

1-1-2005

Moving from Impunity to Accountability in Post-War Liberia: Possibilities, Cautions, and Challenges

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Moving from Impunity to Accountability in Post-War Liberia: Possibilities, Cautions, and Challenges

RENA L. SCOTT*

Abstract

Liberia has become the quintessential example of an African failed state. Though Liberia's civil war is officially over, war criminals are free and some are even helping run the transitional government under the authority of Liberia's Comprehensive Peace Agreement (CPA). This peace agreement calls for the consideration of a general amnesty for those involved in the Liberian civil war alongside the parceling of governmental functions among members of various rebel groups. The drafters of the agreement claim that this was the only viable solution for sustainable peace in Liberia. Meanwhile, Charles Taylor relaxes in Nigeria's resort city of Calabar.

To contrast Liberia, Sierra Leone took the brave step of implementing the SCSL when it realized that its peace agreement – which had similar goals and structure to Liberia's – was a failure. Sierra Leone's decision signals a desire to begin the transition to rule of law and the end of rule by impunity. Sierra Leone can be a model for Liberia. This Comment revisits the colonial period in Liberia to track the growth of a culture of impunity. This rule by Liberian elites, without answering to their own people, has directly caused a failure of the Liberian state. I suggest that a Special Court for Liberia, instead of less punitive transitional mechanisms, would create a hands-on approach to

* Boalt Hall School of Law, University of California Berkeley, J.D. 2005. The thought to write on transitional justice in Liberia came to me while I was an extern in the chambers of Judge Terry Hatter Jr., US District Judge, Central District of California. This was the summer that Charles Taylor departed Liberia for exile in Nigeria. My thoughts on all of the issues that arose after that summer of 2003 are in this paper. I would like to thank the following people for inspiration, guidance, and hard work in getting this piece together: David K. Leonard, Dean of Inter Area Studies U.C. Berkeley, Angela Harris, Professor of Law Boalt Hall School of Law, and Kathleen Savage.

building the respect for a tradition of rule of law and justice in a country that lacks such a tradition. If the intervention of the transitional government of Liberia and the international community is at the level of the exercise of elite power instead of at the level of reconciliation among the masses (which is where the TRC focuses its energies)-through the use of punitive mechanisms such as prosecution in a hybrid court of law, Liberia can begin to end the culture of impunity and ring in a sustainable peace. In pursuing this goal of the implementation of the Special Court for Liberia, the CPA would need to be revised to reflect the concerns expressed in this Comment. Primarily, a revised CPA must reject amnesty for war crimes and crimes against humanity as was done in Sierra Leone.

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INTRODUCTION

Liberia is the classic portrait of a failed state.¹ Today, Liberia is one of the world's poorest countries. According to World Bank indicators, 46% of its population is below the poverty line compared to 37% for the rest of Sub-Saharan Africa; the population of Liberia is generally undereducated, with a literacy rate of 44.1%; and Liberia faces a debt that cannot be realistically repaid.² Two civil wars have left an estimated 200,000 people dead, created at least 250,000 new refugees, and displaced approximately 350,000.³ This state of affairs did not arise overnight, and contrary to popular opinion, Liberia's situation is not a result of deep rooted ethnic hatred or poverty. These are only some of the symptoms of a bigger disease: the deadly

¹ JOHN-PETER PHAM, *LIBERIA: PORTRAIT OF A FAILED STATE* 224 (2004).

² World Bank, *Liberia at a Glance* (2004) at http://worldbank.org/data/countrydata/aag/lbr_aag.pdf. (last visited March 7, 2005).

³ STEPHEN ELLIS, *THE MASK OF ANARCHY: THE DESTRUCTION OF LIBERIA AND THE RELIGIOUS DIMENSION OF AN AFRICAN CIVIL WAR* 315 (1999); Human Rights Watch, *World Report 2003: Liberia* (2003) 48 at <http://www.hrw.org/wr2k3/africa7.html> (last visited Apr. 10, 2005) [hereinafter Human Rights Watch, *World Report 2003: Liberia* (2003)]; CLIFF BERNATH & SARAH MARTIN, *PEACEKEEPING IN WEST AFRICA: A WORLD REPORT 3* (Refugees International 2004), available at http://www.refintl.org/files/2992_file_PK_WestAfrica_Jun04_v2.pdf (last visited Apr. 12, 2005).

effects of African governance in general and the Liberian culture of impunity in particular.

The development community seems to have missed the historical lesson of the impact of colonialism on the post-colonial state by pretending that measures such as “democracy”, development, and human rights promotion alone will cure all of the problems that plague failed and weak states in Africa.⁴ Yet, the reality is that states in Africa will not function properly until elites are held accountable, that is, when they are encouraged to rule over citizens rather than subjects. Therefore, the project of democracy has to take a critical look at the culture of impunity that has become characteristic of African governance since decolonization.

Instead, the dominant theme of late for addressing post-conflict rebuilding in African states has been one of protracted diplomacy.⁵ Leonard Robinson, President of the Africa Society, recently suggested that ending conflict requires “patience, fortitude, understanding, the difficult skill of neutrality, and critically important, it requires that all parties negotiate in good faith.”⁶ In this same diplomatic spirit, commentators on Liberia’s most recent Accra Peace Agreement, the CPA, which formally ended the Liberian civil war and introduced the National Transition Government of Liberia, claim that this document has been a diplomatic effort to end Liberia’s fourteen-year civil war.⁷ The same policy makers claim that the departure of Charles Taylor from Liberia signals the beginning of peace in Liberia.⁸

⁴ The development community continues to insist on the promotion of the rule of law, democracy, and human rights promotion in exchange for aid. But, African leaders do not necessarily follow through on their declarations to work towards these goals. As an alternative, David Leonard argues that Africa is in need of “effective development management” instead of more aid. DAVID K. LEONARD & SCOTT STRAUS, *AFRICA’S STALLED DEVELOPMENT: INTERNATIONAL CAUSES & CURES* 37-38 (2003). Achieving this effective development management involves four different types of management behavior—public policymaking, organizational leadership, internal administration, and bureaucratic hygiene. *Id.*

⁵ See, e.g., Symposium, *State Reconstruction After Civil Conflict*, 95 AM J. INT’L L. 1 (2001) (noting that after the Second World War, internal conflicts usually end by negotiation and concession, not by conquest or unconditional surrender); Interview by Robert Siegel & Michele Norris (National Public Radio) with Jacques Paul Klein, UN Secretary-General’s Special Representative for Liberia, Washington, D.C. (Sept. 18, 2003) (describing the efforts of the Nigerian government to force Charles Taylor to obey the conditions of his exile in Calabar).

⁶ Leonard H. Robinson, Jr., *The Role of Diplomacy in African Conflict Resolution: The Case of Liberia in Context*, 19 MILLER CENTER REPORT 28, 28-32, (2003).

⁷ See, e.g., National Democratic Institute for International Affairs, *War Is Behind Us Now: A Report On Focus Group Research in Liberia* 6, 9 (2004) at

Yet, curiously, the TRC has not dedicated itself to addressing issues of elite-sponsored violence in Liberia. In fact, the Liberian peace agreement recommends the consideration of a general amnesty for all those involved in Liberia's civil wars, which raises important issues about Liberia's choice to privilege diplomacy over legal sanction of state-sponsored violence.⁹ The necessity of a quick peace at the expense of a sustained movement towards a culture free from the incessant cruelty of elite politics ensures that Liberia will not be an emblem of stability for West Africa in the foreseeable future. Given Liberia's past potential for this status, this state of affairs is regrettable.

Liberia's choice, however, was not made in a political vacuum. The international community and its persistent emphasis on light-handed and diplomatic peace measures has a great impact on Liberia's peace process.¹⁰ In this vein, I argue that the international community's emphasis on transitional mechanisms that focus on diplomatic measures and measures concentrating on the general populations of conflict states, rather than mechanisms that focus on swift justice through the use of criminal tribunals, places too much responsibility on Liberians in general and not enough blame on the elite power structure in Liberia in particular. Focusing on these non-punitive transitional mechanisms that grant blanket amnesties to dangerous characters either denies or ignores the historical, political, and economic events that led to Liberia's status as a failed state. The international community and the transitional leaders in Liberia have allowed for a post-conflict situation where the route to peace is completely divorced from history. A discussion of the rebuilding of a failed state like Liberia can only take place when leaders are candid about the nature of colonial rule, the type of rule resulting from colonial domination, and the complete failure of many other African leaders to be accountable for their behavior. During post-conflict rebuilding, the injustice that results is that violence will ultimately begin anew.

http://www.accessdemocracy.org/library/1769_lr_war_100104.pdf; *U.S. Policy Toward Liberia: Hearing before the Subcommittee on Africa of the Committee on International Relations House of Representatives*, 108th Cong. 40 (2003) (statement of Nohn Kidau, President, Movement for Democratic Change in Liberia) [hereinafter *U.S. Policy Toward Liberia* (statement)].

⁸ *Id.*

⁹ Comprehensive Peace Agreement Between the Government of Liberia and the LURD and the MODEL and Political Parties, August 18, 2003, art. XXXIV, at http://www.usip.org/library/pa/liberia/liberia_08182003_toc.html [hereinafter CPA and Accra Peace to refer to this document]

¹⁰ See generally, Survivor's Rights International, *SRI Country Briefing: Liberia* 22 (2003) (supporting the CPA's proposed creation of a TRC and National Commission on Human Rights) at http://www.survivorrightsinternational.org/pdfs/Liberia_report.pdf [hereinafter *SRI Country Briefing: Liberia*].

In contrast to Liberia, Sierra Leone, Liberia's neighbor, once had a similar agreement but quickly realized the grave problems that come with granting a blanket amnesty to high-level criminals. Instead of granting a blanket amnesty to war criminals, the Sierra Leonean government created the SCSL to try those individuals most responsible for war crimes and for the looting of the Sierra Leonean state.¹¹ Sierra Leone's choice to privilege justice over diplomacy is a clear sign of that country's realization of the need to end the culture of impunity in Sierra Leone. Liberia, however, has decided to continue the status quo of impunity while paying lip service to democratic goals.¹² This will only contribute to the culture of impunity that has existed in Liberia for years; Liberia is a failed state precisely because elite-sponsored violence continues to cause perpetual insecurity in Liberia.

Sierra Leone's approach to justice, through its creation of a SCSL (SCSL) seems an apt model for Liberia given the similarities between the two countries.¹³ Liberia and the international community must realize two things on the road to Liberia's reconstruction. First, pursuing a justice that addresses the causes of the weak state phenomena in Liberia is a crucial step on the way to peace. This type of justice must deal specifically with crimes committed by Liberian elites and other higher officials instead of focusing exclusively on those who actually carried out the atrocities. Second, peace (and when I use this term I mean simply the existence of a secure society evidenced by a long-term cessation of state sponsored violence and the delivery of political goods to the people within its borders), can be an achievable goal through the use of legal mechanisms that promote accountability.

Recognizing that emphasis on justice without equal commitments of military, political, and economic resources undermines goals of democracy, I consider the particular contribution of justice to post-conflict peace building in Liberia. Part I provides a background for the Liberian crisis and puts Liberia's history and the two most recent civil wars in context. It also shows the similarities between Liberia's and Sierra Leone's conflicts.

¹¹ See generally, website for the SCSL at <http://www.sc-sl.org/frontpage.html> (last visited Mar. 19, 2004); *Compare Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (2000) (insisting that the amnesty provision in the Lome Peace Agreement cannot be granted in respect of international crimes), available at <http://www.un.org/Docs/sc/reports/2000/sgrep00.htm>. [hereinafter Secretary General Report S/2000/915] with *Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, art. IX, July 7, 1999, available at http://www.usip.org/library/pa/sl/sierra_leone_07071999_toc.html (calling for a general amnesty) [hereinafter *Lome Accord*].

¹² See generally, CPA, *supra* note 9.

¹³ Secretary-General Report S/2000/915, *supra* note 11.

By providing a brief history of Liberia and its civil wars, Part II explains the emergence of the culture of impunity which has brought about the failure of Liberia as a modern state. In particular, I suggest that Liberia has failed at protecting its people from insecurity precisely because these same elites benefit from a continuous insecurity and instability; for it is through the promotion of civil war that elites can enjoy the fruits of civil war. After describing the two peace agreements that ended the wars of Sierra Leone and Liberia respectively, highlighting the positive aspects and flaws of these peace agreements, I argue that the peace agreement approach to ending civil wars and transitioning to functioning states is inappropriate for countries like Liberia. The major flaw in Liberia's peace agreement is its failure to address elite-sponsored violence and its granting of a general amnesty to all the perpetrators of violence. In fact, the peace agreement will not only be a historical failure but a sure recipe for renewed hostility and the perpetuation of the culture of impunity.

In Part III, I argue that an approach based on principles of justice, like the approach pursued in Sierra Leone, would be more appropriate. I explain the framework of the SCSL¹⁴ and the Truth and Reconciliation Commission (TRC) that have been set up in Sierra Leone.¹⁵ In Liberia, no court has been alluded to and the transitional government of Liberia missed the opportunity to learn from the Sierra Leone negotiation process. Still, it may not be too late to hold some important figures accountable. The current transitional government might call for this approach or the incoming administration in 2005. In discussing the urgent necessity of a Special Court, I address a likely critique: legal mechanisms such as trials do not consider the delicate political situation of transitional societies or other possible routes to peace and reconciliation. As a preliminary response, I suggest that the failure of this critique is that it completely ignores the impact of colonialism on African governance and that the point of intervention of non-legal mechanisms – the masses or the victims of civil wars – allows elites to escape unscathed. I argue instead that the new government for Liberia should establish a legal forum to address civil war violations. This forum would only try those figures most responsible for fomenting war and looting the Liberian state. This article does not, however, address the type of remedy that the forum should impose.

A Special Court for Liberia could serve a threefold purpose. First, this mechanism could further promote the campaign to end the culture of impunity in Liberia and in Africa as a whole. Second, international commitment to Liberia would show a definite commitment to address violence in Africa in an even-handed manner. Finally, a trial of this sort

¹⁴ *Id.* at 21.

¹⁵ *Lome Accord*, art. VI, *supra* note 11.

could serve to prevent future state sponsored violence by promoting law reform in Liberia. I recognize that the United States should and probably will play an important role in Liberia's future. The United States owes both historical and political duties to Liberia to serve as a guarantor of peace in Liberia just as France and Britain have done in conflicts in Cote d'Ivoire and Sierra Leone respectively.¹⁶

I.

LIBERIA AND IT'S NEIGHBOR'S HISTORY OF EXCLUSIONS, GRIEVANCES, AND GREED

Before delving into the most recent Liberian peace agreement, it is crucial to understand the economic, social, and political history that has brought Liberia to where it is today. One of the central arguments throughout this article is that in negotiating peace agreements, the development community and policy makers should not forget to examine what has happened in the past and try to avoid the same errors. The policy makers who have drafted the current peace agreement in Liberia seem to have forgotten Liberia's colonial history, Liberia's history under Liberian leadership, and the many serious abuses committed throughout Liberia's civil wars.

A. Early Political, Social, and Economic History of Africa's First Republic under Black Leadership

Liberia was never officially colonized like other African states during the European "scramble for Africa."¹⁷ But, the ideology upon which Liberia was founded was informed by the same foundational ideologies justifying colonization in other African countries.¹⁸ Liberia's origins date back to 1822, when the settlement of Monrovia, named for U.S. President James Monroe,¹⁹

¹⁶ See, e.g., ADEKEYE ADEBAJO, BUILDING PEACE IN WEST AFRICA: LIBERIA, SIERRA LEONE, AND GUINEA-BISSAU 93-95 (1989) (discussing the British in Sierra Leone); Chris Mullin, Speech at the UK Mission to the UN (Feb. 6, 2004) (welcoming the willingness of the United States to take the lead in Liberia as the French are doing in Cote d'Ivoire), at http://www.ukun.org/articles_show.asp?SarticleType=17&Article_ID=731.

¹⁷ See generally, ROLAND OLIVER & ANTHONY ATMORE, AFRICA SINCE 1800, 65 (4th ed. 1994). The "scramble for Africa" describes the manner in which European powers pushed for the partition of Africa during the third quarter of the nineteenth century, WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA, 137 (1982) (describing period where Europeans made a grab for whatever they thought spelled profits in Africa).

¹⁸ PHAM, *supra* note 1, at 20.

¹⁹ EGHOSA E. OSAGHAE, ETHNICITY, CLASS AND THE STRUGGLE FOR STATE POWER IN LIBERIA 25 (1996).

was established.²⁰ Aided by the American Colonization Society and many other principally African-American groups, freed slaves who had long harbored hopes of returning to Africa began coming to Liberia as early as 1820, when the first group of about eighty sailed on the *Elizabeth*.²¹ While maintaining strong ties to the United States, Liberia became an independent nation in 1847.²²

Little is known of the history of present day Liberia before its modern establishment, but its ethnic situation is complex. Of the sixteen indigenous ethnic groups, no one group in particular has ever represented a majority of the Liberian population.²³ And, as in other colonial contexts, the Americo-Liberian elites were able to gain access to the lands of the indigenous people by negotiating land contracts in exchange for foreign luxury goods and conquest.²⁴ Before the arrival of the Americo-Liberians, these groups previously had had contact with white people principally for trade purposes.²⁵

It is now a common understanding that the Americo-Liberians (some descendants of freed Black American slaves and others descendants of captured Africans who were intercepted during their trans-Atlantic passage) founded the state of Liberia upon the perceived superiority of the light-skinned elite over the darker-skinned natives.²⁶ The only difference between the colonial context in Liberia and that in other West African countries appears to be that the founders of Liberia were Black.²⁷ Even though the Americo-Liberians never comprised more than 5% of the Liberian population, they ruled for nearly forty years through an elite oligarchy that excluded and

²⁰ PHAM, *supra* note 1, at 12.

²¹ *Id.* at 5-11.

²² *Id.* at 17.

²³ OSAGHAE, *supra* note 19; PHAM *supra* note 1, at 12. These sixteen ethnic groups are divided between three ethno-linguistic groups: the Mel, the Mande, and the Kwa. The Mande are divided into eight ethnic groups, the Kwa into six, and the Mel into two. PHAM, *supra* note 1, at 12. The Mel are concentrated in the northwest of the country. The Kwa have historically been coastal seafaring people and were often recruited to assist European traders and sailors sailing in local waters. *Id.* The Mel and Mande speaking peoples had contacts with Europeans dating back to the seventeenth century; their chieftains traded African slaves for Western commodities. *Id.*

²⁴ See OSAGHAE, *supra* note 19, at 29-31.

²⁵ See PHAM, *supra* note 1 at 12.

²⁶ IKECHI MGBEOJI, COLLECTIVE INSECURITY: THE LIBERIAN CRISIS, UNILATERALISM, & GLOBAL ORDER 5, 7 (2003).

²⁷ See, e.g., OSAGHAE, *supra* note 19, at, 28, 31, 42 (affirming the appropriateness of the use of the colonial model to describe rule by Americo-Liberians—a peripheralised ruling class which lacks an independent material base and which is consistently challenged from within as a hegemonic class).

oppressed the indigenous Liberians.²⁸ In fact, all twenty-one Liberian presidents with the exception of Samuel K. Doe have been Americo-Liberian.²⁹

Recognizing that the state had to have some method of controlling the indigenous people, the Americo-Liberians ruled through a colonial idiom of power: the indirect rule system.³⁰ This was a system “where the central government would recognize the preexisting tribal [authority] structures [by granting] local rulers control over their subjects in exchange for [collaboration] with Monrovia,” the capital.³¹ Liberia’s interior territories were divided into districts with preexisting ethnic and cultural allegiances in mind.³² Within the districts, “the chiefs were [to be] chosen according to traditional custom” with final approval in the hands of a district commissioner.³³ As long as there was no conflict with the central government, the district commissioners were to uphold the traditional power of chiefs over their peoples.³⁴ The primary duty of the chief vis-à-vis Monrovia was the collection of valuable taxes and provision of free labor to the government.³⁵ Even though there was moderate inclusion of indigenous people into Liberian mainstream society through the indirect rule system, it was not until the 1940s that the indigenous were allowed the benefits of Liberian citizenship.³⁶ This social context coupled with declining economic prospects would soon become a major grievance for many Liberians.

