n 25, paras 86-88.

²²⁰ *Lomé Accord Amnesty*, above n 25, para 85.

the SCSL as an entirely new body operating under its own statute "in the sphere of international law."²²¹ According to the judges, the Court exercises its judicial power in the interest of the international community. As a result, article IX of the Lomé Peace Agreement could not be a bar to the exercise of this jurisdiction.²²²

While this paper agrees with the position that the SCSL operates regardless of the amnesty provision and therefore has the competence to assert jurisdiction over crimes committed prior to Lomé, it nevertheless asserts that the Government of Sierra Leone violated the Lomé Peace Agreement by consenting to the creation of a criminal tribunal.

As has been established earlier, in contrast to the two international criminal tribunals in Yugoslavia and Rwanda, the SCSL is based on an agreement between the United Nations and a national government. Due to this and its mixed composition as well as the application of both international and domestic laws, it is not an international, but a "mixed" tribunal. It is ascertained that, for a number of reasons, the international character, as opposed to the national one, prevails. The SCSL operates independently from the national penal jurisdiction; it is created by an international agreement that sets internationally valid standards of fair trial; and the number of judges appointed by the United Nations is higher than that of those appointed by Sierra Leone. An amnesty provision in an agreement concluded between a national government and a rebel group can therefore not impact on the jurisdiction of a tribunal with suchlike international character.

However, the SCSL was created and article 10 inserted by an agreement

²²¹ SCSL Prosecutor against Augustine Gbao *Decision on 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 for Sierra Leone* (25 May 2004) SCSL-2004-15-PT-141, para 6, <www.sc-sl.org> (last accessed 29 November 2004).

²²² *Decision on 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 for Sierra Leone*, above n 221, para 7.

to which the Government of Sierra Leone consented.²²³ In his letter to the President of the United Nations Security Council, Sierra Leone's President Kabbah links his request for an initiative to establish a special court on the RUF rebels' having breached the peace agreement.²²⁴ He considers mechanisms to ensure individual accountability of the RUF leaders to be the only way to achieve lasting peace.²²⁵ The process to establish a special court was therefore initiated with the specific aim to try the leaders of the RUF as those responsible for the breach of the peace agreement.

However, the Statute of the SCSL makes no difference as to what armed group those most responsible the Court has personal jurisdiction over belong to. While the Government could argue that the RUF breached the Peace Agreement first, which exempted the Government from its obligations,²²⁶ no such conclusion can be drawn with regard to the members of other armed groups who abode by Lomé. Prosecuting members of armed groups that had nothing to do with the RUF's breach of the Peace Agreement violates the deal amnesty in return for peace.

The Appeals Chamber finds that the requirement set up in article IX(3) of the Lomé Peace Agreement to "ensure that no official or judicial action is taken against any member" of any armed group, ought to be interpreted in the way that it can only relate to the national official and judicial powers of Sierra Leone, over which the Government has authority and power.²²⁷ It would therefore only relate to domestic prosecution, not to international. However, by negotiating with the United Nations the Agreement establishing the SCS, the Government was in the position to suggest that only members of the RUF be prosecuted.²²⁸

It is thus ascertained that the Government reneged its amnesty promise under the Lomé Peace Agreement by consenting to the creation of the SCSL

²²³ Fritz and Smith, above n 189, 425.

²²⁴ *Lomé Accord Amnesty*, above n 25, para 9.

²²⁵ *Lomé Accord Amnesty*, above n 25, para 9.

²²⁶ Fritz and Smith, above n 189, 426.

²²⁷ *Lomé Accord Amnesty*, above n 25, para 63.

²²⁸ See Fritz and Smith, above n 189, 426.

with jurisdiction over those bearing greatest responsibility for the atrocities regardless of what armed group they belong to and whether or not this armed group has abided by the Peace Agreement.