Like other colonial states, Liberia had the potential to be an economic leader throughout West Africa, but the government’s economic practices have led to a continual drain of the country’s resources. In addition to one-sided contracts with the United States, Liberia entered into abusive loan agreements and contracts with several international lending institutions.³⁷ Customs duties and tax revenues were often pledged as security for loan repayment.³⁸ Furthermore, coercive and one-sided dealings between Liberian elites and foreign companies, such as granting of exclusive mineral rights, and securing

²⁸ ADEBAJO, *supra* note 16, at 45-46; PHAM, *supra* note 1, at 14.

²⁹ Samuel K. Ngaima, *Liberian Civil War*, 27 *FUTURICS* 102, 106 (2003).

³⁰ OLIVER & ATMORE, *supra* note 17 at 190; PHAM, *supra* note 1, at 31.

³¹ PHAM, *supra* note 1, at 31

³² *Id.*

³³ *Id.* at 31.

³⁴ *Id.*

³⁵ *Id.* at 32

³⁶ *Id.*

³⁷ *Id.* at 35

³⁸ *Id.*

loans using future customs revenues and duty free imports, contributed to Liberia's declining economic prospects.³⁹

One concrete example of bad economic practice has been Liberia's manner of exploiting its rubber. Rubber has always been Liberia's key resource but Liberia's relationship with the United States has virtually ruined the potential for that resource to benefit the country. The United States' relationship to the Liberian rubber industry began when the United States became the world's leading consumer in rubber, at which time it used Liberian rubber plantations to exploit the rubber used to meet the demands of America's expanding automobile industry.⁴⁰ However, the agreements between Liberia and the Firestone Rubber and Tire Company were not the fairest in their terms.⁴¹ One such agreement granted Firestone a ninety-nine year lease on a Liberian plantation for a \$1 an acre rent for the first year and a flat \$6,000 per year rent thereafter.⁴²

The social and economic problems in Liberia – including its declining economic prospects and the inability of the elite to integrate the indigenous people – continued from its founding through the 1970s, when Liberia's problems were further exacerbated.⁴³ Liberia reached a breaking point following the imposition of rice subsidies, Liberia's staple food, in 1979.⁴⁴ The effect of the rice subsidies was an increase in the price of rice to a sum representing more than one-third of the monthly income for an average Liberian family.⁴⁵ The price increase sparked campaigns of protest and civil disobedience. Amadu Sesay argues that the rice riots of 1979 marked a turning point in Liberia.⁴⁶ The incident left then-President Tolbert weakened and the dominant political party of Liberia, the True Whig Party, split.⁴⁷ In the meantime, indigenous political opposition quickly formed and demanded concessions, such as having the right to register as political parties to challenge the upcoming elections.⁴⁸ When Tolbert decided to push back the 1980 elections, the scene was set for the coup led by Samuel Doe, an

³⁹ *Id.* at 32-41.

⁴⁰ *Id.* at 38-39.

⁴¹ *Id.* at 37-41; *See also*, OSAGHAE, *supra* note 19 at 40 (implying that Firestone was more of an exploiter than an investor).

⁴² PHAM, *supra* note 1, at 39.

⁴³ MGBEOII, *supra* note 26, at 2, 11.

⁴⁴ *Id.* at 11.

⁴⁵ PHAM, *supra* note 1, at 76.

⁴⁶ DR AMADU SESAY, *Historical Background to the Liberian Crisis in THE LIBERIAN CRISIS: A PHOTOGRAPHIC EXPEDITION* (1992).

⁴⁷ PHAM, *supra* note 1, at 76-77; OSAGHAE, *supra* note 19, at 56-60.

⁴⁸ PHAM, *supra* note 1, at 76-77; OSAGHAE, *supra* note 19, at 56-60.

indigenous low-ranking soldier, that would break the domination of the Americo-Liberian elites.⁴⁹

B. Indigenous Rule under President Doe

Instead of reversing the course of Liberian history, the Samuel Doe regime followed suit in 1980. Doe did not bring democracy, equality, or long term economic stability to the country.⁵⁰ Instead he became the one of the most repressive Liberian leaders in its history, ruling through an idiom of divide and destroy.⁵¹ Doe contributed to the ethnicization of the Liberian army by filling the most important military positions with people of the Krahn ethnic group (Doe's own group) and purging the army of Gios and Manos.⁵² He also alienated other political and social groups by disproportionately representing Krahn and Mandingo people in government positions.⁵³

Though Doe was weak as a leader, foreign support heavily bolstered his regime. The Reagan administration embraced him as a line of defense against the Soviets during the Cold War.⁵⁴ In fact, the Liberian government was the largest recipient of U.S. aid in Sub-Saharan Africa by the time Doe was inaugurated, such aid representing roughly one third of the Liberian government's revenues.⁵⁵ Between 1981 and 1985, U.S. economic and military assistance to Liberia totaled over \$500 million.⁵⁶ Nonetheless, Liberia's international debt under Doe rose from \$750 million to \$1.4 billion.⁵⁷ Even though the Liberian government was particularly repressive, the United States continued to aid Liberia to prevent Doe from turning to Libya and the Soviet Union.⁵⁸ The support that Liberia received from the United States quickly withered after the Cold War.⁵⁹ Some argue that it was the combination of widespread corruption, the decline in revenues from

⁴⁹ PHAM, *supra* note 1, at 78-79; OSAGHAE, *supra* note 19 at 60-65.

⁵⁰ ADEBAJO, *supra* note 16, at 45-46 (citing Doe's instigation of ethnic rivalries); OSAGHAE, *supra* note 19, at 66 (citing instances of political repression under Doe); PHAM, *supra* note 1, at 90-91 (arguing that Doe failed to maintain productive economic relationships with the United States, the IMF, or the World Bank).

⁵¹ ADEBAJO, *supra* note 16, at 44-45.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ PHAM, *supra* note 1, at 88-89.

⁵⁵ PHAM, *supra* note 1, at 89.

⁵⁶ *Id.*

⁵⁷ OSAGHAE, *supra* note 19, at 74-77.

⁵⁸ PHAM, *supra* note 1, at 88.

⁵⁹ PHAM, *supra* note 1, at 226.

Liberia's main exports (rubber, timber, and iron ore), and the cessation of the U.S. economic assistance that caused the out-break of civil war in 1989.⁶⁰

C. The Effects of Charles Taylor's War Without End: Civil War 1989-1997, 2001-2003

Although few writers have dealt sufficiently with the causes of the Liberian conflict,⁶¹ readily identifiable factors contributed to the first conflict in Liberia which brought Charles Taylor to the presidency in 1997. The internal factors included:

- (1) the legacy of the Americo-Liberian insistence on total social, political, and economic exclusion of the Liberian indigenous population from Liberian society;
- (2) the subsequent reliance of Doe on ethnic mistrust to divide the Liberian people;
- (3) natural resource exploitation without economic development; and
- (4) the proliferation of competitive warlord factions.⁶²

External factors included the ineffectiveness of the international community in coming to the aid of the Liberian people earlier, the dominance of the Economic Community of West African States (ECOWAS) as the only regional organization to come to the aid of Liberia, and the interference of contiguous states in Liberian affairs.⁶³ These conditions allowed the half-indigenous, half-Americo-Liberian warlord, Charles Taylor, to control the war-time scene in Liberia.

Charles Taylor's seven-year civil war resulted in his ascendancy to the Presidency, and was successful for several key reasons. First, factionalism prevented other groups from becoming powerful enough to win the strategic battles, and Taylor gained access to more resources than the other factions.⁶⁴ In fact, Liberia's resources probably provided more incentive to continue the war than any political goal of these factions.⁶⁵ Battles were fought for control of areas rich in economic resources—gold, diamond,

⁶⁰ ADEBAJO, *supra* note 16, at 46.

⁶¹ Ngaima, *supra* note 29, at 103.

⁶² *Id.* at 103, 106-07; Yekutiel Gershoni, *War Without End and an End to a War: The Prolonged Wars in Liberia and Sierra Leone*, 40 AFR. STUD. REV. 55 (1997).

⁶³ See ADEBAJO, *supra* note 16, at 48-49 (citing the damaging of effect of interference by contiguous states); MGBEOJI, *supra* note 26, at 59-70 (discussing the critiques of ECOWAS intervention in the Liberian crisis); PHAM, *supra* note 1, at 203-206 (explaining that the foreign policy of the United States to Liberia has been one of benign neglect).

⁶⁴ ADEBAJO, *supra* note 16, at 66-67; PHAM, *supra* note 1, at 120-124, 173; Gershoni, *supra* note 52, at 55-76.

⁶⁵ ADEBAJO, *supra* note 16, at 47.

timber, iron ore, rubber, and tree crops.⁶⁶ Taylor individually may have derived \$75 million annually from these exports.⁶⁷

Second, regional actors greatly influenced Taylor's consolidation of power. Countries that aligned themselves with the Taylor regime were also rewarded. Through Cote d'Ivoire, Taylor had access to bases and commercial interests.⁶⁸ Burkina Faso lent soldiers.⁶⁹ Libyan President Muammar Qaddafi also supported Taylor.⁷⁰

Taylor's 1997 victory did not successfully convert him from a warlord to a statesman. After several peace talks and treaties, Taylor agreed to a ceasefire in virtual exchange for the presidency.⁷¹ Some suggest that Taylor was voted into office for fear that he would cause more fighting if he was not.⁷² But Taylor's presidential rule was short-lived.⁷³ Only five years after Liberia began a transition to peace, the country erupted once again into civil war.⁷⁴ Taylor ruled by centralizing power through the reward of loyalists and through the intimidation of critics.⁷⁵ High-ranking officials misused state power to further their own political objectives.⁷⁶ Similarly, Taylor and his partners monopolized profitable businesses like fuel and food, and gained from imports.⁷⁷ State institutions, including the judiciary, the legislature, the human rights commission, and the commission on reconciliation, remained weak under Taylor.⁷⁸

Signs of a second civil war began to show in 1999 when rebels crossed into Liberia from Guinea. Liberians United for Reconciliation and Democracy (LURD) and Movement for Democracy in Liberia (MODEL)

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 48.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ PHAM, *supra* note 1, at 173; ADEBAJO, *supra* note 16, at 65.

⁷² PHAM, *supra* note 1, at 134.

⁷³ *Id.* at 215.

⁷⁴ *Id.* at 182.

⁷⁵ *Id.* at 178-79.

⁷⁶ Human Rights Watch, *Back to the Brink: War Crimes by Liberian Government and Rebels: A Call for Greater International Attention to Liberia and the Sub-region*, at <http://www.hrw.org/reports/2002/liberia/liberia0402.pdf>. (last visited Mar. 7, 2005) [hereinafter HRW *Back to the Brink*].

⁷⁷ Jamie O'Connell, *Here Interest Meets Humanity: How to End the War and Support Reconstruction in Liberia, and the Case for Modest American Leadership*, 17 HARV. HUM. RTS. J. 213 (2004).

⁷⁸ Human Rights Watch, *World Report 2003: Liberia* (2003), *supra* note 3, at 48.

waged war to unseat Taylor in 2000.⁷⁹ In many ways, LURD and MODEL are new names for old factions. LURD was formed by Liberian exiles in response to feelings of frustration and perceived exclusion from the implementation of the Abuja Peace Accords that ended the first civil war.⁸⁰

D. Sierra Leone's Civil War: Comparing Civil Wars

The origins of Liberia and Sierra Leone follow similar patterns.⁸¹ The crises of these countries are so intertwined that some scholars doubt that peace can exist in one locale if it does not exist in the other.⁸²

Sierra Leone began as the Freetown Colony, founded in 1792 by a private group of British philanthropists-- the Sierra Leone Company-- as a haven for freed Black slaves.⁸³ The company managed the Freetown settlement until the corporation was dissolved in 1808.⁸⁴ Sierra Leone then became a crown colony and continued to receive assistance from Britain. Sierra Leone received its independence in 1961.⁸⁵

Though the beginnings and causes of Sierra Leone's civil war are due to more than the encouragement of Charles Taylor, the fact that the same players have operated in both states suggests a strong linkage. During Liberia's first civil war, Taylor used Sierra Leone's diamond fields in the north of the country as a source of income for his own military operation, and supported the new Sierra Leonean rebel movement, the Revolutionary United Front (RUF), led by Taylor's friend Foday Sankoh.⁸⁶ Sankoh's troops entered Sierra Leone on March 23, 1991, beginning the civil war in Sierra Leone that lasted for eleven years and resulted in the death of tens of thousands of people. Sierra Leone's civil war was primarily a war over resources.⁸⁷

As a result of Taylor's support for rebels in Sierra Leone, the governments of both Sierra Leone and Guinea began to organize Liberian

⁷⁹ Human Rights Watch, *Liberia* (2004) at <http://hrw.org/english/docs/2004/01/21/liberi6977.html> (last visited Apr. 11, 2005).

⁸⁰ Danny Hoffman, *The Civilian Target in Sierra Leone and Liberia: Political Power, Military Strategy and Humanitarian Intervention*, AFR. AFF. 103, 215 (2004).

⁸¹ For a history of the eleven year civil war in Sierra Leone and Liberia's influence, see Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436 (2002)

⁸² See Levi Woodward, *U.N. Report: Taylor's Liberia and the U.N.'s Involvement*, 19 N.Y.L. SCH. J. HUM. RTS. 923, 932, 938 (2003).

⁸³ PHAM, *supra* note 1, at 156.

⁸⁴ *Id.* at 157.

⁸⁵ *Id.*

⁸⁶ *Id.* at 159-161

⁸⁷ LEONARD & STRAUS, *supra* note 4, at 69-70.

refugees inside their borders to fight against Taylor's National Patriotic Front of Liberia (NPFL).⁸⁸ In Liberia's second civil war, the rebel group, LURD was a group of Liberian dissidents composed of both Liberians and Sierra Leoneans who did not support Taylor's alliance with the RUF.⁸⁹ The Sierra Leonean component of LURD, the "kamajor militia," fought for the government of Sierra Leone against Sankoh's troops in the Sierra Leonean war, and also played a part in Liberia's second civil war.⁹⁰

E. Abuses Committed in Sierra Leone and Liberia

Numerous organizations have documented the abuses from both wars in Sierra Leone and Liberia.⁹¹ The abuses committed might fall into three categories under international law: war crimes, crimes against humanity, and other serious human rights abuses.⁹² Addressing Sierra Leone first, abuses committed included rape, murder, abduction, and forced labor.⁹³ All parties used children and youth to carry out human rights violations.⁹⁴

In Liberia, there were widespread rapes, massacres, mutilation, torture, forced conscription of child combatants, and cannibalism.⁹⁵ Liberians committed human rights violations in the Sierra Leonean territory as well.⁹⁶ Danny Hoffman, a cultural anthropologist who studied rebels and government fighters who moved in and out of the Sierra Leone and Liberian wars, has

⁸⁸ Survivors' Rights International, *SRI Background Alert: Liberia*, at http://www.survivorsrightsinternational.org/ms_word_files/liberiabackgrounden.org (last visited Mar. 7, 2005).

⁸⁹ *SRI Country Briefing: Liberia*, *supra* note 10 at 10.

⁹⁰ *Id.*

⁹¹ *see* Human Rights Watch *available at* www.hrw.org; Refugees International, *available at* <http://www.refugeesinternational.org/cgi-bin/ri/index>; International Crisis Group *available at* <http://www.crisisweb.org/home/index.cfm>; Amnesty International *available at* www.amnesty.org.

⁹² The crime against humanity comprises grave offenses, such as murder, deportation, and torture as well as persecution based on political, racial, and religious grounds. These crimes transcend the national boundaries and they violate the law of all nations.

⁹³ Human Rights Watch, *World Report 2002, Sierra Leone (2002)*, at <http://hrw.org/wr2k2/africa10.html> (last visited Mar. 11, 2005) [hereinafter HRW: *World Report 2002, Sierra Leone*].

⁹⁴ *See generally*, Human Rights Watch, *How to Fight, How to Kill: Child Soldiers in Liberia* (2004) at <http://hrw.org/reports/2004/liberia0204/>, (last visited Apr. 10, 2005); Human Rights Watch, *Sierra Leone: Getting Away with Murder, Mutilation, and Rape* (1999), at <http://www.hrw.org/reports/1999/sierra/> (last visited Apr. 10, 2005).

⁹⁵ Corinne Dufka, *Liberia: Do Not Forget the Crimes*, INT'L HERALD TRIB., Feb 6, 2004, at <http://hrw.org/english/docs/2004/02/06/liberi7280.htm>.

⁹⁶ *See, e.g.*, Human Rights Watch, *Back to the Brink*, *supra* note 76.

explained the phenomenon of atrocities against civilians as a military tactic that employed the following reasoning: “When the international community responds to African crises, the more atrocious the conflict, the greater the level of aid.”⁹⁷ Again, this wartime economy profited rebels and rebel leaders more than the legitimate state economic system.⁹⁸

In the Liberian context, some have noted the religious and cultic aspects of certain killings.⁹⁹ Pham reports that all sides during the conflict in Liberia employed the power of traditional beliefs and symbols in an attempt to reinforce the morale of supporters and to encourage fear in opponents.¹⁰⁰ During the first civil war, Charles Taylor cultivated the support of the indigenous religious cults of Liberia.¹⁰¹ After the first civil war, reports surfaced of ritual cannibalism; many Monroviaans believe that even Charles Taylor participated in the human sacrifices.¹⁰²

⁹⁷ See generally, Hoffman, *supra* note 80, at 211-226. Hoffman explains that the Kamajor Militia, Sierra Leonean government fighters employed to contain the rebels during the Sierra Leonean civil war, became increasingly disillusioned with the DDR (disarmament, demobilization, and reintegration) campaign at the end of the Sierra Leone war because RUF fighters were rewarded with incentive packages, job training, and reintegration benefits, while the kamajors were not rewarded for their work in defense of the established order. *Id.* The result was that the Sierra Leonean Kamajors and Liberian dissidents formed the Liberian rebel movement LURD that led the attacks in the second Liberian civil war. *Id.* Hoffman sees the tactics used by LURD as much more deadly and civilian targeted than the attacks used by the same kamajor fighters in Sierra Leone, which for him was an indication that being a rebel has its pay off. *Id.*

⁹⁸ See LEONARD & STRAUS, *supra* note 4, at 68-70.

⁹⁹ PHAM, *supra* note 1, at 64-7. Several scholars have devoted attention to ancient religious societies in Liberian culture. See e.g., ELLIS, *supra* note 3, at 220-280 (connecting war, power, and the spiritual order). The central government of Liberia has never been able to assert its control over the Poro and the Sande societies, that play the role in transmission of traditional lore and initiation of indigenous Liberians. *Id.* These religious cults were popular before the creation of the state and during the Americo-Liberian rule. Today, even practicing Christians are initiated into these societies. During his rule, President Barclay attempted to eradicate this aspect of Liberian society by jailing certain ringleaders. Members of these societies have killed and consumed individuals, raided towns, and brought human flesh to market for sale. In 1952 President Tubman passed a law creating a post of secretary of the interior charged with overseeing matters pertaining to these indigenous societies. Yet President Tolbert, Tubman’s successor, President Doe and President Taylor were all initiated into these cults. PHAM, *supra* note 1, at 64-7.

¹⁰⁰ *Id.* at 66.

¹⁰¹ *Id.* at 63-67

¹⁰² *Id.* at 67.

In Sierra Leone the war officially ended when the RUF signed a peace agreement with the Government of Sierra Leone on July 7, 1999, to end the civil war;¹⁰³ but the war on the ground continued until 2000 when Foday Sankoh was captured and the RUF began to hand over their weapons.¹⁰⁴ In Liberia, Charles Taylor agreed to meet in the Ghanaian capital of Accra to discuss a peace plan, until he fled when an indictment for his arrest was issued during the peace talks.¹⁰⁵ Although the peace plan was implemented, Taylor is currently in exile in Nigeria.¹⁰⁶ Recent evidence indicates that Taylor is still receiving money from his supporters in Liberia, possibly to incite future rebellions.¹⁰⁷

II.