Notwithstanding the above, the signing of the Agreement establishing the SCSL has no legal effect on the legitimacy of the SCSL or the validity of article 10 of its Statute.²²⁹ The only grounds, on which a provision of an international agreement may be regarded unlawful, are a violation of a peremptory norm of international law, error, fraud or coercion none of which has been raised in the present case.²³⁰

The establishment of the SCSL has been viewed critically by the Sierra Leone TRC. While it does not assert the creation of the SCSL to be a breach of the Government's amnesty promise under Lomé, in its Final Report, the Commission criticises the fact that the breach of the peace negotiated under Lomé solely by RUF combatants lead to the prosecution of leaders of various armed groups apart from the RUF who had nothing to do with the RUF's breach of the agreement, calling such action "unwise and legally unsound."²³¹ In the view of the TRC, the actions of the RUF should not have been made the basis for depriving others of the "benefit of amnesty."²³² Furthermore, the TRC condemns the creation of the SCSL for its negative potential of signalling to future conflict parties that amnesty clauses in peace agreements might be unreliable and that they therefore cannot trust the agreement.²³³ Conversely, the TRC is certainly of the

²²⁹ Fritz and Smith, above n 189, 426.

²³⁰ *Lomé Accord Amnesty*, above n 25, para 63.

²³¹ In May 2000, some 500 UNAMSIL peacekeepers were taken hostage by RUF combatants (ICTJ: ICTJ Activity in Sierra Leone: Background to this Country <www.ictj.org>, last accessed 22 November 2004); Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 2: Findings: Findings in Respect of the TRC and the SCSL for Sierra Leone*, para 553, 560, <www.ictj.org> (last accessed 11 November 2004).

²³² Sierra Leone TRC: *Findings in Respect of the TRC and the SCSL for Sierra Leone*, above n 75, para 560.

²³³ Sierra Leone TRC *Findings in Respect of the TRC and the SCSL for Sierra Leone*, above n 75, para 562.

opinion that breaches of peace accords should not be tolerated.²³⁴

With respect to the United Nations, they had made clear on signing the Lomé Peace Agreement that the amnesty provision did not apply to international prosecution.

With regard to the Government of Sierra Leone, the TRC's critique is justified as has been determined above.

Consequently, the TRC recommends the inclusion of a clause in future peace agreements that explicitly provides for legal consequences in case of a breach of the accord, thus retracting the protection of amnesty from those who have violated the provisions of the peace accord without abrogating the amnesty provision towards any other former parties to the conflict.²³⁵ This approach considers the political reality in war torn countries whose only perspective to end the suffering seems to be the granting of amnesty for those responsible for the atrocities. At the same time, it provides for legal consequences for the case of parties not abiding by the peace accord requirements. Thus, it sends a signal to those who are likely to breach a mutually negotiated peace accord that such action is intolerable. Not only do they breach provisions of a treaty, they also inflict even greater suffering on the population by destroying their renewed hopes for peace and greatly impact on the government's efforts to stabilise the country. In the case of Sierra Leone in particular, taking international peacekeepers hostage furthermore endangers the willingness of the international community to engage in peacekeeping activity in a country that has proven to be so dangerous.

Implicitly regretting that no such safeguard stipulation was included in the Lomé Peace Agreement, the TRC is generally in favour of the co-

²³⁴ Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 3: Recommendations: The Commission and the SCSL*, para 481, <www.ictj.org> (last accessed 11 November 2004).

²³⁵ Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 3: Recommendations: The Commission and the SCSL*, para 481, <www.ictj.org> (last accessed 11 November 2004).

existence of a truth and reconciliation commission and a criminal tribunal, stating that "Sierra Leone, with its two institutions of transitional justice in operation at the same time, (...) had the opportunity to offer the world a unique framework in moving from conflict to peace."²³⁶ However, the TRC found several points of friction in the simultaneous operation of itself and the SCSL. They will be addressed in the following section.

C Confidentiality and Information Sharing

A crucial question was that of information sharing between the TRC and the SCSL. That question was essential because the passing of information gathered by the TRC in hearings and statement taking to the SCSL could have kept ex-combatants from testifying before the TRC for fear of subsequently being called before the SCSL as defendants or witnesses.²³⁷ Conversely, the disclosure of details in public hearings before the Commission might have compromised criminal proceedings and caused suspects to elude prosecution through flight.²³⁸

The TRC Act in section 7(3) imposes a duty of confidentiality on the TRC with regard to any information received.²³⁹ However, the SCSL Agreement (Ratification) Act stipulates a hierarchy between the two institutions in favour of the SCSL, saying that "[n]otwithstanding any other law, every (...) body created by or under Sierra Leonean law shall comply with any direction specified in an order of the SCSL."²⁴⁰ The relationship between the two institutions was thus, by law, characterised by the predominant position of the Court, which could override the confidentiality

²³⁶ Sierra Leone TRC *Findings in Respect of the TRC and the SCSL for Sierra Leone*, above n 75, para 563.