FAILED STATES AND THE CULTURE OF IMPUNITY

Liberia, as a failed state, is plagued by leaders who rule through a culture of impunity. Sierra Leone has a similar history, and it too has been characterized as a failed state.¹⁰⁸ The civil wars that plagued both of these countries were caused by a complete break-down in the elites' ability to assure the security of their countries. As a result, rebels and several governmental figures were able to carry out war on the ground, take control of key state resources, and commit grave human rights violations. Despite years of war, both Sierra Leone and Liberia were able to end "official" violence in their countries through careful negotiations of peace accords with these rebels, elite politicians and select members of civil society.

In this Part I make two points. First, the focus on negotiated peace agreements in Liberia illustrates the problems Liberia faces as a modern state. As Susan Ackerman has aptly stated: "[T]he options for law reform [in states created in the aftermath of violent internal conflicts] may be limited by the very process that permits the state to exist in the first place."¹⁰⁹ In other

¹⁰³ *Lome Accord*, Annex, *supra* note 11.

¹⁰⁴ PHAM, *supra* note 1, at 167.

¹⁰⁵ Kathy Ward, *Might v. Right: Charles Taylor and the Sierra Leone Special Court*, 11 No. 1 HUM. RTS. BRIEF 8 (2003)

¹⁰⁶ Agence France Press, *Charles Taylor: Exiled but Still Pulling Strings* (Oct. 21, 2003) at

<http://www.globalpolicy.org/security/issues/liberia/2003/1012strings.htm>.

¹⁰⁷ The Analyst, *Taylor's Money Trail Raises Eyebrows* (Dec. 17, 2004) at <http://allafrica.com/stories/200412170160.html>. (last visited Mar. 12, 2005).

¹⁰⁸ ROBERT I. ROTBERG, *The Failure and Collapse of Nation-States: Breakdown, Prevention, and Repair*, in WHEN STATES FAIL: CAUSES AND CONSEQUENCES 11 (Robert Rotberg ed., 2004) ([hereinafter ROTBERG, WHEN STATES FAIL]).

¹⁰⁹ Susan Rose-Ackerman, *Establishing the Rule of Law in WHEN STATES FAIL: CAUSES AND CONSEQUENCES*, 211 (2004)

words, law reform is limited by the negotiated peace. These peace agreements place the majority of their focus on neutralizing rebel groups, while seemingly turning a blind eye to elite sponsored violence, the real threat to peace and stability in Liberia. In this way, the negotiations have failed to account for the history that has brought Liberia where it is today.

Second, the agreements should reflect the lessons learned in Sierra Leone. Sierra Leone also initially privileged diplomacy over justice in its peace negotiations, but later took the important step to pursue human rights violators in court upon realizing that the Lome Peace Accord and other peace-keeping efforts had failed.¹¹⁰

While the agreements offend abstract notions of social justice, the drafters of these agreements claim that they are the only way to end armed conflict. Yet even with this tension, these agreements may contain a solution to Liberia's problems. Through careful redrafting, these agreements could recognize that legal mechanisms crafted to change the nature of elite power over the Liberian state can end the culture of impunity.

A. Colonial Origins of the Culture of Impunity and the Failed State Phenomenon

The categorization of Liberia as a failed state, evidenced by the complete lack of security provided by the state for its inhabitants and its concomitant submission to a culture of impunity, is directly related to its quasi-colonial origins and its neo-colonial governmental structure.¹¹¹

¹¹⁰ Ward, *supra* note 105, at 8.

¹¹¹ It is always difficult to provide a complete definition for a term that sums up so much. Recognizing the need to define key terminology, however, I rely on the work of Robert Rotberg, Director of the Kennedy School of Government's Program on Intrastate Conflict and President of the World Peace Foundation's characterization of a failed state. ROTBERG, *WHEN STATES FAIL*, *supra* note 108 at 5-9. First, and most importantly, Rotberg ranks states according to certain performance criteria. *Id.* at 2. Starting from the premise that nation-states exist to provide a decentralized method of delivering political goods to persons living within designated parameters, Rotberg provides the following performance criteria as a means to measure the ability of states to provide political goods: (1) human security (to prevent cross-border invasions and infiltrations, and any loss of territory; to eliminate domestic threats to or attacks upon the national order and social structure; to prevent crime and any related dangers to domestic human security; and to enable citizens to resolve their differences with the state and with their fellow inhabitants without recourse to arms or other forms of physical coercion); (2) codes and procedures that comprise an enforceable body of law, security of property and inviolable contracts, an effective judicial system, and a set of norms that legitimate and validate the values embodied in a local version of the rule of law; (3) essential freedoms (e.g. the right to participate

Therefore, we cannot examine the modern state of Liberia without looking more closely at the colonial form of rule in Liberia. Establishing the historical framework is crucial because even though a primary cause of state failure is destructive leadership that is, the avaricious policies of all of the Presidents of Liberia, the history of colonial rule in Liberia and the influence of the colonial period in Africa paved the way for this culture of impunity.¹¹²

Liberia is no different from the other failed states in Africa in the sense that its leaders made destructive decisions that paved the way to state failure. Other examples include President Mobutu Sese Seko's three-plus decades of kleptocratic rule that "sucked Zaire (now the Democratic Republic of Congo, or DRC) dry" until he was deposed in 1997.¹¹³ In Sierra Leone, President Siaka Stevens (1967-85) systematically plundered his tiny country and institutionalized disorder.¹¹⁴ President Mohamed Siad Barre (1969-91) did the same in Somalia.¹¹⁵ These rulers were personally greedy, but as predatory leaders they also licensed and sponsored the avarice of others, thus preordaining the destruction of their states. All of these countries, including Liberia, have shared the experience of colonial rule, and for this reason I will explain how colonial rule can directly cause a state to collapse. Liberia is a unique case of state failure, however, because of its origins and its particular claim of emblematic African democracy.

The culture of impunity that has contributed to state failure in Africa in general and in Liberia in particular grew directly out of the colonial institution of indirect rule. In short, the colonial institution of indirect rule gave birth to the notion that it is acceptable to rule over people through

in politics and compete for office); and (4) other goods such as medical and health care; schools and educational instruction; roads; communications networks; a money and banking system; a beneficent fiscal and institutional context within which citizens can pursue personal entrepreneurial goals; space for the flowering of civil society, etc. *Id.* at 2-5. Second, Rotberg emphasizes that political goods two through four only become possible when a reasonable measure of security is guaranteed. *Id.* at 3. Third, a failed state is one where violence consumes the state, where regimes prey on their constituents, where the state has no control of peripheral regions, where there is a state of lawlessness that develops in the state in reaction to the state's own criminal behavior, and where the state can only provide limited quantities of other essential political goods. *Id.* at 5-9. Fourth, a failed state does offer economic opportunity, but only for the ruling elites, hence the term "corruption." *Id.* at 8.

¹¹² *Id.* at 11

¹¹³ Robert I. Rotberg, *Failed States in a World of Terror*, 81 FOREIGN AFFAIRS 4, 127-40 (2002).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

illegitimate forms of control.¹¹⁶ This birth of illegitimacy during the colonial era has carried over into the post-colonial modern nation-state.

The most obvious and long-lasting failure of the colonial state has been its engendering of modern forms of inequality—a liberal government in form, but class division in fact. Although colonialism claimed to bring civilization to the “native savage,” the post-colonial theorist Aime Cesaire argues that colonialism as a system of rule was not a “question of eliminating the inequalities among men but of widening them and making them into a law.”¹¹⁷ This phenomenon is best illustrated through a description of the colonial mode of control:

Here, the land remained a communal—“customary”—possession. . . . The tribal leadership was either selectively reconstituted as the hierarchy of the local state or freshly imposed where none had existed as in “stateless societies.” Here political inequality went alongside civil inequality. Both were grounded in a legal dualism. Alongside received law was implemented a customary law that regulated non-market relations, in land, in personal (family), and in community affairs. For the subject population of natives, indirect rule signified a mediated—decentralized—despotism.¹¹⁸

The manipulation of tribal leadership and the imposition of a two-tiered system of law in African colonies meant that African societies were organized differently in rural areas from urban ones, thus producing a “Janus-faced” or bifurcated state.¹¹⁹ “It contained a duality: two forms of power under a single hegemonic authority” where urban power spoke the language of civil society and civil rights, rural power of community and culture.¹²⁰ Native chiefs and commissioners dispensed customary justice while white magistrates dispensed modern justice to non-natives.¹²¹ Yet the development of the political center at the expense of the periphery meant that there would be no way for the rural to hold accountable the leadership developing in the center.

¹¹⁶ When I use the term “illegitimate,” I simply mean through forms not necessarily approved of by the society where the ruling is taking place.

¹¹⁷ AIME CESAIRE, *DISCOURS SUR LE COLONIALISME* 37 (Joan Pinkham trans., Monthly Review Press, 2000) (1955).

¹¹⁸ MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: DECENTRALIZED DESPOTISM AND THE LEGACY OF LATE COLONIALISM* 17 (1996).

¹¹⁹ *Id.* at 18

¹²⁰ *Id.*

¹²¹ *Id.* at 109.

The independence of African countries was successful in the sense that African states finally were able to exercise their right of self-determination.¹²² Independence, however, failed in two important ways: in the manner that power was transferred to the indigenous rulers, and in the way that it left Africa largely underdeveloped.¹²³ Most post-colonial independent African states inherited from their colonial rulers, whatever their limitations, a ‘framework’ of internal and external security, efficient and disinterested administration, sound finance, a basic economic infrastructure of roads, railways and harbors, and at least the beginnings of modern social services in education, health, and community development.¹²⁴ Yet between colonization and independence there was no effort made to create a legitimate core of properly trained leaders who could then build on these colonial frameworks.

The colonial trend of developing frameworks of states instead of real states and investing in weak material structures characterized by mono-cultural and externally-oriented economies in Africa led to authoritarian rule that facilitated the monopolization of both political power and economic activities by the metropolitan bourgeoisie and the successor national bourgeoisie.¹²⁵ This occurred because the indirect rule system never attempted to make the center of colonial states accountable to territories outside of the capital.

An example of how African states were manipulated at the expense of the masses to the benefit of European powers and a small elite core may be useful. The colonial system was first and foremost an economic system whereby the metropole (the colonizing state) sought an economic advantage through its colonization of the periphery state.¹²⁶ African countries were industrialized during the colonial period to the extent that private foreign companies were integrated into African economic systems under a management system that operated to the complete benefit of the metropole.¹²⁷

First, private companies often forced unequal exchange upon African countries, in that there were major differences between the prices of African exports of raw materials and their importation of manufactured goods.¹²⁸ The

¹²² OLIVER & ATMORE, *supra* note 17, at 266.

¹²³ ROTBERG, *WHEN STATES FAIL: CAUSES AND CONSEQUENCES*, *supra* note 108, at 21; *See generally*, RODNEY, *supra* note 17 (discussing the decisiveness of the period of colonialism and its negative consequences for Africa, principally Africa’s underdevelopment through a loss of power).

¹²⁴ OLIVER & ATMORE, *supra* note 17, at 266.

¹²⁵ LEONARD & STRAUS, *supra* note 4, at 6 (arguing that the postcolonial state has less ability to coerce its subjects, leading to a heavier reliance on patronage).

¹²⁶ *Id.* at 10.

¹²⁷ RODNEY, *supra* note 17, at 149.

¹²⁸ *Id.* at 160.

colonial state could guarantee optimal conditions under which private companies could exploit African countries because of the sheer political and military supremacy of the colonizing force.¹²⁹ Recall, for example, the Firestone Agreements in Liberia.¹³⁰ Although Liberia was blessed with rubber as a natural resource, the United States completely controlled the industry.¹³¹ Historian Walter Rodney explains that this control was reinforced by a massive military presence of Americans in Liberia.¹³² Rodney further explains that the rubber production in Liberia symbolized the colonial phenomenon of “growth without development” where “there was growth of the so-called enclave import-export sector, but the only things which developed were dependency and underdevelopment.”¹³³

Second, by the end of the colonial period, these fragile state structures could no longer stand without the financial support of the colonial state.¹³⁴ These states had no ability to act independently because they were left politically, economically, and militarily weak. Often the African leaders who were chosen to succeed the colonial state were no more than puppets installed to ensure that the colonial metropole would continue to benefit even after the end of the colonial era.¹³⁵

During its the colonial period, Liberian elites implemented a system of indirect rule to facilitate easy communication between the capital city of Monrovia and the hinterland where most indigenous Liberian people lived.¹³⁶ In many ways this indirect rule system implemented under Liberia’s period of Black colonialism was no less patronizing and demeaning than European forms of colonialism.¹³⁷ The Liberian elites who first ruled Liberia were the colonizers, and their successors, Americo-Liberians and those of indigenous origin, ruled through the same colonial mechanisms as those employed by European colonizers.¹³⁸ Under Americo-Liberian domination, the hinterland Liberians acted as implementing agents for the Monrovia government.¹³⁹ Even after indigenous Liberians became more integrated into Liberian

¹²⁹ *Id.* at 164.

¹³⁰ PHAM, *supra* note 1, at 37-41.

¹³¹ *Id.* at 193.

¹³² *Id.* at 198.

¹³³ *Id.* at 234.

¹³⁴ *Id.* at 225.

¹³⁵ *Id.* at 225.

¹³⁶ *See Id.* at 31-32.

¹³⁷ *See generally*, MGBEOJI, *supra* note 26, at 5 (explaining that the young state of Liberia quickly adopted the politics of Americanized elitism by divorcing itself from its African roots and heritage and blindly copying foreign norms, structures, and prescriptions of government).

¹³⁸ *See* OSAGHAE, *supra* note 19 at 23.

¹³⁹ PHAM, *supra* note 1, at 59-60.

society, the countryside was never developed to their benefit. Rather, the hinterland was opened up solely for exploitation by foreign investors.¹⁴⁰ A system of patronage flourished where access to the country's resources was granted to a few, usually those connected to the heads of state or government officials by kinship lines or some other connection.¹⁴¹ Appointments and promotions in the civil services, the police forces, the judiciary, and the state corporations became subject to party patronage.¹⁴² Liberia fits well in this description of the colonial influence on African states.

The question that remains is how the culture of impunity grew from this history. I define the culture of impunity as the conscious decision by leaders who have inherited these weak state structures to turn their backs on the problems of the post-colonial state, and instead find ways to benefit from impoverishment and misery of the people over which they rule. The culture of impunity is the particular method through which rulers, particularly those in African states, use the fragile post-colonial state as a personal withdrawal account without ever reinvesting. In these states there is an absence of investigation, justice, or punishment. There is always the potential to commit crimes without having to face punishment, and implicit approval of the morality of these crimes. Thus, there is the idea that what is done without any punishment can be repeated without fear. Other characteristics of this culture include skimming from the state treasury, restricting participatory processes, and distancing of the ruling families from their subjects.¹⁴³

In other words, it does not matter to these leaders that their state has in fact failed.¹⁴⁴ Robert Rotberg, one of the leading scholars of failed states, explains that even when a state is weak, failing, failed or collapsed, ruling "families and cadres arrogate to themselves increasing portions of the available pie."¹⁴⁵ Rotberg suggests that "once greed has claimed the

¹⁴⁰ OSAGHAE, *supra* note 19, at 46.

¹⁴¹ *Id.* at 50-53.

¹⁴² *Id.*

¹⁴³ Rotberg, *supra*, note 113, at 127-40.

¹⁴⁴ The characteristics of a failed state include: a rise in criminal and political violence; a loss of control over their borders; rising ethnic, religious, linguistic, and cultural hostilities; civil war; the use of terror against their own citizens; weak institutions; a deteriorated or insufficient infrastructure; an inability to collect taxes without undue coercion; high levels of corruption; a collapsed health system; rising levels of infant mortality and declining life expectancy; the end of regular schooling opportunities; declining levels of GDP per capita; escalating inflation; a widespread preference for non-national currencies; and basic food shortages, leading to starvation. Rotberg, *supra*, note 113, at 127-40.

¹⁴⁵ *Id.*

behavioral goals of actors within failed states . . . peace is harder to achieve.”¹⁴⁶

The reality has often been that bad African leaders do not benefit financially from peace.¹⁴⁷ Instead, their *modus operandi* is violence and manipulation of state resources. On the political side of state failure, leaders and their associates often subvert prevailing democratic norms, coerce legislatures and bureaucracies into subservience, strangle judicial independence, block civil society, and gain control over security and defense forces.¹⁴⁸ Charles Taylor and other rebel groups did this in 1996, when they threatened the outbreak of another civil war unless the Liberian people elected Taylor president and his and other rebel groups to key governmental offices.¹⁴⁹ Only negotiation with Taylor could replace war.¹⁵⁰ Another element that contributes to complete instability in failed states is that the leaders usually patronize an ethnic group, clan, class, or kin while causing other groups to feel excluded or discriminated against.¹⁵¹ Though the colonial state laid the foundation for the illegitimate African state, bad leaders solidify this illegitimacy. Rotberg observes:

In the last phase of failure, the states' legitimacy crumbles. Lacking meaningful or realistic democratic means of redress, protesters take to the streets or mobilize along ethnic, religious, or linguistic lines. Because small arms and even more formidable weapons are cheap and easy to find, because historical grievances are readily remembered or manufactured, and because the spoils of separation, autonomy, or a total takeover are attractive, the potential for violent conflict grows exponentially as the states' power and legitimacy recede.¹⁵²

This culture of impunity as the primary symptom of state failure developed in Liberia despite the fact that it was by no means a resource-poor country. Liberia has always been a resource-rich country, and with the proper development of its industries the country had the huge potential to flourish.¹⁵³

¹⁴⁶ ROTBERG, *supra* note 108 at 28.

¹⁴⁷ ADEBAJO, *supra* note 16, at 47.

¹⁴⁸ ROTBERG, *supra* note 108 at 22-25.

¹⁴⁹ ADEKEYE ADEBAJO, *supra* note 16, at 44.

¹⁵⁰ ELLIS, *supra* note 3, at 106-107.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ LEONARD & STRAUS, *supra* note 4, at 70-71. Leonard and Straus explain that as an enclave economy, Liberia has access to rubber, iron ore mines, timber, gold and diamonds. *Id.* In fact, diamonds have recently become a lucrative commodity in the country. *Id.*

To its detriment, however, Liberian leaders such as Samuel Doe, Prince Johnson, and Charles Taylor have failed to remedy its weak institutional capacity, instead preferring to support bureaucracies that have no sense of professional responsibility and that exist only to carry out the order of the executive and to oppress the citizens.¹⁵⁴ It has not helped that the United States and the international community have dealt generously with successive Liberian governments even during times when it was clear that the government abused the aid funds received.¹⁵⁵

International economic organizations recognized the potential for state failure in African states. In the 1980s, these organizations promoted structural adjustment policies aimed at moving African economies away from state-run systems by placing businesses under private management and promoting deregulation.¹⁵⁶ Yet the International Monetary Fund (IMF) and World Bank quickly acknowledged that these purely market-oriented economic policies were not effective in achieving sustainable economic development.¹⁵⁷ This may be because mandated conditions were never enforced, causing the perpetuation of poor policies and the strengthening of elites.¹⁵⁸

In the 1990s, the international community began to focus on good governance and democratization, key features of the rule of law, as the method to achieve economic development and growth.¹⁵⁹ Organizations such as the World Bank began to define governance in ways that stressed the manner in which social resources are controlled to exercise political power and promote social and economic development.¹⁶⁰ Similarly, the IMF began to emphasize the importance of good governance as a condition to assistance.¹⁶¹ These organizations now focus their attention on the role played

¹⁵⁴ ROTBERG, *WHEN STATES FAIL*, *supra* note 108, at 7.

¹⁵⁵ PHAM, *supra* note 1, at 32-37, 87-91.

¹⁵⁶ Sadaharu Kataoka, *The Plight of African States and Good Governance* 1 (2003), at www.ciaonet.org/wps/kas09.

¹⁵⁷ *Id.*

¹⁵⁸ LEONARD & STRAUS, *supra* note 4, at 30.

¹⁵⁹ *Id.*

¹⁶⁰ World Bank Institute, *About Governance* (defining governance as the traditions and institutions by which authority in a country is exercised for the common good), at <http://www.worldbank.org/wbi/governance/about.html> (last checked Apr. 7, 2005).