²³⁷ ICTJ, above n 175, 11; see also Post-conflict Reintegration Initiative for Development and Empowerment (PRIDE) "Ex-Combatants Views of the Truth and Reconciliation Commission and the SCSL in Sierra Leone: A Study by PRIDE in Partnership with the International Center for Transitional Justice" 12 September 2002, Freetown <www.ictj.org> (last accessed 23 November 2004) at Chapter 4.

²³⁸ Evenson, above n 17, 755.

²³⁹ Truth and Reconciliation Act 2000, <www.sierra-leone.org> (last accessed 04 September 2004).

²⁴⁰ Section 21(2) SCSL Agreement (Ratification) Act 2000, <www.sc-sl.org> (last accessed 23 November 2004).

stipulation and request information from the TRC.²⁴¹ This situation, unsatisfying in light of the aims of the Commission, called for the negotiation of an agreement.²⁴² However, no such agreement was ever concluded.²⁴³ Major problems of coordination in this aspect have nonetheless been absent, since the Prosecutor David Crane explicitly stated that he did not intend to use TRC information in proceedings before the Court.²⁴⁴

D Access of the TRC to SCSL Detainees

The SCSL has some of the former leaders in custody.²⁴⁵ It was crucial for the Commission to gain access to these detainees in order to obtain their testimonies, as these were essential for a comprehensive understanding of the history of the war.²⁴⁶ The Court granted this access and adopted a Practice Direction on the procedure to be followed.²⁴⁷ It denied, on the contrary, the TRC's request to obtain a detainee's statement in a public hearing. In October 2003, the TRC submitted a request to the SCSL asking to let CDF leader and SCSL detainee Samuel Hinga Norman appear in a public hearing, characterising him as a crucial figure in the war and therefore of importance to the TRC proceedings.²⁴⁸ While the detainee

²⁴¹ ICTJ, above n 201, 5.

²⁴² ICTJ, above n 201, 5.

²⁴³ Evenson, above n 17, 732.

²⁴⁴ Evenson, above n 17 at 756; see also SCSL for Sierra Leone: The Office of the Prosecutor, Press Release 27 February 2003 *SCSL Prosecutor Addresses Seminar Participants; Encourages Perpetrators to Talk to the TRC* <www.sc-sl.org> (last accessed 08 September 2004). The issue as to whether a defence counsel could use exculpatory material gathered by the TRC remained unsolved, though (Evenson, above n 17, 756). Abdul Tejan-Cole remarks that this scenario would be of little concern to the TRC as a perpetrator would not be kept from making a testimony knowing that his information would be exculpatory, Abdul Tejan-Cole "The Complementary and Conflicting Relationship between the SCSL for Sierra Leone and the Truth and Reconciliation Commission" (2003) 6 *Yale Hum Rts & Dev L J* 139, 155.

²⁴⁵ Above section VI A.

²⁴⁶ See Evenson, above n 17, 757.

²⁴⁷ SCSL for Sierra Leone "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 SCSL for Sierra Leone" adopted 9 September 2003, amended 4 October 2003 <www.sc-sl.org> (last accessed 23 November 2004).

²⁴⁸ The Request of the TRC, the submission of the Defence Counsel as well as the response of the Prosecution are reproduced in the SCSL for Sierra Leone Trial Chamber decision SCSL-2003-08 PT The Prosecutor against Samuel Hinga Norman *Decision on the Request by the Truth and Reconciliation of Sierra Leone to Conduct a Public Hearing with Samuel*

himself was willing to testify before the TRC,²⁴⁹ the Prosecution rejected the request as being contrary to the interests of justice and the integrity of proceedings before the SCSL.²⁵⁰ According to the abovementioned Practice Direction, these are the two sole justifications that can support a refusal of request for access to a detainee with the aim of conducting a public hearing with him.²⁵¹ As said by the Prosecution, there was a risk of Hinga Norman telling a different version of the events in the public TRC hearing than in the SCSL trial under oath. Such contradictions would endanger the credibility of the entire criminal procedure and thus the standing of the Court.²⁵² It was furthermore asserted that Hinga Norman was different from ordinary citizens and that the appropriate place to examine his role in the war was a criminal court.²⁵³ The Trial Chamber of the SCSL denied access of the TRC to Hinga Norman. It primarily based its reasoning on the fundamental principle of the presumption of innocence. According to Thompson J, the nature of the TRC proceedings was such that it related only to those who,