¹⁶¹ International Monetary Fund, *Good Governance: The IMF's Role* (emphasizing aspects of good governance that are most closely related to surveillance over macroeconomic policies—namely, the transparency of government accounts, the effectiveness of public resource management, and the stability and transparency of the economic and regulatory environment for private sector activity), at

by governmental authorities in establishing a framework for economic activity and in deciding how the benefits of such activity are distributed.¹⁶² Even though a healthy amount of criticism exists about the goals of these organizations, their recent focus on governance has helped to reveal the essence of relations between those who govern and those who are governed in Africa.¹⁶³

Of course, the leaders themselves may be the real source of instability and violence in African states. The chain of logic that follows is simple: the social contract that binds citizens and central governmental structures is forfeited when citizens believe leaders are illegitimate. At this precise moment, citizens transfer their allegiances to communal warlords.¹⁶⁴ This short explanation merely shows the difficult past that Liberia must face.

Let us examine the reasons the elites in a country like Liberia must experience a (legal and judicial) shock in order to move out of this post-colonial phase. Aime Cesaire provides one perspective on how a post-colonial society should progress: "It is a new society we must create, with the help of all our brother slaves, a society rich with all the productive power of modern times, warm with all the fraternity of olden days."¹⁶⁵ One target for change must be promotion of the reform of elites and the conception of ruling and power in Africa. Ending the era of the old-guard politicians, promoting political leaders who are genuinely talented, and focusing on how to change the behavior of high ranking officials must form the heart of the project of democracy in African countries. In Cesaire's view, the dehumanizing effect of colonialism does not just create an animal out of the native but also out of the colonizer himself.¹⁶⁶ Cesaire brings home the point that "no one colonizes innocently, that no one colonizes with impunity either; that a nation which colonizes" calls for its own punishment.¹⁶⁷

<http://www.imf.org/external/pubs/ft/exrp/govern/govindex.htm> (last checked Apr. 7, 2005)

¹⁶² Kataoka, *supra* note 156, at 2.

¹⁶³ In recent years this model is beginning to be critiqued. *See, e.g.*, STEPHEN GOLUB, BEYOND RULE OF LAW ORTHODOXY: THE LEGAL EMPOWERMENT ALTERNATIVE, (Carnegie Endowment for International Peace, Rule of Law Series, Democracy and Rule of Law Project No. 41 2003) (advancing an alternative approach to the dominant rule of law paradigm: legal empowerment- the use of legal services and related development activities to increase disadvantaged populations' control over their lives).

¹⁶⁴ ROTBERG, *supra* note 108, at 6.

¹⁶⁵ CESAIRE, *supra* note 117, at 52.

¹⁶⁶ *Id.* at 41.

¹⁶⁷ *Id.* at 39

B. Sierra Leone and Liberia's Peace Agreements: Why the Peace Agreement Approach Furthers the Culture of Impunity

The above discussion leads to the conclusion that, to promote reform in countries like Liberia where there has been a history of state abuse, reform mechanisms should focus on the very actors that have historically implemented destructive state activities. Unfortunately, the two peace agreements that officially ended the wars in Sierra Leone and Liberia did not serve this goal. Instead, the agreements created an arrangement that will continue this culture of impunity. As Peter Pham so aptly notes, parceling out government agencies in the name of peace “tie[s] the authority of leaders of the various political groups directly to their ability to let their subalterns exploit profitable opportunities at the expense of the state.”¹⁶⁸ In this section, I show that although the peace agreements in both Sierra Leone and Liberia were nearly identical documents in the way that rebel groups were able to secure leadership over key governmental branches, Sierra Leone recognized this flaw and changed course upon failure of its agreement, ultimately implementing the SCSL. To contrast, and despite recent breaches of its agreement Liberia has not decided to change course.¹⁶⁹

1. Sierra Leone's Lome Accord: The First Path Taken

It is important to note that the Lome Accord is not the tool that has sustained peace in Sierra Leone.¹⁷⁰ Nevertheless, the lessons that the Sierra Leonean government learned through its negotiation process are considered here.

The peace agreement that officially ended Sierra Leone's eleven year civil war, the Lome Accord, signed in the Togolese capital Lome, was negotiated between the government of Sierra Leone and the RUF, Sierra Leone's most infamous rebel group.¹⁷¹ The Lome Accord provided for the following:

¹⁶⁸ PHAM, *supra* note 1, at 219.

¹⁶⁹ See, e.g., *Sixth Progress Report of the Secretary-General On the United Nations Mission in Liberia*, U.N. Doc. S/2005/177, 2 (citing attempts by some senior government officials to circumvent provisions of the TRC) [hereinafter S/2005/177]; The News, *Let's Maintain the Peace At All Costs* (Mar. 21, 2005) available at <http://allafrica.com/stories/200503211283.html>.

¹⁷⁰ Secretary-General Report S/2000/915, *supra* note 11, Annex at 15, *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*; Laura Hall & Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT'L L.J. 287, 288 (2003)

¹⁷¹ *Lome Accord*, *supra* note 11.

1. a cease-fire between the warring parties and disarmament of the RUF;¹⁷²
2. complete amnesty to all combatants;¹⁷³
3. transition of the RUF into a political party;¹⁷⁴
4. allocation of official control over Sierra Leone's diamond mines to Foday Sankoh by naming him chairman of strategic minerals, and
5. establishment of a Truth and Reconciliation Commission.¹⁷⁵

Significantly, the UN ultimately made a reservation that the amnesty could not cover international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.¹⁷⁶

The Lome Accord quickly unraveled.¹⁷⁷ It assured a lucrative deal for Foday Sankoh, the most infamous rebel leader of the RUF, under which he was given complete control over the mineral resources that he exploited throughout the war.¹⁷⁸ Yet instead of hastening peace, there were reports that Sankoh was again encouraging breaches of the agreement.¹⁷⁹ Reports surfaced that the RUF continued to participate in the killing of UN peacekeepers and the capturing of others even after the signing of the Lome Peace.¹⁸⁰ Some say that it was only the capture of Foday Sankoh and his subsequent death that saved the situation on the ground.¹⁸¹ Therefore, though the Lome Accord diplomatically sought to end the war by negotiating with rebel groups, this sequence of events suggests that it was not the negotiation that ended the hostilities, but rather the fortuitous death of the lead rebel.

¹⁷² *Id.* at art I

¹⁷³ *Id.* at art. IX

¹⁷⁴ *Id.* at art III

¹⁷⁵ *Id.* at art VI.

¹⁷⁶ SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW 380 (vol. 1 1999-2000).

¹⁷⁷ See, e.g., *First Report on the United Nations Mission in Sierra Leone (UNAMSIL)* at 2, U.N. Doc. S/1999/1223 (1999).

¹⁷⁸ PHAM, *supra* note 1, at 166.

¹⁷⁹ Robert P. Fowler, Statement by Ambassador to The UN Security Council On The Situation in Sierra Leone, *Department of Foreign Affairs and International Trade of Canada* (May 11, 2000), at <http://www.un.int/canada/html/s-11may2000fowler.htm>.

¹⁸⁰ Mark Malan, et al., *Peace with Justice? The Special Court and the Truth and Reconciliation Commission*, in PEACE KEEPING IN SIERRA LEONE: UNAMSIL HITS THE HOME STRAIGHT, available at <http://www.iss.co.za/pubs/monographs/No68/Chap11.html> (last visited Apr. 12, 2005)

¹⁸¹ PHAM, *supra* note 1, at 166

As part of the peace process, the government in Sierra Leone held public workshops and conferences with civil society engagement, helping to incorporate policies specifically addressing the needs of the Sierra Leonean people on their journey to reconciliation.¹⁸² From this process, the people of Sierra Leone implemented a Truth and Reconciliation Commission.¹⁸³ Though some commentators were skeptical about the TRC's ability to fulfill its mandate due to administrative, staffing and financial difficulties, the TRC has been successful.¹⁸⁴ Currently the government plans to implement the recommendations of the TRC report, disseminate the report, and set up a war victims' reparation fund.¹⁸⁵ Some have commended the TRC commissioners for their creation of a child-friendly version of the report, noting that this is the first time in the world that a child-friendly version of a Truth and Reconciliation Report has been produced.¹⁸⁶

Finally, the Sierra Leonean government went one step further than the Lome Accord and the TRC. Upon realizing that the Agreement did not go far enough to remedy elite violations, Sierra Leone entered into an agreement with the UN to form the SCSL, with the special mandate to try those most responsible for the violations during Sierra Leone's war.¹⁸⁷ Sierra Leone's choice to include justice in its peace process is discussed later in this part.

2. Liberia's Path to Peace?: The Comprehensive Peace Agreement

As it stands, the CPA for Liberia articulates the structure and scope for a transition government to prepare Liberia for democratic elections in

¹⁸² International Center for Transitional Justice, *Statement by International Center for Transitional Justice*, at <http://www.un-ngls.org/cso/cso3/security2.html> (June 22, 2004)[hereinafter ICTJ, *Statement*].

¹⁸³ Marian Samu, *Truth and Reconciliation Commission Presents Report, The Republic of Sierra Leone State House Online*, at <http://www.statehouse-sl.org/trc-fin-rep-oct5.html> (last visited Mar. 7, 2005).

¹⁸⁴ Malan et al., *supra* note 180; International Crisis Group (ICG), *Sierra Leone's Truth and Reconciliation Commission: A Fresh Start?*, at <http://www.crisisgroup.org/home/index.cfm?id=1801&l=1> (Africa Briefing; 2002) (last visited Apr. 11, 2005); Pricilla Hayner, "The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year" 1, 6, *The International Center for Transitional Justice (2004) at* http://www.ictj.org/downloads/SL_TRC_Case_Study_designed.pdf. (last visited Mar. 21, 2005)

¹⁸⁵ Samu, *supra* note 183.

¹⁸⁶ *See Id.* (paraphrasing the UNICEF Regional Director for West and Central Africa, Dr. Rima Salah).

¹⁸⁷ Secretary General Report S/2000/915, *supra* note 11 at 1.

2005.¹⁸⁸ The National Transition Government of Liberia (NTGL) led by Chairman Gyude Bryant, a respected Liberian businessman, is scheduled to operate for two years from October 14, 2003 to October 25, 2005, at which time elections will be held for the next Liberian President.¹⁸⁹ The mandate of the NTGL will not expire until January 2006, when the next elected government of Liberia will be inaugurated.¹⁹⁰

The ten most important provisions of the agreement are:

- (1) the call for a total and permanent end to hostilities between the Government of Liberia, MODEL and LURD;¹⁹¹
- (2) establishing ceasefire monitoring and ensuring the security of senior political and military leaders;¹⁹²
- (3) United Nations Chapter VII International Stabilization Force to support the implementation of the Agreement;¹⁹³
- (4) United States support for security sector restructuring;¹⁹⁴
- (5) establishment of a Truth and Reconciliation Commission;¹⁹⁵
- (6) establishment of a governance reform commission to review the existing program for the Promotion of Good Governance in Liberia;¹⁹⁶
- (7) authorization for LURD and MODEL to transform into political parties;¹⁹⁷
- (8) provision of twenty-four of the seventy-six seats of the National Transitional Legislative Assembly to members of LURD and MODEL;¹⁹⁸
- (9) allocation of key ministries to warring parties;¹⁹⁹ and

¹⁸⁸ National Democratic Institute for International Affairs, *Liberia: Civil Society's Role in the Political Transition* at 5 (2004) at http://www.accessdemocracy.org/library/1710_lr_civilsociety_010104.pdf (last visited Apr. 11, 2005) [hereinafter, NDI, *Civil Society's Role*].

¹⁸⁹ International Crisis Group, *Rebuilding Liberia: Prospects and Perils* (Africa Report No. 75. 2004), available at <http://www.crisisweb.org/home/index.cfm?l=2&id=1170> (last visited Mar. 21, 2005)[hereinafter ICG, *Rebuilding Liberia*]

¹⁹⁰ CPA, art. XXI (2), *supra* note 9.

¹⁹¹ *Id.* at art. II

¹⁹² *Id.* at art. III (2) (e)

¹⁹³ *Id.* at art. IV (7)

¹⁹⁴ *Id.* at art. VII (1) (b)

¹⁹⁵ *Id.* at art. XIII.

¹⁹⁶ *Id.* at art. XVI

¹⁹⁷ *Id.* at art. XXI(6)

¹⁹⁸ *Id.* at art. XXIV(3)(b), (4). The NTGL has three branches: the NTLA, the Executive and the Judiciary.

¹⁹⁹ *Id.* at Annex 4 (Allocation of Cabinet Positions, Public Corporations and Autonomous Agencies/ Commission Under the NTGL)

(10) consideration of recommendations for general amnesty to all persons and parties engaged or involved in military activities during the Liberian conflict.²⁰⁰

In form and structure, the CPA resembles Sierra Leone's Lome Accord. However, several aspects of the road to the CPA indicate that Liberia's future might not resemble that of Sierra Leone's. The NTGL faces particular challenges due to the conflicts arising from the composition of its personnel and its substantive goals as outlined by the CPA.²⁰¹ Though the agreement strives to strike a balance between the preexisting government in Liberia, the two major rebel factions, LURD and MODEL, and "civil society," it is difficult to see how future violence will be averted given the division of political power and the partition of control over Liberia's resources as outlined by the Agreement.

In general, this agreement strikes only at the manifestations of Liberia's general sickness: the culture of impunity. Because the agreement does not strike at the heart of the cause of insecurity and violence in Liberia—irresponsible elite control—there is no hope that this agreement will render any long-lasting solution for Liberia. More specifically, these negotiations are doomed to fail for at least four reasons. First, the CPA is just one in a line of similar peace agreements in Liberia's history that have failed,²⁰² and there is no indication that this agreement, especially with so much control designated to rebels, will be any different. Second, the mere fact of rebel exercise of control over key sectors and resources is an indication that this agreement is doomed.²⁰³ Remember Sierra Leone.²⁰⁴ Third, the possibility of a general amnesty for those who participated in the Liberian wars is the most serious flaw.²⁰⁵ On the one hand, the amnesty could be a diplomatic concession to rebels for the sake of maintaining a fragile peace.²⁰⁶ On the other hand, there is no way for the fragile peace to be maintained when the real perpetrators are allowed to exist in society without confronting their

²⁰⁰ *Id.* at art. XXXIV

²⁰¹ S/2005/177, *supra* note 169.

²⁰² Charles Abiodun Alao, *Commentary on the Accords*, in *THE LIBERIAN PEACE PROCESS 1990-1996* (Conciliation Resources, Accord Programme, Jeremy Armon & Andy Carl eds., 1996), at <http://www.c-r.org/accord/lib/accord1/alao.shtml>. (Last visited Feb. 9, 2005).

²⁰³ International Crisis Group (ICG), *Liberia: Security Challenges*, 3-4 (Africa Report No. 71. (2003), available at <http://www.humanitarianinfo.org/liberia/services/security/reports/docs/ICG-report%20on%20Liberia.pdf> (last visited Apr. 11, 2005) [hereinafter ICG, *Security Challenges*]

²⁰⁴ See Annex to Secretary General Report S/2000/915, *supra* note 11, at 15

²⁰⁵ CPA, art XXXIV, *supra* note 9.

²⁰⁶ U.S. Policy Toward Liberia, *supra* note 7, at 37. (statement of Nohn Kidau).

wrongs in some acceptable way. Finally, there seems to be no real participation of ordinary Liberians in the negotiation of the peace agreement under which they are to live.

a. Liberia's History of Failed Peace Agreements

Signed on August 18, 2003 in the capital of the West African Republic of Ghana, the CPA comes on the heels of several peace agreements that have been negotiated in Liberia's recent history.²⁰⁷ Between 1990 and 1997, there were thirteen major ECOWAS, the west-African economic and peace keeping organization, sponsored agreements.²⁰⁸ With the benefit of hindsight, it is clear that these initiatives have repeatedly and tragically failed.²⁰⁹ The reasons for failure are many. Some commentators have suggested that these agreements failed because they did not meet the needs and interests of Liberia's warring factions and their leaders, much less those of civilian populations.²¹⁰ Others have presented views suggesting that Nigeria's role in the Economic Community Monitoring Group (ECOMOG) – the peacekeeping arm of ECOWAS – contributed to the failure of these agreements and prolonged the civil war because it ceased to be “an impartial peacekeeping force and had turned into just another combatant.”²¹¹ Finally, some have suggested that Taylor's determination, with the backing of the strongest rebel group, to capture the capital city of Monrovia and ultimately the presidency could not be averted by any peace process.²¹² Although a combination of all these factors contribute to continual failure of Liberia's peace process, this last view is of fundamental significance. Again, securing the presidency does not only mean Taylor's ascendancy to Head of State, but also seizing territory means securing commercial alliances and creating economic opportunities.²¹³

The first set of agreements, including the Banjul peace plan and the Yamoussoukro agreement, were largely crafted by Liberia's civil society groups.²¹⁴ Their mandate was to establish a peacekeeping force, ECOMOG, which would supervise a cease-fire and establish an interim government. During this first round of negotiations, none of the faction leaders were allowed to join the interim government.²¹⁵ The Yamoussoukro agreement

²⁰⁷ See generally ADEBAJO, *supra* note 16 at 43-78 (describing and considering the durability of the several Liberian peace agreements that emerged since 1997).

²⁰⁸ *Id.* at 66.

²⁰⁹ Alao, *supra* note 202.

²¹⁰ *Id.*

²¹¹ PHAM, *supra* note 1, at 137-138.

²¹² MGBEOJI, *supra* note 26, at 20-21.

²¹³ PHAM, *supra* note 1, at 121.

²¹⁴ *Id.* at 51-52.

²¹⁵ *Id.* at 52.

differed from the Banjul peace in that it attempted to balance the Nigerian dominance, with more francophone support through Senegal in the peace negotiation process.²¹⁶

These first negotiations failed for many reasons, but primarily because there was absolutely no negotiation with the factions involved.²¹⁷ At this time Taylor and his forces grew stronger, and he refused to support the efforts of ECOMOG at peacekeeping if he could not be at the negotiating table.²¹⁸ Furthermore, these early accords gave too central a role to the Nigerian-run ECOMOG. The factions would not agree to a peace because they believed that ECOMOG did not act impartially during the peace process.²¹⁹ At this time ECOMOG did not have the support of other West African countries because of its Nigerian dominance nor did it have the support of Liberian rebel groups.

In stark contrast to the first round of agreements, the July 1993 Cotonou Accord²²⁰ and all of the peace agreements since have attempted to move away from this ECOWAS-dominated diplomacy by ringing in the era of power-sharing agreements.²²¹ ECOWAS leaders and the UN employed the simple reasoning that by accommodating the aspirations of the armed factions, peace would be achieved at a faster pace.

This plan, like the others, quickly unraveled because an increase in the number of rebel groups made it increasingly difficult to satisfy all rebel desires.²²² Because of the sheer number of rebel groups at the negotiating table, it became more and more difficult to coordinate a policy for ending war in Liberia, especially when the rebel groups benefited economically by taking control over key resources in Liberia-- resources that were often in concentrated geographical areas that were easy to pirate.²²³ Seen in this manner, the Cotonou Accord ultimately failed because the power-sharing regime did not recognize that the factions had vested interests in maintaining instability rather than moving towards peace.²²⁴

Even after the failure of the Cotonou Accord, in 1994 ECOWAS still believed that the only way to bring peace to Liberia was to include warlords

²¹⁶ *Id.* at 54.

²¹⁷ Alao, *supra* note 202.

²¹⁸ ADEBAJO, *supra* note 16, at 53.

²¹⁹ MGBEOJI, *supra* note 26, at 24.

²²⁰ *Id.* at 56-58.

²²¹ Alao, *supra* note 202.