Hinga Norman, 29 October 2003, Bankole Thompson J, <www.sc-sl.org> (last accessed 23 November 2004). Hinga Norman was National Co-ordinator of the Civil Defence Forces (CDF). According to the findings of the Sierra Leone TRC, the CDF was, although initially an "alternative protective mechanism" against RUF attacks, also responsible for serious human rights violations during the conflict, which were mostly carried out with the full knowledge of the leadership, that is including Hinga Norman. Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 2: Findings: Findings Military and Political History of the Conflict: Civil Defence Forces (CDF)*, para 332, <www.ictj.org> (last accessed 11 November 2004).

²⁴⁹ SCSL for Sierra Leone Trial Chamber decision SCSL-2003-08 PT The Prosecutor against Samuel Hinga Norman *Decision on the Request by the Truth and Reconciliation of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman*, 29 October 2003, Bankole Thompson J, para 2, <www.sc-sl.org> (last accessed 23 November 2004).

²⁵⁰ SCSL for Sierra Leone Trial Chamber decision SCSL-2003-08 PT The Prosecutor against Samuel Hinga Norman *Decision on the Request by the Truth and Reconciliation of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman*, 29 October 2003, Bankole Thompson J, para 3, <www.sc-sl.org> (last accessed 23 November 2004).

²⁵¹ SCSL for Sierra Leone "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 SCSL for Sierra Leone" adopted 9 September 2003, amended 4 October 2003, para 5, <www.sc-sl.org> (last accessed 23 November 2004).

²⁵² SCSL for Sierra Leone Trial Chamber decision SCSL-2003-08 PT The Prosecutor against Samuel Hinga Norman *Decision on the Request by the Truth and Reconciliation of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman*, 29 October 2003, Bankole Thompson J, para 3, <www.sc-sl.org> (last accessed 23 November 2004).

²⁵³ SCSL for Sierra Leone Trial Chamber decision SCSL-2003-08 PT The Prosecutor against Samuel Hinga Norman *Decision on the Request by the Truth and Reconciliation of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman*, 29 October 2003, Bankole Thompson J, para 3, <www.sc-sl.org> (last accessed 23 November 2004).

allegedly, were perpetrators and were willing to confess their guilt.²⁵⁴ For that reason, the request of the TRC was based on Hinga Norman allegedly being a central figure among the perpetrators.²⁵⁵ Conducting a public hearing with someone who has pleaded not guilty would impact on the impartiality and fairness of the subsequent criminal trial.²⁵⁶ It would therefore be inappropriate for someone who, like Hinga Norman before the SCSL, has pleaded innocent.²⁵⁷ In the balancing of the opposing interests, the interest that all accused may have a fair and impartial trial and the valuable role of the TRC in establishing a comprehensive record of the past, the fundamental right to a fair process prevails. Similarly, the rule of law that demands a contentious matter be brought before a court where the accused enjoys a range of procedural guarantees triumphs over the right of the accused to exercise his free will (and decide to appear in a public hearing).²⁵⁸

The decision of the Trial Chamber was brought before the Appeals Chamber. The Appeals Chamber, similarly to the Trial Chamber, emphasised the need for procedural safeguards, non-existent in hearings before the TRC, where the interviewee faced “impromptu questions (...) by skilled (...) commissioners”,²⁵⁹ as well as the danger of a biased trial before

²⁵⁴ SCSL for Sierra Leone Trial Chamber decision SCSL-2003-08 PT The Prosecutor against Samuel Hinga Norman *Decision on the Request by the Truth and Reconciliation of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman*, 29 October 2003, Bankole Thompson J, para 12, <www.sc-sl.org> (last accessed 23 November 2004).

²⁵⁵ SCSL for Sierra Leone Trial Chamber decision SCSL-2003-08 PT The Prosecutor against Samuel Hinga Norman *Decision on the Request by the Truth and Reconciliation of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman*, 29 October 2003, Bankole Thompson J, para 12, <www.sc-sl.org> (last accessed 23 November 2004).

²⁵⁶ SCSL for Sierra Leone Trial Chamber decision SCSL-2003-08 PT The Prosecutor against Samuel Hinga Norman *Decision on the Request by the Truth and Reconciliation of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman*, 29 October 2003, Bankole Thompson J, para 14, <www.sc-sl.org> (last accessed 23 November 2004).

²⁵⁷ SCSL for Sierra Leone Trial Chamber decision SCSL-2003-08 PT The Prosecutor against Samuel Hinga Norman *Decision on the Request by the Truth and Reconciliation of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman*, 29 October 2003, Bankole Thompson J, para 12, <www.sc-sl.org> (last accessed 23 November 2004).

²⁵⁸ SCSL for Sierra Leone Trial Chamber decision SCSL-2003-08 PT The Prosecutor against Samuel Hinga Norman *Decision on the Request by the Truth and Reconciliation of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman*, 29 October 2003, Bankole Thompson J, para 16, <www.sc-sl.org> (last accessed 23 November 2004).

²⁵⁹ SCSL for Sierra Leone SCSL-2004-014 (formerly SCSL-2003-08) The Prosecutor v Sam Hinga Norman *Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone 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 Samuel Hinga Norman JP*, para 21,

the Court subsequent to the hearing.²⁶⁰ It objected to the idea of a “full-scale public hearing broadcast ‘live’ before the nation.”²⁶¹ Instead, the Court referred to the alternative option of a written statement submitted to the Commission.²⁶² This would allow for the mandate of the Commission to be fulfilled and the fundamental right to freedom of speech of the detainee to be respected.²⁶³ As can be deduced from the reasoning of the SCSL, written statements had previously been used to receive accounts from SCSL detainees.²⁶⁴

However, it is questionable, whether the Truth and Reconciliation Act 2000 actually provided for the submission of written documents to the TRC, in other words, whether it is a legitimate tool for the TRC’s work. A few sections that potentially allow for written accounts are examined in the following.

< www.sc-sl.org> (last accessed 23 November 2004).

²⁶⁰ SCSL for Sierra Leone SCSL-2004-014 (formerly SCSL-2003-08) *The Prosecutor v Sam Hinga Norman Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone 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 Samuel Hinga Norman JP*, para 17,

< www.sc-sl.org> (last accessed 23 November 2004).

²⁶¹ SCSL for Sierra Leone SCSL-2004-014 (formerly SCSL-2003-08) *The Prosecutor v Sam Hinga Norman Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone 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 Samuel Hinga Norman JP*, para 21,

< www.sc-sl.org> (last accessed 23 November 2004).

²⁶² SCSL for Sierra Leone SCSL-2004-014 (formerly SCSL-2003-08) *The Prosecutor v Sam Hinga Norman Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone 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 Samuel Hinga Norman JP*, para 21,

< www.sc-sl.org> (last accessed 23 November 2004).

²⁶³ SCSL for Sierra Leone SCSL-2004-014 (formerly SCSL-2003-08) *The Prosecutor v Sam Hinga Norman Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone 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 Samuel Hinga Norman JP*, para 21,

< www.sc-sl.org> (last accessed 23 November 2004).

²⁶⁴ SCSL for Sierra Leone SCSL-2004-014 (formerly SCSL-2003-08) *The Prosecutor v Sam Hinga Norman Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone 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 Samuel Hinga Norman JP*, para 21: “There was not, indeed never has been, any inhibition against an indictee volunteering or communicating information to the TRC, either directly or through his lawyer. (...) It is surprising that the TRC does not appear to have requested information in written form from this indictee.” < www.sc-sl.org> (last accessed 23 November 2004).

Section 8(1) of the TRC Act 2000 enumerates the competencies of the TRC regarding the collection of statements, evidence and other information to fulfil its mandate.²⁶⁵ While section 8(1)(a) of the TRC Act 2000 gives to the TRC the power to “gather, by means it deems appropriate, any information it considers relevant (...) from any source”, this widely phrased competence seems to refer primarily, if not exclusively, to the Commission’s background research and investigative work, established in section 7(1)(a), not to the conduct of hearings. The authority to interview individuals is explicitly set up in section 8(1)(c), thus separately from the information gathering in subparagraph (a). Also, section 8 establishes a wide range of competencies in order to facilitate the work of the Commission through greatest possible access to information of all kind.²⁶⁶ It is therefore meant to make the work of the TRC as effective as possible. Receiving written statements rather than public and oral accounts in a hearing, on the contrary, is rather a limitation of the work of the Commission as this is build on the concept of participants delivering “open and transparent” stories before the Commission.²⁶⁷ Section 8 can therefore not be invoked with the aim to assert the competence of the TRC to collect written statements.