²²² *Id.*

²²³ *Id.*

²²⁴ ADEBAJO, *supra* note 16, at 58.

in the government.²²⁵ There was hope that the Abuja Accords would not present the same failures as the earlier accords for three reasons. First, Abuja attempted to improve on Cotonou by first assuming that inclusion of the factions was the first step in direction towards peace and that the next logical step would be to assure a well-run disarmament program.²²⁶ Second, it was assumed that political power could be exchanged for military peace. Since Taylor's faction suddenly befriended ECOMOG, it was thought that the peace process would no longer be threatened.²²⁷ Finally, optimism came from assuming that because the faction fighters had become weary of fighting, evidenced through voluntary disarmament, there would now be peace.²²⁸

The future of the Abuja Accords looked bleak, for several reasons, soon after they went into effect. Liberia's security situation remained weak due to the mobilization of armed groups in support of rival warlords,²²⁹ following ECOMOG's departure, Liberia's borders were weakened,²³⁰ Taylor's opponents viewed the state apparatus as a mere extension of his own personal power;²³¹ and Taylor himself still had the mentality of a warlord.²³² The Abuja Accords were ultimately misguided because of their indulgent characteristics. A major flaw has been the increasing willingness to cede power to the factions in the executive arm of the transitional government without demanding accountability for continual breaches of the agreements themselves. These same flaws are obvious in Liberia's latest attempt at peace.

b. Members of the NTGL: Rebels Turned Politicians

The allocation of seats in the NTGL shows that peace negotiators have capitulated to the rebels in a more frightening manner than in Sierra Leone.²³³ The outgoing government, designated in the CPA as one of the three warring parties, currently has five of its ministers in key government

²²⁵ *Id.* at 60.

²²⁶ *Id.* at 59.

²²⁷ *Id.* at 61.

²²⁸ *Id.*

²²⁹ *Id.* at 68.

²³⁰ *Id.* at 69.

²³¹ *Id.* at 70.

²³² *Id.* at 71.

²³³ One might argue that Charles Taylor initiated this pattern of negotiation with warlords. Even after the first civil war when the international community was in negotiations with Charles Taylor over the Abuja agreement, Taylor contended that only the inclusion of warlords who held effective control of the country would guarantee that any interim regime might be able to exercise leadership. See PHAM, *supra* note 1, at 126. Pham argues that the acceptance of this rationale stood in stark contrast to a previous policy of bolstering the civilian political leaders. *Id.*

positions, while the two most notorious rebel groups combined hold seven key positions in the transitional government: agriculture; commerce and industry; finance; foreign affairs; justice; labor; and land, mines and energy.²³⁴ Other political parties and civil society organizations hold six seats.²³⁵ Yet the main concern of former government members of the NTGL and members of LURD and MODEL seems to be securing jobs for themselves during the 2005 elections instead of forging a sustainable economic, political, and social future of Liberia.²³⁶ The Special Representative of the UN Secretary General (SRSG) in Liberia, Jacques Paul Klein, has reported that Chairman Bryant often acts at the whims of the rebel politicians, making it difficult for him to address human rights abuses and institutional reform.²³⁷

The provision of seats to rebel leaders seems to be a complete windfall for human rights violators. Law professor Ikechi Mgbeoji condemned the transformation of violent rebel groups into political parties when the first Liberian civil war ended.²³⁸ First, he argued, the global community too easily accepts the idea that mere elections are the cornerstone to stability.²³⁹ Second, Mgbeoji argues that the metamorphosis of violent rebel groups into political parties at the insistence of the international community promotes the culture of coercion and corruption.²⁴⁰ More specifically, this amounts to society's acceptance of noncompliance with the law, glorification of the use of arms to gain power, and failure to hold rebels and government leaders accountable for their criminal conduct and human rights violations against the masses.

Additionally, and possibly more harmfully, this attention to the desires of rebel groups serves as a decoy that diverts attention from the root cause of insecurity in the first place — bad leadership. When the international community continues to focus on rebels and factions, they miss the opportunity to meaningfully alter post-colonial African leadership.

c. *General Amnesty: A Curse Unto Itself*

The possibility of general amnesty²⁴¹ is one of the most serious flaws of the CPA. Besides the fact that granting a general amnesty is one way of encouraging rebels to participate in the peace process, there are several

²³⁴ CPA, Annex 4, *supra* note 9.

²³⁵ *Id.*

²³⁶ ICG, *Rebuilding Liberia*, *supra* note 189, at 13.

²³⁷ *Id.*

²³⁸ MGBEOJI, *supra* note 26, at 26.

²³⁹ *Id.*

²⁴⁰ *Id.* at 26, 37.

²⁴¹ CPA, art. XXXIV, *supra* note 9.

theoretical and practical problems with this form of concession.²⁴² The possibility of a general amnesty in the Liberian context is problematic legally, politically, and morally. First, the state of the legality of amnesty in the Liberian context is unclear under international law.²⁴³ Given that the determination of whether to grant amnesty involves an extremely context-sensitive legal decision making-process, there has been no real determination by policy makers in Liberia that a blanket amnesty was the most appropriate option for this context.

Although it is not definitive that international law prohibits general amnesty for crimes such as genocide, crimes against humanity, war crimes and other serious violations of international law, it is clear that the UN has consistently maintained the position that amnesty cannot be granted for such acts.²⁴⁴ Additionally, Human Rights Watch has spoken out against this type of provision, and states that impunity for crimes under international law must end and that there can be no amnesty for such crimes.²⁴⁵ Second, amnesty alone is a dangerous formula for peace because of the messages it sends to elites, to rebels and to society that crimes can be committed and civil wars staged with no consequences for any of the parties involved. Finally, the blind granting of amnesty does not consider the moral hazards of dismissing the role of punishment of the main perpetrators. A lesson should have been learned from the Sierra Leone case. There the UN ultimately rejected the idea that a blanket amnesty could be granted for violations of international law including war crimes and crimes against humanity.²⁴⁶

d. Participation of Ordinary Liberians

While commentators on the CPA highlight the complex nature of the new role that the agreement affords for Liberian civil society organizations, there is no indication that the voices of ordinary Liberians were present in the

²⁴² Karen Gallagher, *No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone*, 23 T. JEFFERSON L. REV. 149 (2000); Human Rights Watch, *The Sierra Leone Amnesty under International Law* (1999), at <http://www.hrw.org/campaigns/sierra/int-law2.htm> (last visited Apr. 10, 2005)

²⁴³ In some cases the granting of amnesty conforms to international law while in other cases a granting of amnesty would be a clear violation of international law. See Gallagher, *supra* note 242, at 166-174. It is not absolute whether states have a duty to prosecute certain violations. *Id.* In international law, the answer lies in a case by case determination. *Id.*

²⁴⁴ Secretary General Report S/2000/915, *supra* note 11, at 5.

²⁴⁵ Human Rights Watch, *The Sierra Leone Amnesty under International Law*, *supra* note 242.

²⁴⁶ MURPHY, *supra* note 176, at 380.

negotiation of the peace agreement or in its current interpretation.²⁴⁷ Instead, the CPA seems to have been born from the negotiations between ECOWAS, the President of Ghana, and a Nigerian mediator.²⁴⁸ Observers of the peace process have encouraged what remains of Liberian civil society to improve citizens' understanding of the Accra Agreement as a means of engaging the participation of all Liberians in the transition process.²⁴⁹ Similarly, the International Center for Transitional Justice has argued that "a rule of law strategy must be rooted in local conditions, and developed with local civil society."²⁵⁰ Furthermore, outreach should move beyond the capital so that members of the larger Liberian community can begin to have faith in the new systems put in place.²⁵¹ There is no indication, however, that organizations have attempted to move beyond Monrovia to teach Liberians about the peace agreement.

Even the participation of Liberia's civil society has been criticized. On the one hand, civil society's new place in both the legislature and the executive branches takes civil society beyond their traditional roles as advocates, educators and watchdogs.²⁵² In this way, Liberian civic leaders can promote democracy in government from within. On the other hand, those civil society organizations that wish to maintain their independence and traditional watchdog role are weary of an insider civil society that will be confronted by the realities and temptations of political life.²⁵³

e. Predicting Failure: Sierra Leone Has It Right

Several factors indicate that a negotiated peace with no mechanism for accountability will fail and that Liberia too should be urged to pursue a Special Court like the one created in Sierra Leone. I address this in detail in Part III. First, now that the peace process is well under way, there have been accusations that the transitional government has let down the Liberian people

²⁴⁷ NDI, *Civil Society's Role*, *supra* note 188, at 5-6. This summary highlights the tension that the Accra Agreement represents where civil society has a new role as member of the NTGL. *Id.* at 8. In some ways, civic leaders have abdicated their traditional role as watchdogs of the politicians because now civic members are political insiders. *Id.* Although civil society can take on many meanings, traditionally civil society is non-political, non-governmental, broad based and representative of the masses. *Id.* at 11.

²⁴⁸ CPA, *supra* note 9.

²⁴⁹ NDI, *Civil Society's Role*, *supra* note 188, at 14

²⁵⁰ ICTJ, *Statement*, *supra* note 182.

²⁵¹ *Id.*

²⁵² NDI, *Civil Society's Role*, *supra* note 188, at 8.

²⁵³ *Id.* at 11.

through its inability to ensure their security.²⁵⁴ Continuous reports detail lack of every-day control over ex-combatants and Liberian citizens in general.²⁵⁵ Even with a negotiated settlement, ex-combatants have expressed unwillingness to disarm without the promise of jobs.²⁵⁶ Therefore, the reintegration portion of the Disarmament, Reintegration, and Rehabilitation Program is increasingly a worry given the country's 85% unemployment rate.²⁵⁷ In Sierra Leone, the disarmament process, with the help of the British, took place at a much faster pace.²⁵⁸ These incidents highlight that negotiated settlements do not always secure peace for a fragile, failed state. This occurs because the agreements are not addressing the root issues.

Some will observe that the CPA will establish a TRC to provide a forum to address issues of impunity, as well as an opportunity for victims and perpetrators of human rights violations to share their experiences; however, this will not extend far enough to develop a clear picture of the past and to facilitate genuine healing and reconciliation.

III.

THE JUSTICE APPROACH TO ENDING THE CULTURE OF IMPUNITY

The negotiators of peace in Liberia chose to privilege diplomacy over justice in their attempt to move Liberia out of its civil war period and into a period of stability. In making this choice, they have also rejected the use of justice to achieve stability. This choice partly stems from fear that punishment will only lead to more violence and instability.²⁵⁹ The arguments against using the least punitive mechanisms possible (like negotiated peace

²⁵⁴ Abdullah Dukuly, *Development-Liberia: Rise In Crime Ignites Mob Justice*, 1 Global Information Network. (Apr 16, 2004), available at <http://proquest.umi.com/pqdweb?did=618656161&sid=1&Fmt=3&clientId=1566&RQT=309&VName=PQD>. (last visited Apr. 12, 2005).

²⁵⁵ IRINnews.org, *Liberia: LURD Drops Threat to Hold Up Disarmament* (Dec. 3 2003), available at <http://www.irinnews.org/report.asp.l> (last visited Apr. 10, 2005); The Analyst, *Chaos at Freeport Again* (Sept 30, 2004), available at <http://allafrica.com/stories/printable/2004090300189.html> (last visited Apr. 10, 2005); The Inquirer, *We Denounce Attack On UNMIL Soldiers* (Mar. 24, 2005), available at <http://allafrica.com/stories/200503250419.html> (last visited Apr. 10, 2005)

²⁵⁶ ICG, *Rebuilding Liberia*, supra note 189, at 7.

²⁵⁷ United Nations News Service, *Liberia: UN Run-Disarmament Tops Expectations but Aid Needed to Help Ex-Fighters*, UN NEWS SERVICE, (Oct. 20, 2004) available at <http://www.reliefweb.int/rw/rwb.nsf/0/6df36ebda9ce774585256f330067ad1f?OpenDocument> (last visited Apr. 12, 2005).

²⁵⁸ O'Connell, supra note 77, at 207, 216.

²⁵⁹ U.S. Policy Toward Liberia, supra note 7, at 37 (statement Nohn Kidau).

agreements similar to Liberia's) to address war-torn societies are abundant and forceful; however, these interventions do not fully consider Liberia's historical situation. By targeting the masses or the rebel groups as the site of intervention during transitional periods, one misses the point that the elites need the intervention, not the masses. Addressing the needs of victims and focusing too heavily on disarming members of factions ignores the bigger problem, one that Sierra Leone has recognized.²⁶⁰

In this regard, a Special Court for Liberia would be the best option for Liberia for at least three reasons. First, Sierra Leone's approach to transitional justice, with its creation of a SCSL, attests to the importance of using justice to assure accountability. In the years following Sierra Leone's civil war and the establishment of the mixed tribunal, there are signs that the society is beginning to institutionalize the culture of human rights, and the political scene has moved away from impunity.²⁶¹ Second, there is modest empirical evidence that prosecution of elite actors can play a role in changing the calculation of political actors in transitional states such as Liberia. This could have a tremendous effect on future politics in Liberia.²⁶² Third, a hybrid court for Liberia would allow it to rebuild its own justice system and to address crimes that were specifically Liberian in nature, thus moving the country forward. Finally, given the fact that there have been prosecutions of war criminals in similar situations in other countries, there seems to be a

²⁶⁰ The Special Court for Sierra Leone website, *supra* note 11.

²⁶¹ See, e.g., Henry Mbawa, *Can the Special Court Deliver on its Promise to End the Culture of Impunity in Sierra Leone*, CAMPAIGN FOR GOOD GOVERNANCE (Mar. 30, 2005), available at <http://allafrica.com/stories/200504060400.html>. (last visited Apr. 10, 2005); John Mannah, *Stop the Politics of Personal Destruction*, CONCORD TIMES (Apr. 6 2005), available at <http://allafrica.com/stories/200504060306.html> (noting that Vice President Solomon Berewa of Sierra Leone has the qualities that any democratic nation should desire in a vice president—credibility, morality, integrity, and dignity) (last visited Apr. 10, 2005).

²⁶² This article makes no attempt to address the legal remedy that should be imposed after prosecution is complete or to address the type of remedy that the State of Liberia should request in prosecuting elites that have been responsible for state failure. Susan Rose-Ackerman has dealt with the issues that arise in assigning responsibility and imposing punishments across societies. See Rose-Ackerman, *supra* note 109, at 183. Although Rose-Ackerman makes no claim to be in support of holding prior rulers and public officials to account for past actions, she does suggest an interesting remedy for allegations of corruption. She argues that prosecutions for corruption could be part of an effort to locate and repatriate corrupt proceeds deposited abroad. *Id.* at 188. In my opinion, the repayment of stolen funds would be an apt remedy for crimes that fall under the culture of impunity that I have described here. Rose-Ackerman further argues that “a criminal law system based on fines and restitution would take on many of the characteristics of the civil liability system.” *Id.* Punishments other than imprisonment are a very viable option for actors like Charles Taylor.

moral call for justice in the Liberian context as well.²⁶³ Furthermore, the United States holds a unique relationship with Liberia that will allow it to facilitate this process.²⁶⁴

I first address the example of Sierra Leone and the promise that it represents for the possibility of a court in Liberia. Next, I briefly survey the challenges to the establishment of a Special Court for Liberia. These challenges relate to the model that should be used during transition periods to ensure peace and stability and the practical challenges to implementation and securing legitimacy. These critiques generally insist that the criminal law model as the primary manner to promote rule of law compliance is not useful. First, these critiques insist that to achieve peace and reconciliation in society, political carrots such as amnesty, truth and reconciliation commissions or traditional forms of dispute resolution should be used. Second, when it is suggested that more punitive mechanisms such as tribunals should be used, the response is often raised that there is no way to insure legitimacy through externally influenced trials and that the costs of punitive mechanisms such as trials are prohibitively expensive.

Instead of challenging the efficacy of less punitive mechanisms of transitional justice, I suggest that a Special Court for Liberia would create a hands-on approach to building the respect for a tradition of rule of law and justice in a country that purports to have such a tradition, but in reality it completely lacks such a tradition. The ultimate goal of a Special Court for Liberia would be to address the burgeoning culture of impunity that continues to damage the prospects for peace in Liberia.²⁶⁵ By focusing on the

²⁶³ Susan Tiefenbrun, *Peace with Justice*, 3 HOFSTRA L. & POL'Y SYMP. 1 (1999) (discussing the history and development of three war crimes tribunals: Nuremberg, ICTY, and ICTR); Fausto Pocar, *The Proliferation of International Criminal Courts and Tribunals*, 2 J. INT'L CRIM. JUST. 304 (2004) (discussing the establishment of the SCSL, the Special Panels for Serious Crimes for East Timor, and the Extraordinary Chambers in the Courts for Cambodia).

²⁶⁴ O'Connell, *supra* note 77, at 207.

²⁶⁵ This is a popular justification for the establishment of international, mixed tribunals, or national tribunals with international participation and supervision. For example, Fausto Pocar (Judge and Vice-President of the ICTY) argues that the ultimate goal of these international courts and tribunals is to prevent further violations and to achieve respect for the norms and principles of these distinct branches of international law. *See* Pocar, *supra* note 263 at 306. Pocar also addresses the critique that the proliferation of these courts will produce case law that is inconsistent. Pocar responds that concurring or divergent interpretations of international case law will make these areas of law develop more robustly. More importantly Pocar argues that the proliferation of international courts is "a necessity in the current situation of international relations, aimed at progressively strengthening the incipient international system of criminal jurisdiction." *Id.* at 307. The most important factor to Pocar is

perpetrators of the civil wars—those who planned and implemented the civil wars—a society can begin to increase the cost of this type of political culture, thus changing the long-term behavior of politicians. Implementing the Special Court for Liberia, the CPA would need to be revised. This type of structure would need to be conditioned upon the rejection of a blanket amnesty for war crimes and crimes against humanity as was done in Sierra Leone, requiring an amendment or modification of the CPA.

A. The Special Court for Sierra Leone: The New Path Forward

Upon the failure of the Lome Accord at the hands of persistent rebels and the desire to go further than the mandate of the TRC, the people of Sierra Leone, the Sierra Leonean government, and the UN combined efforts to create and to implement the SCSL.²⁶⁶ Though the primary players in the creation of the Special Court have been the government of Sierra Leone, the United States and the UN, the Special Court has been assisted by local civil society organizations that contribute to the court's outreach function.²⁶⁷ Some suggest that this strong support among both the Sierra Leonean people and in the UN for the court's establishment has been one of the main reasons for its perceived success amongst Sierra Leoneans.²⁶⁸

The SCSL is a unique mechanism for war crimes law enforcement.²⁶⁹ The SCSL was created as an agreement between the UN and Sierra Leone, with the specific mandate to bring to justice those “who bear the greatest responsibility” for serious violations of international humanitarian law and

that the tribunals meet the criteria of independence and impartiality and that they get support from the international community as a whole. *Id.* at 304.

²⁶⁶ For discussions on potential evidentiary and other legal issues that are beginning to present themselves to both the TRC and the SCSL *see generally* Daniel J. Macaluso, *Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lome Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone*, 27 *BROOK. J. INT'L L.* 347 (2001); Hall & Kazemi, *supra* note 170, at 287; Elizabeth M. Evenson, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court*, 104 *COLUM. L. REV.* 730 (2004); and MARIEKE WIERDA ET AL., *EXPLORING THE RELATIONSHIP BETWEEN THE SPECIAL COURT AND THE TRUTH AND RECONCILIATION COMMISSION OF SIERRA LEONE*, *The International Center for Transitional Justice* (2002) *available at* <http://www.ictj.org/downloads/TRCSpecialCourt.pdf>.

²⁶⁷ ICTJ, *Statement*, *supra* note 182.

²⁶⁸ U.N. Doc. S/2000/1055

²⁶⁹ Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 *EUR. J INT'L L.* 833 (2000). The SCSL is the first ad hoc criminal tribunal based upon an agreement between the UN and the government of a member state. The judges are to be appointed partly by the Government of Sierra Leone and partly by the UN. Further, the Court's jurisdiction embraces both international crimes and crimes of national character.

Sierra Leonean law, committed in the territory of Sierra Leone since November 30, 1996.²⁷⁰ The Court's main focus is to try those who held leadership and command positions, that is, those who planned and instigated attacks.²⁷¹ The government and civil society of Sierra Leone have concluded that lower level perpetrators of human rights violations and victims of these violations will have their opportunity for justice through Sierra Leone's Truth and Reconciliation Commission.²⁷²

The SCSL has indicted thirteen people for war crimes, including former Liberian president Charles Taylor²⁷³ and former Sierra Leone government minister Hinga Norman.²⁷⁴ The surviving indictees are being charged with war crimes, crimes against humanity, and serious violations of international humanitarian law.²⁷⁵

The Special Court is more flexible than a fully international court because the Court can apply both international law as well as Sierra Leonean law,²⁷⁶ allowing the Court to address crimes specific to the Sierra Leonean conflict. Yet the reach of the Special Court is limited to the national courts of Sierra Leone and does not extend to the courts of third states.²⁷⁷ Unlike Sierra Leone, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY) Tribunals were mandatory in nature because the UN determined under Chapter VII of the UN charter that the wars in those countries were a threat to international peace and security.²⁷⁸

²⁷⁰ Lansana Gberie, *Briefing: The Special Court of Sierra Leone*, AFR. AFF. 637, 641 (2003)

²⁷¹ Secretary General Report S/2000/915, *supra* note 11 at 6.

²⁷² WIERDA, ET AL., *supra* note 266 at 2.

²⁷³ The allegations against Taylor are that he financed, trained and gave logistical support to rebels, mainly the RUF, in Sierra Leone. See Jess Bravin, *Peace vs. Justice: A Prosecutor Vows No Deals for Thugs In Sierra Leone War; American's Zeal Complicates Diplomat's Ideas to Deal With Crisis in West Africa*, WALL ST J. (Jul. 28, 2003) at A1.

²⁷⁴ HRW, *World Report 2002: Sierra Leone*, *supra* note 93.

²⁷⁵ Special Court Sierra Leone, *supra* note 11.

²⁷⁶ Secretary General Report S/2000/915, *supra* note 11 at 3-5.

²⁷⁷ *Id.* at 3.

²⁷⁸ Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 501 (1996). Chapter VII authority allows the UN to take any measure to restore peace and stability. BASIC DOCUMENTS IN INTERNATIONAL LAW 11 (Ian Brownlie ed., 5th ed., 2002). For this reason, it is legally binding for UN member states to comply with the orders and requests of those Courts. *Id.* Ultimately, Chapter VII powers can be used for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the court. *Id.*

The Court has issued a number of precedent-setting decisions on international law, including a ruling in 2004 that heads of state are not immune from prosecution before an international court.²⁷⁹ Crimes under Sierra Leonean law are limited to offences relating to the abuse of girls and damage to property under two Sierra Leonean statutes.²⁸⁰ This ability of the Court to decide cases under Sierra Leonean law reinforces Sierra Leone's rules of law alongside the international rules that will be applied.

Some would argue that the most pressing issue facing the court relates to its financing mechanism. The government of Sierra Leone is unable to contribute in any significant manner to the operational costs of the Special Court, which means that the Court relies primarily on contributions from non-governmental sources.²⁸¹ Institutions created by the Security Council, such as the ICTR and the ICTY, are funded by scaled assessments, in which each country's contribution is proportionate to its size and wealth.²⁸² However, because the UN did not directly establish by the SCSL, the Sierra Leone court is financed through voluntary contributions. One should note, however, that a major obstacle for funding the Court is its relative inability to collect the funds that donor states have pledged.²⁸³

Yet it is highly unlikely that the international community will let this effort fail.²⁸⁴ By the end of 2003, the United States, through its United States Agency for International Development (USAID) program, provided the Special Court a total of \$15 million to pursue its operations.²⁸⁵ The organization's rationale for support of the Court is that the nation's fragile peace will depend heavily on sustained external support. Furthermore, given

²⁷⁹ Human Rights Watch, *Sierra Leone: Landmark Rulings Advance Justice*, available at <http://hrw.org/english/docs/2004/05/31/sierra8629.htm> (last visited Mar. 2, 2005).

²⁸⁰ Secretary-General Report S/2000/915, *supra* note 11, at 5.

²⁸¹ *Id.* at 10-11.

²⁸² Michelle Sieff, *A "Special Court" for Sierra Leone's War Crimes* (Crimes of War Project, 2001) at <http://www.globalpolicy.org/security/issues/sierra/court/2001/analysis.htm>. (last visited Mar. 21, 2005).

²⁸³ UN Security Council, *Security Council Extends Sierra Leone Mission until 30 Sept.- with Residual Force to Remain until Jun 2005*, unanimously adopts resolution 1537 (2004). at <http://www.unis.unvienna.org/unis/pressrels/2004/sc8045.html>. (last visited Mar. 21, 2005)

²⁸⁴ Nsongurua J. Udombana, *Globalization of Justice and the Special Court for Sierra Leone's War Crimes*, 17 EMORY INT'L L. REV. 55, 126 (2003)

²⁸⁵ USAID, *USAID Sierra Leone Transition Strategy Phase 2 FY 2-4- FY 2006*, available at http://www.usaid.gov/gn/sierraleone/background/programstrategy04_06.htm (last visited Mar. 21, 2005)

the United Kingdom's unique connection to Sierra Leone,²⁸⁶ British aid for Sierra Leone is more than likely.

The critiques of the SCSL have been offset by its promises. The hope is that trials taking place in Freetown will send a powerful message to the people of Sierra Leone that justice is being done within the framework of the rule of law. There are signs that these goals are being achieved. The special court has trained local attorneys and sent teams to explain legal concepts to villagers, soldiers, and students.²⁸⁷ Additionally, the simple fact that the SCSL has indicted Charles Taylor sends the message that Sierra Leone is committed to changing its legal landscape.

B. Dominant Methods of Addressing the Aftermath of Violence, Just as Many Unanswered Questions and Possibly the Wrong Target: Amnesty, Truth and Reconciliation Commissions, and Traditional Mechanisms for Peace and Reconciliation in Liberia

The problem of how many and who to punish, and an ethic of reconciliation and forgiveness, permeate discourse on international peace and justice.²⁸⁸ Professors Laurel Fletcher and Martha Minow have considered the question of why countries address past episodes of mass violence, and the goals they seek to achieve.²⁸⁹ These goals include:

- (1) discovering and publicizing the truth;
- (2) making a symbolic break with the past;
- (3) promoting the rule of law and strengthening democratic institutions;
- (4) deterrence;
- (5) punishment of perpetrators; and
- (6) healing victims and achieving social reconstruction.²⁹⁰

As part of the discussion on which of these goals should be privileged over others, there is a growing debate as to whether trials are useful in the reconciliation process at all.²⁹¹

²⁸⁶ ADEBAJO, *supra* note 16 at 93-95.

²⁸⁷ Bravin, *supra* note 273, at A1.

²⁸⁸ See, e.g., Laurel Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573-639 (2002).

²⁸⁹ See, e.g., MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 70-72 (1998); Laurel Fletcher, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, 19 BERKELEY J. INT'L L. 428 (2001) (book review); Fletcher & Weinstein, *supra* note 288 at 573.

²⁹⁰ Fletcher, *supra* note 289, at 431-34.

²⁹¹ See, e.g., Fletcher & Weinstein; *supra* note 288 at 600 (citing the lack of data regarding the contributions of justice to process of social repair); INTERNATIONAL

Although I discuss both the utility and the problems with trials in the next section, I assert first that in arguing for less punitive measures, some scholars and policymakers question the effectiveness of law in promoting peace in these ruined societies. First, some suggest that although trials have the potential to be effective and efficient, there is no hard proof that they actually promote rule of law goals or peace.²⁹² At worst, trials may detract from rule of law goals because they lead to further instability in the country.²⁹³ This is so because trials focus on punishing instead of bringing about economic justice and political change. Second, some suggest that trials as an exclusive means to promoting peace and justice do not deal adequately with the need for all members of a society to be reconciled.²⁹⁴ Finally, trials and other reconstruction efforts are too expensive considering the amount of infrastructure and training needed to get them running.²⁹⁵

In response to claims about the disadvantages of trials, transitional justice scholars focus primarily on three types of less punitive mechanisms.²⁹⁶

CENTER FOR TRANSITIONAL JUSTICE (ICTJ), *The "Legacy" of the Special Court for Sierra Leone* 11 (2003) (citing potential threats to the Court's legacy including lack of outreach, lack of ownership, perceived bias, lack of access, and false expectations), available at <http://www.ictj.org/downloads/LegacyReport.pdf> (last checked Apr. 12, 2005) [hereinafter ICTJ, *Legacy*]; Udombana, *supra* note 284, at 119 (2003) (discussing the argument that prosecutions may undermine respect for the law in a society undergoing transition); Danilo Zolo, *Peace Through Criminal Law?*, 2 J. INT'L CRIM. JUST. 727, 727 (2004) (arguing that the normative structure of international criminal justice remains quite uncertain and confused when compared to domestic law); Sarah Williams, *The Cambodian Extraordinary Chambers—A Dangerous Precedent for International Justice?*, 53 ICLQ 227, 244 (2004) (noting serious reservations regarding the ability of the Chambers to meet international standards of procedural fairness and judicial independence and impartiality).

²⁹² ICTJ, *Legacy*, *supra* note 291, at 1, 8, 11

²⁹³ *Id.*, at 11.

²⁹⁴ Fletcher & Weinstein, *supra* note 288, at 600.

²⁹⁵ See generally O'Connell, *supra* note 77, at 207, 232 (noting that the international reconstruction effort in Liberia is likely to face a shortage in funding and experts); Symposium, *Tribunal Justice: The Challenges, The Record, and the Prospects*, 13 AM U. INT'L L. REV. 1541, 1546 (1998) (acknowledging generally the problem of resources and tribunals); William Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L. J. 729, 738 (2003) (arguing that regional courts could reduce the financial burden of international criminal law enforcement).

²⁹⁶ See, e.g., Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 COLUM. HUM. RTS. L. REV. 661, 719 (2004) (noting that while policy makers promote reconciliation programs they do not pay attention to the serious questions that reconciliation programs raise); Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 356 (2002) (noting some serious deprivations of due process rights in the gacaca system and recommending amnesty to assist in

Scholars have offered alternatives such as amnesty in exchange for truth and reconciliation, or using traditional courts and other traditional dispute mechanisms to dispense more quickly with less serious violations. The use of these mechanisms suggests that, to move from a society of violence and to rehabilitate the masses, the society and the international community must promote mechanisms that target society at large instead of individual perpetrators.²⁹⁷

1. The Amnesty as a Transitional Mechanism: Too Many Unanswered Questions

Currently, the CPA calls for the consideration of amnesty for crimes committed during the civil war in Liberia.²⁹⁸ Amnesty is the decision by which a society decides not to prosecute the wrongs of a predecessor regime or insurgents during the regime.²⁹⁹ As an alternative to punishment, amnesty attempts to assure that transitions will happen peacefully.³⁰⁰ Professors Jeremy Sarkin and Erin Daly cite three reasons why a transitional government might sanction an amnesty.³⁰¹ First, nascent governments may make the political calculation to grant amnesty to gain the support or acquiescence of outgoing officials.³⁰² Second, amnesty may result from a calculated conclusion that doing nothing is better than doing anything.³⁰³ Finally, a new government might be unable to pursue other methods of reconciliation for lack of political or economic resources thus causing a de facto amnesty.³⁰⁴

The dominant critique of a general amnesty, as opposed to a limited amnesty, however, is that it capitulates to past perpetrators and does not honestly attempt to move a country forward.³⁰⁵ The danger of amnesty, from this perspective, is that it can easily cause a society to slip into a culture of impunity.³⁰⁶ Sarkin and Daly argue that this may occur if “amnesty confirms a lack of accountability and of responsibility—if it denies the wrongfulness of

reconstruction); Fletcher & Weinstein, *supra* note 288, at 573-639 (recommending an ecological model for social repair); Jennifer Widner, *Court and Democracy In Postconflict Transitions: A Social Scientist's Perspective On the African Case*, 95 AM. J. INT'L L. 64 (2001) (noting the importance of neighborhood and local forums in postconflict transitions).

²⁹⁷ See, e.g., Fletcher & Weinstein, *supra* note 288 at 601.

²⁹⁸ CPA, art. XXXIV, *supra* note 9.

²⁹⁹ Gallagher, *supra* note 242, at 191-193.

³⁰⁰ *Id.* at 168.

³⁰¹ Sarkin & Daly, *supra* note 296, at 719.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ See *Id.*

the prior regime's actions and, ultimately denies the fact of those actions."³⁰⁷ Undoubtedly, supporters of amnesty will point how, in South Africa, the TRC used the promise of amnesty to obtain some information about past crimes; it is generally believed that the TRC achieved more truth than would have been possible otherwise.³⁰⁸ I do not challenge this notion here. Yet in South Africa, the political and social environment was more conducive for amnesty than in countries such as Sierra Leone and Liberia.

I suggest that a second fatal problem with the granting of a general amnesty is that no consensus exists on when amnesty should be granted and when it should not.³⁰⁹ There are reasons why amnesties work in contexts such as South Africa, but might not be as helpful in countries with a history like Liberia. Even those who argue that amnesty could be a positive mechanism to achieve societal reconciliation are firm in the suggestion that there are two requirements that must temper the granting of amnesty.³¹⁰ First, amnesty should always be individual and not general.³¹¹ Each applicant should submit voluntarily to the terms of the amnesty and a blanket amnesty should be disfavored. Second, Sarkin and Daly argue that amnesties should be conditional.³¹² In other words, there is consensus that amnesty should not be given away for free or in exchange for a pre-existing duty such as a duty to obey the law. The CPA in its current form does not suggest a limitation on the application of amnesty.³¹³ For this reason, this provision of the agreement should not be followed.

2. Truth and Reconciliation Commissions: The Wrong Target

The CPA also calls for the establishment of a truth and reconciliation commission.³¹⁴ Truth commissions are institutions established to review an era of systematic violence and to provide an authoritative account of what happened.³¹⁵ Amnesty International has indicated that such a commission may have an important role in establishing the facts and identifying those responsible for crimes under international law. Nevertheless, it cannot be a

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ See Gallagher, *supra* note 242 at 169-185.

³¹⁰ Sarkin & Daly, *supra* note 296 at 719.

³¹¹ *Id.*

³¹² *Id.*

³¹³ CPA, art. XXXIV, *supra* note 9.

³¹⁴ *Id.* at art. XIII.

³¹⁵ Fletcher, *supra* note 289 at 439.

substitute for a court of law to try alleged perpetrators of serious violations of international law.³¹⁶

In popular culture, the South African TRC is the point of reference for those who espouse reconciliation and security through forgiveness as the dominant form of transitional justice.³¹⁷ The South African TRC used the promise of amnesty to obtain information about past crimes to produce a fuller understanding of the truth of what occurred during the Apartheid Era.³¹⁸ South Africa was dealing largely with the problem of societal racism in the form of Apartheid. Apartheid as a system of racism permeated all aspects of society and effected race relations among all South Africans.³¹⁹ The entire country needed the healing effects of the TRC. Liberia is different; not all of Liberia's people act in a way to destroy the purpose of the state of Liberia. But the elites in Liberia do. Martha Minow suggests that truth commissions might address mass violence in societies better than trials because, designed to be a sympathetic forum for survivors wishing to testify, they are a more therapeutically appropriate model for victims.³²⁰

TRCs may actually help victims coping with past violence inflicted on their communities. But, aren't the victims really the wrong target for sustained intervention? The needs of victims will be positively addressed if the root causes of civil strife are dealt with through a long-term strategy that addresses impunity in African states and state-sponsored or state-supported violence against the masses. It simply is not clear how a truth commission can promote reconciliation in society when the major perpetrators of violence in Liberia are at large or hold seats in the transitional government. Scholars who focus on TRC effectiveness have left this tension unexplained. Governance in Liberia is unlikely to change when there is no advantage to do so, that is, when political elites are allowed to escape through the transition cracks because all of the transition resources are focused on victims.

Additionally, several transitional scholars, including Professors Sarkin and Daly, note that no quantitative study exists to assesses the success

³¹⁶ Amnesty International, *Liberia: Recommendations to the International Reconstruction Conference New York 5 and 6 February 2004* (2004) available at <http://web.amnesty.org/library/Index/ENGAFR340022004?open&of=ENG-LBR> (last visited Mar. 21, 2005).

³¹⁷ Sarkin & Daly, *supra* note 296, at 719.

³¹⁸ *Id.*

³¹⁹ See generally, ANTJIE KROG, *COUNTRY OF MY SKULL: GUILT, SORROW, AND THE LIMITS OF FORGIVENESS IN THE NEW SOUTH AFRICA* (1998) (reporting on the South African TRC and describing the pervasiveness of guilt in South African society).

³²⁰ MINOW, *supra* note 289, at 70-72.

of truth commissions.³²¹ Because further empirical study is needed to test arguments for truth commissions, arguments for alternative models of transition as well as for trials are weakened. In Sierra Leone, one of the problems that arose over the possibility of a TRC was that some individuals were reluctant to testify to a commission for fear that they would implicate their friends.³²² Furthermore, some civil society organizations have noted that Liberia has not even begun the process of implementing a well run TRC like the TRC in Sierra Leone.³²³ Liberia has failed to hold conferences involving the participation of members of Liberian society in order to ascertain their ideas about the need for a commission; this might be because Liberian civil society, though present, is really weak. Instead, the transitional government of Liberia continues to focus exclusively on the needs of rebels-turned-politicians, despite the fact that many Liberians have expressed the view that they want Charles Taylor to be brought to justice in some forum.³²⁴

3. *Traditional Mechanisms of Dispute Resolution: What is Traditional?*

Finally, scholars critiquing the state-centered rule of law model promote more grassroots approaches to addressing communal violence.³²⁵ These approaches tend to promote revitalizing traditional forms of dispute resolution.³²⁶ Some have called this form of reconciliation “restorative justice”-- a form of justice more characteristic of traditional African jurisprudence.³²⁷ With this type of justice, the goal is not retribution or punishment, but “redressing of imbalances, the restoration of broken relationships, [and] a seeking to rehabilitate the victim and the perpetrator . . .”³²⁸

Professor Jennifer Widner explores the role of local forums in post-conflict transitions.³²⁹ She explains that traditional forums for dispute resolution that stress mediation and arbitration serve as a gap filler for the formal judicial system while lawyers are trained and courthouses are rebuilt.³³⁰ Widner’s main argument for greater reliance on traditional courts is that the state judiciary can become overburdened if too many cases are referred to them during vulnerable times.³³¹ Customary and community

³²¹ Sarkin & Daly, *supra* note 296, at 724.; Fletcher, *supra* note 289, at 439 .

³²² Gberie, *supra* note 270, at 648.

³²³ ICG, *Rebuilding Liberia*, *supra* note 189, at 24.

³²⁴ *Id.* at 8.

³²⁵ *See e.g.*, Widner, *supra* note 296, at 64-65; Daly, *supra* note 296, at 366-381.

³²⁶ Widner, *supra* note 296 at 64-65.

³²⁷ Sarkin & Daly, *supra* note 296, at 692.

³²⁸ *Id.*

³²⁹ Widner, *supra* note 296, at 64.

³³⁰ *Id.*

³³¹ *Id.* at 73, 75

courts, Widner argues, can establish a foundation for rule of law reconstruction because they have been effective in resolving ordinary disputes fairly and quickly.³³²

In Rwanda, for example, the gacaca, or village courts, have enjoyed a resurgence since the end of the genocide.³³³ The Rwandan government decided to use the gacaca courts to deal with lower-level offenders at a community level as a result of the country's realization that the Rwandan justice system could not handle the huge number of genocide cases.³³⁴ Those who promote the gacaca system argue that it will have healing effects for society because it will provide individuals the chance to discuss the genocide, participate in the creation of justice and a standard of responsibility for criminal actions, and deal with traumatic events more quickly.³³⁵

Still, observers also have several reservations about the gacaca system that highlight more general concerns about relying on tradition and native customs in forging modern legal practice.³³⁶ First, gacaca was traditionally a dispute settlement mechanism for resolving local disputes over family matters, property rights, and other local concerns and may not adapt as a criminal justice model.³³⁷ Second, no system protects witnesses and victims, monitors the release of defendants, or ensures that they do not retaliate against their accusers.³³⁸ Finally, gacaca may not protect the due process rights of the accused.³³⁹ More recently, scholars argue that the gacaca process might actually contribute to the insecurity of all Rwandan citizens in the future, emphasizing the fact that these courts will accentuate ethnic divides in Rwandan society because they only try genocide crimes and not war crimes.³⁴⁰ Hutus will be disproportionately charged with crimes. These concerns with gacaca only highlight larger concerns about privileging traditional practices over more modern ones. While traditional practices

³³² *Id.*

³³³ Widner, *supra* note 296, at 65.; Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L. J. 163 (2000); Allison Corey & Sandra Joireman, *Retributive Justice: The Gacaca Courts in Rwanda* AFR. AFF. 103, 73-89 (2004).

³³⁴ Carroll, *supra* note 333, at 189.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ Corey & Joireman, *supra* note 333, at 81-82

³³⁸ Carroll, *supra* note 333, at 192.