Section 7(3) allows individuals to submit information to the TRC on a confidential basis. However, this provision is based on the concern for particularly vulnerable groups like children, women or girls who might not want to talk about very personal and difficult experience in a public hearing.²⁶⁸ Confidentiality is not an issue with respect to SCSL detainees, though. According to the SCSL, they do not have to be personally protected from giving a public account. It is rather, as was elaborated on above, the

²⁶⁵ Truth and Reconciliation Act 2000, Article 8(1), <www.sierra-leone.org> (last accessed 23 November 2004).

²⁶⁶ Compare the enumeration of the “functions” of the TRC in section 7(1) and the following determination of its “powers” in section 8(1).

²⁶⁷ Sierra Leone TRC *Findings in Respect of the TRC and the SCSL for Sierra Leone*, above n 75, para 553, 573 (a).

²⁶⁸ See Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 12.

integrity and credibility of the following criminal proceeding that are at risk to be damaged by the appearance of the detainee in a hearing.

However, the idea behind the Truth and Reconciliation Act 2000 is to equip the TRC with the widest possible range of competencies to effectively exercise its mandate. Despite the power to request written statement from a SCSL detainee as a substitute for an oral account in a public hearing not being explicitly determined in the Truth and Reconciliation Act 2000, it is an efficient means to achieve the TRC's goal to receive crucial information from the detainee, who is, pursuant to the mandate of the SCSL, a former high rank military leader in the war and can therefore give an account, which is vital for the truth finding process. Although the principles of openness and transparency as well as direct contact of the people with the detainee cannot be fulfilled, and interactive dialogue between the Commissioners and the detainee cannot be established, when the detainee does not appear in person, it is ascertained that truth can nonetheless be found. A written statement contributes to the aim of truth finding to a lesser degree than a testimony in a public hearing. However, it provides a certain amount of truth, and, in a transitional society, every single piece of the picture of the past is appreciated. Despite not being explicitly provided for in the Truth and Reconciliation Act 2000, the collection of written statements is therefore covered by the powers of the TRC and a legitimate means to establish the truth. The requirement of the SCSL expressed towards the TRC in its appeal decision to ask detainees to submit written statements as a substitute for appearance in a public hearing therefore suggested a mechanism that would have been covered by the competencies of the TRC as set up in the Truth and Reconciliation Act 2000.

The TRC, in its Final Report, sees in the decision of the SCSL to deny detainees the direct participation in the TRC proceedings a denial of the rights of all Sierra Leoneans to see the truth finding process become reality

with respect to those most responsible for the violence during the war.²⁶⁹ The Commission also characterises the decision as a refusal of the SCSL to let the detainees exercise their right to free speech.²⁷⁰ With respect to the Practice Direction, the Commission finds that it lacks consideration of the nature and spirit of the truth finding process.²⁷¹ The Final Report does not address the suggestion of submission of written statements.

A public hearing with commissioners asking questions and the general public being present, presumably in very high numbers when the perpetrator is a former rebel leader, indeed entails the possibility of the latter incriminating him-/herself in the omnipresent atmosphere of truth-telling and seeking forgiveness. In order for him/her not to compromise his/her fundamental right to presumption of innocence, he/she should be allowed to submit a written statement to the TRC as a substitute for his/her personal account in a hearing. This would ensure both the rights of the detainee, namely freedom of expression and the presumption of innocence, and the functioning of the TRC, which is certainly interested in including the testimonies of those bearing greatest responsibility in its findings. Although a written statement is unable to capture the essence of a public hearing, specifically the communal effort to understand, forgive, and reconcile, it is a second-best, yet viable alternative. Without it, the TRC would not receive any statement at all. It is therefore regrettable that the TRC did not seize the opportunity offered to it by the SCSL to request information in written form from Hinga Norman as a prominent SCSL detainee willing to testify before the TRC.

As a result of the issues arising from the TRC requesting information from SCSL detainees and the resulting discrepancies in the case of Samuel

²⁶⁹ Sierra Leone TRC *Findings in Respect of the TRC and the SCSL for Sierra Leone*, above n 75, para 553, 557, 573.

²⁷⁰ Sierra Leone TRC *Findings in Respect of the TRC and the SCSL for Sierra Leone*, above n 75, para 553, 557, 573.

²⁷¹ Sierra Leone TRC *Findings in Respect of the TRC and the SCSL for Sierra Leone*, above n 75, para 553, 569.

Hinga Norman, the TRC deplores the failure of the two institutions to agree upon a definition of the nature of the co-existence and of mechanisms of cooperation. The saddening resumé of the TRC is that "(...) the two bodies had little contact and when they intersected at the operational level, the relationship was a troubled one."²⁷² Surely, a determination of the relationship at an operational level would have been desirable and would have made the co-existence effective and valuable for the national process of transition.²⁷³

E Contrasting Findings of the TRC and the SCSL

It has been argued that the potential issue of the TRC and the SCSL reaching divergent conclusions about a particular individual might lead to a friction in the two-pronged process of transitional justice, impairing the path to reconciliation.²⁷⁴ In the specific case of Sierra Leone, though, it is questionable whether the nature of the interrelationship between the two institutions substantiates this concern.²⁷⁵ As has been illustrated above in part VI A, their mandates are complementary. In the abovementioned decision on appeal, the Court expresses the concern that a condemnation by the TRC in its report might provoke expectations vis-à-vis the Court to pronounce a respective sentence.²⁷⁶ However, it raises this point with regard to the possible risk of deterring potential defence witnesses, not in consideration of a loss of credibility among the population due to divergent findings.²⁷⁷ In such a case, given the extent of the involvement of the

²⁷² Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Volume 2 Chapter 2: Findings: Findings in Respect of the TRC and the SCSL for Sierra Leone*, para 553, 563, <www.ictj.org> (last accessed 11 November 2004).

²⁷³ Evenson, above n 17, 739.

²⁷⁴ Evenson, above n 17, 759.

²⁷⁵ See Chandra Lekha Sriram "Revolutions in Accountability: New Approaches to Past Abuses" (2003) *American University Law Review* 301, 421.

²⁷⁶ SCSL for Sierra Leone SCSL-2004-014 (formerly SCSL-2003-08) *The Prosecutor v Sam Hinga Norman Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone 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 Samuel Hinga Norman JP*, para 17.

²⁷⁷ SCSL for Sierra Leone SCSL-2004-014 (formerly SCSL-2003-08) *The Prosecutor v Sam Hinga Norman Decision on Appeal by the Truth and Reconciliation Commission for*

accused in the atrocities, it seems highly unlikely, anyway, that the Court would not sentence that person. The reverse case of the TRC exculpating an individual, which the SCSL convicts, seems very unrealistic given the Court's mandate over those bearing the greatest responsibility.

VII CONCLUSION

Conventional international law does not offer a clear answer to the enquiry as to whether Sierra Leone had a duty to prosecute the serious violations of international humanitarian law and international human rights law that occurred during the civil war. Pursuant to the increasingly frequent and explicit incorporation of an obligation to prosecute in international treaties, it is ascertained that such a duty is at least emerging as a rule of customary international law.²⁷⁸ By granting blanket amnesty in the Lomé Peace Agreement, Sierra Leone therefore violated this obligation under international law.

However, the amnesty was granted to put an end to a brutal internal armed conflict and to enhance the process of transition to peace and stability. This kind of extraordinary political reality in transitional societies requires the adoption of an equally out-of-the-ordinary framework of justice and accountability for serious violations of international law, that of transitional justice. Transitional justice looks at the concepts of justice and accountability not through the traditional lens of retribution and punishment, but through that of restoration and reconciliation. Under these circumstances, amnesty should, by way of exception and to meet the demands of political reality, be allowed.²⁷⁹

In the context of some post-conflict societies, a truth and reconciliation commission, rather than a criminal tribunal, is the appropriate institutional

Sierra Leone 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 Samuel Hinga Norman JP, para 17.

²⁷⁸ Above section III A 2 (c) (ii).