³³⁹ Daly, *supra* note 296 at 381.

³⁴⁰ Corey & Joireman, *supra* note 333, at 86.

ought not to be rejected outright, we must avoid supporting practices simply because they have historical or traditional roots.³⁴¹

Turning to Liberia, there has been no suggestion that the Liberian government would be willing to turn over matters of transitional justice to Liberian traditional courts, even though indigenous Liberians do have informal dispute settlement mechanisms.³⁴² Additionally, the same problems that face the gacaca courts in Rwanda would probably face any traditional court in Liberia. Furthermore, the cultural context in Liberia is different from that of Rwanda; Liberia has over sixteen ethnic groups and it is not clear that the people of Liberia would agree upon the type of dispute mechanism that should be used. Furthermore, there were many instances of cross-ethnic violence in Liberia, and forcing members of outside ethnic groups to appear before other ethnic courts might undermine perceptions of fairness.

C. In Defense of Trials: Why Punish?

A growing body of evidence indicates that punitive measures such as trials, though imperfect, can contribute greatly to addressing the problems articulated in the previous section. I have chosen to discuss the particular contribution that trials offer the Liberian context because of the pressing need to end the culture of impunity. This is especially true in a country that could be an example for other African states struggling with similar issues of accountability. Simply stated, if the manner in which power is exercised in societies can be changed by deterring those who wield the most power in society, the ethic of accountability can begin to permeate the greater political culture.

1. The Modern Critique of the Use of Trials during Transitional Periods

Traditionally, advocates of trials believe that they will help communities rebuild because they support one or more of the following goals:

- (1) to discover and publicize the truth of past atrocities;
- (2) to punish perpetrators;
- (3) to respond to the needs of victims;
- (4) to promote the rule of law in emerging democracies; and
- (5) to promote reconciliation.³⁴³

³⁴¹ Rose-Ackerman, *supra* note 109, at 183.

³⁴² GEORGE B. N. AYITTEY, *INDIGENOUS AFRICAN INSTITUTIONS* 67 (1991); George B. N. Ayittey, *The Rule of Law in Traditional African Society* (The Free Africa Foundation), available at <http://freeafrica.org/features6b.html> (last visited Mar. 21, 2005).

³⁴³ Fletcher & Weinstein, *supra* note 288, at 586.

These goals are very similar to those in societies who chose to address past violence in the first place.

In periods of transition, Professor Ruti Teitel explains, law's role has been to "express the justice of the successor regime."³⁴⁴ In Teitel's view, "trials offer a transitional mechanism for normative transformation to express public condemnation of aspects of the past, as well as public legitimation of the new rule of law."³⁴⁵ Trials, in this sense, focus on the individuals responsible for wrongdoing. This focus on the individual allows an express disavowal of the predecessor norms.

Still, the limits of criminal trials in promoting the goal of reconciliation are no secret. There has been no lack of healthy criticism about the utility of trials.³⁴⁶ Critical scholars suggest that trials are not always the most productive mechanism for insuring the rule of law and peace in transitional societies. Fletcher and Weinstein critique the criminal law model as an exclusive avenue during transitions because they believe that the emphasis on criminal trials overshadows other means of achieving the goal of anti-impunity for human rights violators.³⁴⁷ Others suggest that pursuing perpetrators will only result in more violence because the security structures in weak states are not strong enough to support tribunals;³⁴⁸ or that victims

³⁴⁴ Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2035 (1997).

³⁴⁵ *Id.* at 2035.

³⁴⁶ See generally Fletcher & Weinstein, *supra* note 288, at 604-606 (arguing that war crimes trials do not address the phenomenon of collective power and its influence on individuals); Zolo, *supra* note 291 at 727 (arguing that international criminal justice does not perform the function of transitional justice because it does not take into account modern punitive theory); Williams, *supra* note 291 at 227 (suggesting that the international community must wait until the Cambodian tribunal commences its operations to assess the success or otherwise of this experiment in international justice); but see Talitha Gray, *To Keep You Is No Gain, To Kill You Is No Loss—Securing Justice Through the International Criminal Court*, 20 ARIZ. J. INT'L & COMP. L. 645 (2003) (arguing that the International Criminal Court might be the only functional forum if the United States is truly committed to prosecuting war criminals); Compare Teitel, *supra* note 347, at 2009 (suggesting that a limited sanction through transitional criminal justice is appropriate to attribute individual responsibility for grave wrongdoing perpetrated under repressive rule).

³⁴⁷ Fletcher & Weinstein, *supra* note 288, at 593..

³⁴⁸ Akhavan, *supra*, note 278, at 501 (1996) (noting the distance between the establishment of an ad hoc tribunal like that of Rwanda's and making it operational). In Rwanda, for example, it was clear from the outset that all who participated in the genocide could not be punished. When Akhavan wrote this article there were sixty thousand suspects in Rwandese prisons. *Id.* at 509. In a recent Times Discovery documentary providing an update on Rwanda ten years after the genocide, members of Rwandan society were very concerned about how the jailed individuals who were

and bystanders are left without a means to heal because all resources have been spent on the court, in turn creating a desire for vengeance.³⁴⁹

Although a trial of perpetrators might address goals two through five above, some scholars do not see how trials can contribute to truth telling or to healing victims.³⁵⁰ These scholars have constructed a critical discourse on trials that focuses primarily on trials' inability to address the needs of victims. For example, Fletcher and Weinstein argue that the current paradigm punishes only a few select individuals who carried out the most egregious acts or who commanded others to do so, and fails to address communal engagement with mass violence.³⁵¹

The driving force behind such criticism is the perceived lack of proof that justice rendered in trials in Special Courts contributes to social reconstruction in the aftermath of mass violence.³⁵² The particular concern is that "the theoretical foundation for international criminal trials borrows heavily from writing developed in a political and legal context in which such proceedings were mere aspirations and with no empirical data to substantiate the purported benefits of international trials."³⁵³ Specifically, Fletcher and Weinstein note the dearth of studies of the effects of criminal trials on victims, bystanders, and perpetrators and whether these trials can affect societal beliefs and attitudes.³⁵⁴ Similarly, there is little evidence that the recipients of this transitional justice connect the trials with the establishment of the rule of law.

2. Evidence that Trials Might Have a Positive Effect on Political and Social Change

about to be released would be reintegrated in society. The fact that the court system could not address the violence committed by all perpetrators or the concerns of the Rwandan people is still a major tension in the ad hoc court movement.

³⁴⁹ Fletcher & Weinstein, *supra* note 288, at 573-639; Zolo, *supra* note 291 at 727(doubting that international criminal justice can perform functions of transitional justice because ad hoc tribunal do not take into account modern punitive theory); the International Center for Transitional Justice report on the legacy of the SCSL found that some members of Sierra Leonean society felt that a disproportionate amount of attention had been given to perpetrators, particularly through benefits from the Disarmament, Demobilization, and Reintegration program (DDR). See ICTJ, *Legacy* *supra* note 291, at 10.

³⁵⁰ Fletcher, *supra* note 289, at 433 (explaining the views of Martha Minow).

³⁵¹ *Id.* at 605

³⁵² Fletcher & Weinstein, *supra* note 288, at 573-639.

³⁵³ *Id.* at 584.

³⁵⁴ *Id.* at 601-603

Earlier, this article suggested that there are fundamental problems with addressing the grievances of victims and rebels exclusively when a society emerges from a violent period. These groups are often the wrong target. A negotiated peace agreement such as the CPA places too much emphasis on power sharing with rebel politicians and not enough emphasis on combating the culture of impunity that leads to the need for these peace agreements in the first place. Similarly, the critics of trials place too much emphasis on the inability of trials to address the grievances of victims.³⁵⁵ But critics of trials fail to acknowledge newer evidence showing that trials targeted at specific individuals tend to affect the behavior of politicians and have modest effects on rule of law goals.³⁵⁶

The suggestion that going after perpetrators will only lead to more violence might be incorrect.³⁵⁷ There is no solid proof that indictments of high level officials will necessarily lead to more societal unrest. First, the object of special and international tribunals is to target a handful of perpetrators, not the combatants on the ground.³⁵⁸ It is unlikely that the security of Liberians will be threatened by punishing figures like Charles Taylor. Security is an issue when every person that fought is rounded up and thrown into jail. This is not what I am suggesting should happen. For example, Hinga Norman, a rebel leader during Sierra Leone's war, was indicted by the Special Court of Sierra Leone even though he received a cabinet post when Sierra Leone's elected government was restored.³⁵⁹ Yet his indictment did not cause serious breaches of the Lome Accord by Sierra

³⁵⁵ See Udombana, *supra* note 284 at 19 (arguing that the punishment of human rights violators is the vindication of the victim's harm)

³⁵⁶ See, e.g., Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001) (citing modest support for the notion that international criminal prosecutions can help to prevent the continuance of the culture of impunity and foster inhibitions against habitual violence).

³⁵⁷ This is especially true when it is African societies that are now beginning to insist on punitive and retributive mechanisms. One recent manifestation of the preference of retributive justice over amnesty for example is the gacaca system (traditional Rwandan community courts) in Rwanda. It is important to note that Rwandan people rather than the Western world has chosen this system as a means to cope with the large number of Rwandans who participated in the Genocide. From the outset, the transitional Rwandan government has declined to privilege reconciliation over retributive justice. There has been widespread support for these community courts because of their emphasis on individual responsibility, their ability to strengthen the communities in which they operate, and the national democratic rule of law values promoted through the participatory process. See Daly, *supra* note 296, at 366.

³⁵⁸ Secretary-General Report, S/2000/915 *supra* note 11 at 6-7 (explaining personal jurisdiction of the SCSL).

³⁵⁹ Jess Bravin, *supra* note 273, at A1.

Leoneans. The concerns expressed about the fragility of peace is sometimes so overemphasized that the peace negotiation process gives factions too much leverage over the post-war reconstruction goals. It might be the case that a strong international presence to counter rebels could actually sustain peace.

It is no longer an unproven statement that bringing war criminals to justice can send an important message that power does not buy immunity from charges for war crimes.³⁶⁰ The international community is only now beginning to determine the affects of the ad hoc tribunals on violence prevention, and the effects of the Sierra Leone court may not be known for years to come. But, now that several years have passed since the instigation of the Rwanda and the Yugoslavia tribunals, there is some empirical evidence available that prosecution can actually prevent future atrocities through a process that marginalizes leaders who resort to ethnic appeals.³⁶¹ In the Rwanda and the Yugoslavia contexts, at least, this marginalization has led to the emergence of a more moderate political rhetoric.³⁶²

The work of scholars such as Payam Akhavan demonstrates with empirical evidence that trials may prevent future atrocities by instilling unconscious inhibitions against violence on society at large, and cautioning politicians to perform a cost-benefit calculation before encouraging internationally illegal activities.³⁶³ Akhavan argues that individual accountability for massive crimes is “an essential part of a preventive strategy and, thus, a realistic foundation for a lasting peace.”³⁶⁴

Akhavan proceeds with the assumption that in liberal societies, the criminal law model presupposes some moral choice on the part of the perpetrators of criminal acts.³⁶⁵ Yet during times of mass violence, moral values get so inverted that individuals who are directly responsible for war crimes are elevated in society to a status akin to national heroes.³⁶⁶ Therefore, when individuals are encircled in collective hysteria and routine violence, Akhavan posits that these individuals are not likely to be deterred from committing crimes.³⁶⁷

³⁶⁰ Akhavan, *supra* note 356, at 7 (arguing that stigmatization of criminal conduct may have far-reaching consequences, promoting postconflict reconciliation and changing the broader rules of international relations and legitimacy); Ward, *supra* note 105, at 8.

³⁶¹ Akhavan, *supra* note 356.

³⁶² *Id.* at 7

³⁶³ *Id.*

³⁶⁴ *Id.* at 9.

³⁶⁵ *Id.* at 11.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 11-12.

Faced with how to prevent these abnormal conditions before they occur or reoccur, Akhavan provides two arguments for targeting the most powerful leaders for punishment.³⁶⁸ First, “where leaders engage in some form of rational cost-benefit calculation, the threat of punishment can increase the costs of a policy that is criminal under international law.”³⁶⁹ The assumption here is that leaders would prefer long-term political viability over momentary glory. Furthermore, Akhavan suggests that international legitimacy is a valuable asset for aspiring statesmen; the stigmatization of indictment may threaten the attainment of long-term political power.³⁷⁰ Therefore, the threat of punishment may persuade specific leaders and potential perpetrators to adjust their behavior, thus removing “impediments to stability from the political stage, and provid[ing] an incentive for constructive political behavior.”³⁷¹

Second, Akhavan’s hope is that punishment for international crimes will instill “unconscious inhibitions against crime” or “a condition of habitual lawfulness” in society.³⁷² Through punishment of leaders, there might be a “progressive entrenchment of a more lawful self-conception” among the wider public.³⁷³ Through the force of “moral propaganda” from the implementation of international criminal justice, the international community can change the rules for the exercise of power.³⁷⁴

Two examples of how this process might work come from Yugoslavia and Rwanda. In Yugoslavia, Akhavan describes how the policy of discrediting wartime leaders and the leadership of the Bosnian Serb Republic (the leadership before and during the Bosnian War) by the ICTY have allowed new leaders to emerge and to make politically moderate statements that would have ruined their political future in an earlier context.³⁷⁵ Specifically, politicians in post-war Yugoslavia seem to be distancing themselves from the strong rhetoric of the Serb Democratic Party to claim a new and more moderate image.³⁷⁶ Part of this strategy is to clean up the party’s image by separating it from Radovan Karadzic, its founder and one of the leaders indicted by the ICTY; since the creation of the tribunal, Karadzic has become a liability to the party.³⁷⁷ Akhavan argues that the international community’s policy of using the ICTY as a mechanism to dispose of indicted

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.* at 12.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 14

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 15.

leaders has contributed to post-conflict peace building by “creating incentives for political parties to behave in a more conciliatory manner.”³⁷⁸

Similarly, Akhavan has evidence that the ICTR has made a modest contribution to post-conflict peace building by discrediting and incapacitating the remnants of the former genocidaire government in Rwanda.³⁷⁹ As in Yugoslavia, the ICTR, alongside the national criminal justice system in Rwanda, seems to have exercised a moderating influence in the post-conflict peace-building process in Rwanda.³⁸⁰ The new Tutsi government in Rwanda has been discouraged from sanctioning Tutsi revenge killings against Hutu, since the interest of the Tutsi government is served by distinguishing itself from the previous Hutu rulers of Rwanda.³⁸¹ Furthermore, without the ICTR it would have been easier for the Interahamwe (Hutu forces that carried out the genocide) to gain support and to launch a campaign against the successor government.³⁸² Instead, Akhavan argues that channeling the desire for vengeance into legal process has mitigated the severity of retaliatory abuses.³⁸³ Finally, the ICTR may prove to have a special positive effect: the gradual internationalization of accountability in the African continent.³⁸⁴

D. Lessons from Colonialism, Post-Colonialism: Preliminary Justification for A Special Court for Liberia

A mechanism for criminal trials will be of special significance to Liberia for three reasons. First, a trial will focus on elite-sponsored violence, beginning the process of ending the culture of impunity.³⁸⁵ As a cautionary note, the ability to amend the CPA in such a way as to be non-threatening to those who are likely to cause violence should allay frustrations over whether the push for a trial will foster instability in Liberia. Second, promoting a special court for Liberia would help crimes specific to the Liberian context and rebuild Liberia’s national courts. Finally, the international community has a duty to commit such resources to places like Liberia because similar investment has been committed to Sierra Leone, a country very similar to Liberia and to other countries.³⁸⁶

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 23.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.* at 24.

³⁸⁴ *Id.* at 26.

³⁸⁵ *See Id.*

³⁸⁶ *The United Nations and Humanitarian Intervention: Building Legitimacy By Confronting Our Past- An Open Letter*, 16 FLA. J. INT’L L. 483, 494 (2004) [hereinafter *Open Letter*]

1. Ending the Culture of Impunity while Maintaining a Fragile Peace: Changing the Calculation of Liberian Politicians

Applying the analysis above to the Liberian context and recognizing that Liberian politicians have historically acted with a complete disregard of the needs of Liberian people, Liberia is a ripe setting to enforce an ethic of accountability. Having Taylor at large will not prove helpful for Liberia's transitional government, given his ability to dictate the movement of Liberian affairs even while in exile.³⁸⁷ As it stands, the current situation in Liberia sends a message that it is acceptable to rule through criminal behavior in Liberia.³⁸⁸ More specifically, in the African political context, holding those most responsible is necessary because of the nature of African politics since decolonization, a nature firmly rooted in the culture of impunity.³⁸⁹ Remedying harmful aspects of the colonial legacy in African states will do a great deal to increase the legitimacy of African states in the eyes of the international community.

There is a growing number of critiques of the state-centered method (rule of law orthodoxy) by which the international community addresses the goal of encouraging respect for the rule of law.³⁹⁰ Even so, trials can contribute to achieving rule of law in a given society. In the Liberian context, courts can play a crucial role in the country's transformation to a real rule of law system because their very presence symbolizes a break from the past

³⁸⁷ Ward, *supra* note 105, at 8.

³⁸⁸ *SRI Country Briefing: Liberia*, *supra* note 10 at 18.

³⁸⁹ Professors David Leonard and Scott Straus argue that the political dynamics that characterize sub-Saharan African politics can be summarized using the "personal rule paradigm." LEONARD & STRAUS, *supra* note 4, at 104.

³⁹⁰ Stephen Golub, a lecturer in international development and law, argues that the international aid field of law and development focuses too much on law, lawyers, and state institutions, and too little on development, the poor, and civil society. GOLUB, *supra* note 163, at 5. While the rule of law (a situation where (1) the government itself is bound by the law, (2) every person in society is treated equally under the law, (3) the human dignity of each individual is recognized and protected by law, and (4) justice is accessible to all) is a noble goal, the "rule of law" orthodoxy (a set of ideas, activities, and strategies geared toward bringing about the rule of law) takes an ineffective route. *Id.* at 7. This "top-down," state-centered approach concentrates on law reform and government institutions, particularly judiciaries, to build business-friendly legal systems that presumably spur poverty alleviation. *Id.* at 5. Also development organizations use the rule of law orthodoxy to promote goals such as good governance and public safety. The problem as Golub sees it is not in these economic and political goals, per se, but rather "its questionable assumptions, unproven impact, and insufficient attention to the legal needs of the disadvantaged." *Id.* Golub ultimately argues that international institutions should stop assuming that assistance to state institutions yields greater impact and more sustainable outcomes than does support for civil society.

political arrangement. Still, certain principles can be applied in any context. Litigation in the courts allows access to the new democracy. And as Professor Ruti Teitel argues, courts can be the guardians of the new constitutional order.³⁹¹ In this way, “the law expresses new norms and does the work of reconstruction.”³⁹² Therefore, law does the work of exposing and delegitimizing the value system associated with past rule. In a similar vein, Jamie O’Connell argues that transforming a political system into one that functions democratically requires a citizenry that holds government officials accountable.³⁹³ In countries such as Sierra Leone or Liberia, where ordinary people have become accustomed to abuses by the powerful, internationally-supported courts and truth commissions may begin to undermine this culture of impunity.³⁹⁴ With the proper level of support, a hybrid tribunal reinforced by Liberian national courts might serve the positive role of constructing and enforcing established human rights principles. It may also create and enforce new rules specific to the Liberian context because the judiciary will play a constructivist role that the transitional government cannot play as a result of its political weakness.

Sadly, however, few sources have dealt seriously with the notion of accountability for those who have caused a continual state of instability for Liberia. In fact, plenty of critiques aim at the type of intervention sought here. For example, Mohamed Ibn Chambas, executive secretary of ECOWAS, rejects the notion of a tribunal like Sierra Leone’s for Liberia.³⁹⁵ He explains that “if it’s externally induced, the system may not be able to withstand the consequences.”³⁹⁶ In Africa, Chambas explains, “community bonds, loyalty to individuals are still strong. If one rushes with certain high principles, it certainly won’t lead to stability.”³⁹⁷ Others suggest that Liberians would really prefer to leave these tragic events behind them and move on.³⁹⁸

Some organizations working in Liberia have indicated that “there is little expectation that any of those who have committed gross human rights violations, engaged in widespread corruption or looted government coffers in the past will ever be called to account.”³⁹⁹ To date, observers of the situation

³⁹¹ Teitel, *supra* note 347, at 2031.