²⁷⁹ Above section III A 3.

instrument of transitional justice.²⁸⁰ Truth commissions are most valuable when they are entrusted with the task to grant amnesty that is conditional upon full disclosure of the truth and acceptance of responsibility. Accountability is more likely to be reached this way than by blanket, general amnesty, because nothing needs to be done to receive the benefit of the latter.²⁸¹

In Sierra Leone, where the war mainly targeted civilians, a comprehensive truth finding process, involving all members of society, was indispensable to understand the context of the conflict. Although amnesty had already been granted to the combatants, the Sierra Leone TRC could make a valuable contribution to the process of transition. Interviews, hearings, and research helped to determine the causes and the evolution of the conflict. The truth finding process before the TRC gave victims a unique role, namely the opportunity to tell to the world the full narrative of their experience, rather than being bound to the role of a functional witness in a trial.²⁸² Reconciliation and re-integration ceremonies helped re-uniting society.²⁸³ Although accountability and justice might not be achieved to the same degree as they would have with conditional amnesty, the potential of the truth and reconciliation process to heal the wounds of the war seems to be the decisive factor.

With regard to the SCSL, the fact that it was established to prosecute military leaders of all groups, while solely RUF rebels committed the previous breach of the peace agreement, constitutes a breach by the Government of the Lomé amnesty promise.²⁸⁴ As the TRC observes, this might make future parties to conflicts less willing to respond to the offer of amnesty in return for peace. To make amnesties a functioning and credible tool of peacemaking in transitional societies, a clause should be added to amnesty clauses that any breach of the p Nicole Fritz and Alison Smith "Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone" (2001) 25 *Fordham Int'l L J* 391, 425.

peace would retract the protection of amnesty from the responsible party, but not from those who abide by the ceasefire.²⁸⁵

²⁸⁰ Above section III B.

²⁸¹ Above section III C.

²⁸² See Minow, above n 84, 238

²⁸³ ICTJ, above n 15, 5.

²⁸⁴ Above section VI B.

²⁸⁵ Above section VI B.

The mixed character of the SCSL makes it an adequate tool in the quest for justice, taking into account local customs while guaranteeing international standards in prosecution that are to become an integral part of the country's future judicial system.

The TRC and the SCSL have had complementary functions. While the SCSL addresses impunity of those few who were ultimately responsible for the most serious violations of international law, the TRC helped the general population, victims and perpetrators, to find the truth by telling and hearing stories, to experience relief and forgiveness, and to obtain a comprehensive picture of the sources of the conflict.

However, with two institutions of transitional justice working alongside each other, a clear demarcation of the mandates of the two bodies plus an understandable transmission of their role to the general public would have been required. Although the Sierra Leone TRC was able to collect a considerable number of statements and testimonies,²⁸⁶ the number of perpetrators coming forward was relatively small. As the TRC remarks in its Final Report confusion about the role and the powers of the TRC and the SCSL respectively were predominant in the public and potentially barred some perpetrators from appearing before the Commission in fear of their information being transferred to the SCSL.²⁸⁷

Furthermore, a comprehensive regulation of the relationship of these two institutions prior to their operation would have been necessary to prevent important questions like that of access of the TRC to SCSL detainees from causing friction. In the view of the TRC, the lack of a clear definition of the coordination between the two bodies has significantly impacted on the efficiency of the TRC's truth finding process and on the model role the two-pronged transitional process in Sierra Leone could have had in the world,

²⁸⁶ Above section IV B.

²⁸⁷ Above section V A.

but did not achieve.²⁸⁸

Despite issues in the relationship between the TRC and the SCSL, overall, the combination of these two institutions of transitional justice has hopefully helped Sierra Leone to find its way into a peaceful future. The TRC has suggested a number of promising societal and governmental activities in all areas of concern such as the promotion of human rights and the rule of law, women, children, mineral resources and reparations. A follow-up body is going to be established to observe the implementation progress. The SCSL is going to sentence those most responsible for unspeakable atrocities. It might be a long way to peace, and considerable support from the international community will be necessary, but, as the children of Sierra Leone say in the child-friendly version of the TRC's Final Report, "[t]he future is our challenge, and we cannot refuse."²⁸⁹

²⁸⁸ Sierra Leone TRC *Findings in Respect of the TRC and the SCSL for Sierra Leone*, above n 75, paras 553, 557, 564-566, 563; Sierra Leone Truth and Reconciliation Commission *Sierra Leone Truth and Reconciliation Commission Final Report: Overview: Transitional Justice in Sierra Leone*, para 26, <www.ictj.org> (last accessed 11 November 2004).

²⁸⁹ Sierra Leone TRC *Child-Friendly Version 2004*, above n 137, 12, <www.unicef.org> (last accessed 3 November 2004).

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