³⁹² *Id.* at 2077.

³⁹³ O’Connell, *supra* note 77, at 227.

³⁹⁴ *Id.*

³⁹⁵ Somini Sengupta, *Lessons from Africa: War Crimes Without End*, N.Y. TIMES, Dec. 21, 2003, at 4.5.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ See, e.g. *U.S. Policy Toward Liberia*, *supra* note 7, at 35 (statement of Nohn Kidau).

³⁹⁹ NDI, *Civil Society’s Role*, *supra* note 188, at 13.

in Liberia have mentioned in only a general way one of three possible avenues Liberia might pursue for justice:

- (1) referral of the issue to the SCSL;⁴⁰⁰
- (2) placing transitional justice for war crimes under authority of the International Criminal Court;⁴⁰¹ or
- (3) creating a court for Liberia.⁴⁰²

These individuals have not fully explored the real possibility of any of these avenues.

The predominant current moving against the implementation of judicial mechanisms to achieve justice in Liberia is that “the situation on the ground is by all counts still very precarious”⁴⁰³ The motif of a “fragile peace” has completely frozen the possibility of justice for Liberians by placing the future of the country at the whim of the rebels.

Yet this fear of moving forward with a special court for Liberia is largely unfounded given the example of Sierra Leone's experience. Policymakers have only dealt with the issue of creating a special court for Liberia in a cursory manner (to the exclusion of the extension of jurisdiction of the SCSL or referral of the matter to the International Criminal Court) because the international community does not know the ultimate effect of Sierra Leone's court on peace in that country.⁴⁰⁴

In theory, the structure of a special court for Liberia would be similar to the one established in Sierra Leone. Subject matter, temporal and personal jurisdiction of the court and selection of judges would follow the Sierra Leone model. Funding could come either from assessed contributions or from part of the large reconstruction budget already allocated to Liberia. In February of 2004, a total of \$520 million was pledged at Liberia's donor's conference. The United States pledged \$200 million of this total.⁴⁰⁵ But, as of late October 2004, the transition government only received \$354 million.⁴⁰⁶

⁴⁰⁰ ICG, *Security Challenges*, *supra* note 203, at 21.

⁴⁰¹ *U.S. Policy Toward Liberia*, *supra* note 7, at 39 (statement of Nohn Kidau).

⁴⁰² T. Negbalee Warner, *The Curious Relationship Between Civil Conflicts and Existing Legal Systems in Africa: The Liberian Experience*, 1 CHIMERA J. (USA/ Africa Institute 2003).

⁴⁰³ *U.S. Policy Toward Liberia*, *supra* note 7, at 39 (statement of Nohn Kidau).

⁴⁰⁴ Sources cursorily mention the possibility of another independent internationally backed tribunal for Liberia but no specifics are given. *See, e.g.* Sengupta, *supra* note 395, at 4.5.

⁴⁰⁵ USAID, *US Pledges \$200 Million to Reconstruct Liberia*, Feb. 6, 2004, at <http://www.usaid.gov/press/releases/2004/pr040206.html>. (last visited Mar. 21, 2005).

⁴⁰⁶ UN News Center, *supra* note 257.

Some might argue that extending the jurisdiction of the SCSL is the simplest and fastest method of insuring justice for perpetrators of the most serious violations of crimes committed during the Liberian crisis. After all, many of the actors that led the campaigns of violence operate in and out of the Mano River region, encompassing Liberia, Sierra Leone, and Guinea. This would require the UN to grant the SCSL Chapter VII authority, resulting in the Court having the authority to require Nigeria to turn over Charles Taylor. Furthermore, because the infrastructure is already in place, additional funding may be unnecessary.⁴⁰⁷ Because the charge of the court is to prosecute only those most responsible, there would only be a slight increase in the number of indictees. Finally, the NTGL is not presently politically or financially ready to install its own courts. These arguments would suggest that the extension of jurisdiction might be the only real way to achieve some sense of justice.

Yet the reality is that extension of the jurisdiction of the Sierra Leone Court to cover the Liberian civil war would not be the most productive option for Liberia. Jacques Klein suggested that the expansion of the jurisdiction of the SCSL to cover Liberia would not be feasible for both legal and practical reasons.⁴⁰⁸ For example, the court is particularly adapted to Sierra Leone's needs in that Sierra Leonean law will be applied in some circumstances.⁴⁰⁹ Also, the subject matter of the contract only concerns crimes committed during the Sierra Leonean civil war, not those crimes committed during either of the Liberian crises.⁴¹⁰ One additional lesson from the ad hoc tribunals has been to recognize the importance of local tribunals that truly serve the citizens of the country where the crimes were committed.⁴¹¹ Those who have evaluated the effectiveness of the Rwanda tribunal in Arusha, Tanzania, emphasize the myriad issues that arise with this structure.⁴¹² For example, a noted lack of connection between the Rwandan people and court proceedings exists because the ICTR has not adequately publicized their proceedings.⁴¹³ Furthermore, the trial's location in Arusha has produced witness coordination difficulties.⁴¹⁴ For these reasons, Liberia must face its past on its own turf.

More fundamental issues face the idea of referring the Liberia crisis to the International Criminal Court. First, and most importantly, only crimes

⁴⁰⁷ Secretary-General Report, S/2000/915, *supra* note 11, at 11.

⁴⁰⁸ ICG, *Security Challenges*, *supra* note 203 at 21.

⁴⁰⁹ Secretary-General Report, S/2000/915, *supra* note 11, at 5.

⁴¹⁰ *Id.* at 3.

⁴¹¹ International Crisis Group, *The Special Court for Sierra Leone: Promises and Pitfalls of a "New Model,"* (Africa Briefing No. 16, 2003), available at <http://www.globalpolicy.org/intljustice/tribunals/sierra/2003/0804icg.htm>. (last visited Apr. 12, 2005) [hereinafter ICG, *Promises and Pitfalls*].

⁴¹² Akhavan, *supra* note 278, at 507.

⁴¹³ Carroll, *supra* note 333, at 192.

⁴¹⁴ *Id.* at 183.

committed after the entry into force of the Rome Statute (1 July 2002) can be brought before the ICC.⁴¹⁵ The crimes committed in Liberia occurred well before 2002, even though some continued into 2003.⁴¹⁶ With such a limited temporal jurisdiction, the ICC could not reach some of the perpetrators of the Liberian civil war. Second, the states most likely to commit themselves to scrutiny are those least likely to violate human rights.⁴¹⁷ Louise Arbour and Morten Bergsmo have argued that “the restrictive jurisdictional regime of the ICC Statute will make effective investigation and prosecution by the Court very difficult as long as a situation has not been referred by the Security Council under Chapter VII of the UN Charter.”⁴¹⁸ Although Liberia has recently ratified the Rome Statute, there is no indication that it would submit its citizens to be tried.⁴¹⁹ Finally, if Liberia were to submit to the ICC it risks losing the essential support of the United States, considering the United States lack of support of the ICC.⁴²⁰

2. Addressing Crimes Specific to the Liberian Context and Rebuilding Liberia’s National Courts

A hybrid tribunal would have the additional potential to influence the pace of law reform in the national courts of Liberia and assist in rebuilding Liberia’s own justice system. Taking the second idea first, policy makers support the idea that courts applying both international and national law can help a country rebuild its own justice system and reform its laws.⁴²¹ Because courts like the SCSL are in-country, diplomats hope the court’s location will facilitate the diffusion of legal knowledge from international to local judicial officials. This will assist in rebuilding the country’s own national judicial

⁴¹⁵ Pocar, *supra* note 263, at 305.

⁴¹⁶ *SRI Country Briefing: Liberia*, *supra* note 10, at 7-13.

⁴¹⁷ Akhavan, *supra* note 356, at 26.

⁴¹⁸ Louise Arbour & Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT 129, 139 (Herman A. M. von Hebel, et al. eds., 1999).

⁴¹⁹ Burundi (Sept. 21, 2004) and Liberia (Sept. 22, 2004) have both ratified the International Criminal Court Treaty. No Peace Without Justice International Committee, SOL ICC Member States, at <http://www.npwj.org> (last visited Mar. 21, 2005). Ninety-eight states have ratified the ICC. *Id.*

⁴²⁰ Irene Khan, *Open Letter to the Transitional Chairman of Liberia, Urging Rejection of the Impunity Agreement with the USA Concerning the International Criminal Court*, Oct. 21, 2003, available at <http://web.amnesty.org/library/Index/ENGAFR340202003?open&of=ENG-2F5> (last visited Apr. 12, 2005).

⁴²¹ ICTJ *Legacy*, *supra* note 291 at 1-2.

system.⁴²² If a hybrid court is successful, the host country's legal system can learn from its effectiveness and efficiency.

Using the case of the SCSL, the International Center for Transitional Justice identified the three activities that it hopes will take place:

- (1) substantive law reform (drafting of new legislation to update old laws and bringing Sierra Leonean law into compliance with its international legal obligations),
- (2) professional development (development of relationships between international legal expertise and local legal professionals), and
- (3) raising awareness of the court as exemplary of an independent and well-functioning criminal court (introducing the concept of the court and creating awareness of legal processes to audiences outside of Freetown, the capital).⁴²³

From these goals, policy makers in Sierra Leone hope to see updated and improved laws; availability of skills training and development opportunities for judges, lawyers, investigators, court administrators, and prison guards; and, finally, an increased public awareness and dialogue about criminal processes and the role they fulfill in post-conflict societies.⁴²⁴

A special tribunal might also help modernize potentially destructive cultural values. Most importantly, using law to characterize certain acts as criminal can legitimize certain legal values and criminalize others. Criminalization, Kenneth Abbot argues, supports the penetration of international norms into national legal systems.⁴²⁵ Abbott argues that prosecutions of certain prominent figures might begin to change people's perceptions of statehood and citizenship: "international legal institutions can be "teachers of norms," shaping how governments and citizens perceive particular conduct."⁴²⁶ Thus, citizens would be encouraged to reshape their view of governance and the duties of states and citizens.

This criminalization process has been evident in movements to eradicate societies of harmful traditional practices. Still, the concern that arises when considering changing cultural values is whether societies can transform harmful practices without destroying the culture itself. These questions were raised when Asian and African societies began to combat the

⁴²² *Id.*

⁴²³ *Id.* at 2.

⁴²⁴ *Id.*

⁴²⁵ Kenneth W. Abbott, *International Relations, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361, 374 (1999).

⁴²⁶ *Id.* at 375.

widely known practice of female genital mutilation.⁴²⁷ As soon as civil society groups in these countries began to speak out against these practices and western countries began to publicize the wrongs of female genital mutilation, countries began to pass legislation or to ban the practice.⁴²⁸ For example, Côte d'Ivoire promised the UN in 1991 to use its existing criminal code to prohibit the practice and passed a law prohibiting it in 1998.⁴²⁹ In Sierra Leone, civil society groups hope that the Special Court will have an impact on death penalty law in Sierra Leone.⁴³⁰ Though movements to change harmful traditional practices have been criticized by arguments that espouse theories of cultural relativism,⁴³¹ these theories are problematic and can be just as paternalistic as those calling for the elimination of harmful cultural practices.

One possible target area for a Special Court for Liberia is how Liberian warlords, including Charles Taylor, sanctioned the use of traditional belief in witchcraft and secret societies to further ritual killings. Sierra Leonean and other supporters of the SCSL have credited the effort to address specific Sierra Leonean crimes for the way that the court will help criminalize acts that once appeared legitimate to the Sierra Leonean society.⁴³²

The violence that occurred in Liberia took on a religious nature where murders were of a particular brutal and inexplicable nature.⁴³³ Secret religious societies were a part of Liberian societies well before the coming of the Americo-Liberians in the 1800s.⁴³⁴ These ritualistic societies participated in ritual murder, provoking fear in both Americans and Liberians. Yet, over time, and upon realizing that this form of traditional religion could not be

⁴²⁷ UN Economic and Social Council, Integration of the Human Rights of Women and the Gender Perspective Violence Against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49 Cultural practices in the family that are violent towards women 7, U.N. Doc. No. (2002) [hereinafter UNESC, Violence Against Women].

⁴²⁸ *Id.* at 11

⁴²⁹ *Id.*

⁴³⁰ ICTJ, *Legacy*, *supra* note 291, at 9.

⁴³¹ UNESC, Violence Against Women, *supra* note 427, at 7, 11.

⁴³² *See, e.g.*, ICG, *Promises and Pitfalls*, *supra* note 411, at 14 (discussing the possibility of brining cases against those businessmen who bear the greatest responsibility in the Sierra Leone war). The prosecutor for the Special Court has suggested that a possible line of argument against diamond dealers would be that there is an economy behind the conflict even if it is not a direct cause. *Id.*; Enclosure to Secretary-General Report S/2000/915, *supra* note 11, at 22, *Statute of the Special Court for Sierra Leone*, art. V.

⁴³³ ELLIS, *supra* note 3, at 265 (describing practice of ritual cannibalism).

⁴³⁴ *Id.* at 221

eradicated from society, Americo-Liberians and other politicians adopted these practices too.⁴³⁵ Presidents in Liberia consistently used religion as a way to justify certain public acts and to gain support of the leaders of the religious sects.⁴³⁶ For example, the Doe regime condoned the use of religion as a tool for murder.⁴³⁷ Charles Taylor did the same.⁴³⁸ A special court for Liberia would be a fertile site to address these aspects of Liberian society because the Liberian national justice system does not have the capacity to address these aspects of Liberian society on its own.

3. *The Role of International Involvement and Equal Attention to Crises of Similar Impact*

Finally, arguments for promoting justice in Liberia extend beyond the simple notion that justice can contribute to ending the culture of impunity and the promotion of law reform in African states. Given the similarity between the conflicts in Sierra Leone and in Liberia, some type of court must be established simply because these conflicts deserve equal treatment by the international community. Yet, despite the similarities between the conflicts in Sierra Leone and Liberia, the UN pushed for a court in Sierra Leone, but failed to do the same thing in Liberia, thereby sanctioning further lawlessness in Liberia.

Arguably, the UN's inconsistent application of its Chapter VII powers in deploying Humanitarian Intervention missions throughout the world also evidences this policy.⁴³⁹ Scholars have noted that interventions are not evenly deployed between oppressed white populations on the European continent and oppressed brown populations on other continents.⁴⁴⁰ The possible effect of this failure to commit to African crises in general and to the Liberian crisis in particular may be the primary hindrance to establishing a lasting peace.⁴⁴¹

These same scholars suggest that, if the UN would establish a consistent approach to humanitarian intervention—an approach grounded in precedent—a it could further solidify its legitimacy in the international

⁴³⁵ *Id.* at 242, 245

⁴³⁶ *Id.* at 251.

⁴³⁷ *Id.* at 255.

⁴³⁸ *Id.* at 262.

⁴³⁹ Open Letter, *supra* note 386, at 494. In many past conflicts, the crises were similar yet the UN humanitarian missions were not deployed consistently. Some argue that this distance can be attributed to any of three reasons, the “Somalia Syndrome,” so named because of the death of U.S. forces, racial disparity, and political will.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

community.⁴⁴² Currently, inconsistent application of international policy sends the message that deviance in Africa will be more acceptable than deviant behavior in other conflict areas.⁴⁴³ For Liberia in particular, failure to demand accountability will send a mixed message to the states in the entire Mano River region; in this area of Africa where the conflicts have similar root causes and perpetrators operate across borders, violence will be sanctioned in some countries but not others.

Establishing Special Courts will not be the answer in every transitional context. In Liberia, however, the circumstances are ripe for introducing this type of judicial mechanism. The Peace Agreement process in Liberia consistently fails and consistently evades the basic problems of elite power in Liberia.⁴⁴⁴ Even today, with the new peace agreement, the transitional government fails to prevent the spread of corruption and fiscal mismanagement.⁴⁴⁵ In fact, the transitional government, comprised of rebels-turned-politicians and wealth-opportunity-seeking politicians, takes advantage of the absence of opposition and the ambiguity of the CPA to endow itself with powers beyond those granted in the Agreement.⁴⁴⁶ This pattern is not new in Liberia.

Committing crimes with impunity can be stopped through the process of an internationally supervised justice system. The Special Court system would be a first step in acknowledging that Liberian leaders cannot continue to rule over Liberia without considering the needs of the Liberian people. It is high time that the international community recognizes and defends the notion that there are limits to the exercise of state sovereignty. Specifically, when a state can no longer function as a state because its overseers are the same actors who continuously act against the state's very existence, the international community must demand that those state actors be held accountable for their acts. None of the non-punitive mechanisms of transitional justice address the issue of state-sponsored violence, nor does a peace agreement that calls for power sharing with the same actors who benefit from state decay and forgiveness of the crimes they commit.

E. Ensuring Legitimacy through a Strong U.S. Commitment to Liberia

⁴⁴² *Id.* at 17.

⁴⁴³ *See*, Woodward, *supra* note 82, at 923, 938 (arguing that Liberia receives little public light compared to other countries that have committed such atrocities).

⁴⁴⁴ *See, e.g.*, Warner, *supra* note 402, at 5.

⁴⁴⁵ Moses Wantu, *GRC Finds Flaws with LNTG*, THE ANALYST, Feb. 23, 2005, at <http://allafrica.com/stories/200502230444.html>. (last visited Apr. 11, 2005).

⁴⁴⁶ *Id.*

Liberia's TRC is less than ideal because it hands over the Liberian state to rebel leaders through a blanket amnesty and refuses to confront Liberia's culture of impunity. In the spirit of optimism, however, Liberia still has a chance to redirect its efforts. Liberia has failed, but it can recover with sufficient political will and targeted and well-funded external aid.⁴⁴⁷ Rotberg suggests that a major power can play a key role in revitalizing a failed state in any of the following ways:

- providing security,
- developing a rudimentary police force,
- training local officials across bureaucratic departments, and
- regularizing the local economies.⁴⁴⁸

It will not be enough, however, for a major power to be present merely to gloss over the problems of these countries.

Ensuring long-term peace, security and stability will require keeping in mind the long-term needs of these countries. Most importantly, a guarantor can help maintain security throughout the country. The United States has a special duty to encourage Liberia, like Sierra Leone, to take the extra step to prosecute the individuals most responsible for atrocities in Liberia. This would be a positive first step on the road to ending the culture of impunity in Liberia. The United States has reason grounded in history and diplomacy to commit itself to lending a hand to Liberia.

The United States' crucial decision whether to commit the necessary resources to ensuring a stable future for Liberia will determine whether a Special Court could ever be realistically implemented and whether Liberians would perceive it as a legitimate mechanism. If the United States becomes involved in Liberia in a dedicated way, just as the British have involved themselves in Sierra Leone, the possibility for justice could be real. The United States' powerful presence would ensure financial backing for the Special Court, and with enough troops on the ground, the security issue posed by the rebels would be resolved.

Liberians have also expressed the need for U.S. commitment, more so than most African nations.⁴⁴⁹ O'Connell echoes this view by arguing that an international peacekeeping and reconstruction mission in Liberia, similar to those in Sierra Leone and Cote d'Ivoire under the leadership of the United Kingdom and France, would seal the comprehensive effort to end war in West Africa.⁴⁵⁰ In fact, O'Connell argues that the United States is the only country that can end the war for good in Liberia because of the unique respect that the

⁴⁴⁷ ROTBERG, WHEN STATES FAIL, *supra* note 108, at 31.

⁴⁴⁸ *Id.*

⁴⁴⁹ *U.S. Policy Toward Liberia*, *supra* note 7, at 35 (statement of Nohn Kidau).

⁴⁵⁰ O'Connell, *supra* note 77, at 232.

United States commands in Liberia.⁴⁵¹ One way to ensure peaceful implementation of a court is through the assurance of adequate additional peacekeeping forces. However, the number of American peacekeepers in Liberia is currently inadequate to maintain the fragile peace.⁴⁵²

The United States has continued to play an ambivalent and undecided role in Liberia. For example, in the summer of 2003 when the international community was begging Charles Taylor to leave Liberia so that some type of peace could be achieved, U.S. and African newspapers had different accounts of how the United States should intervene in the Liberia crisis.⁴⁵³ Liberians saw clear reasons for a strong U.S. intervention, while official American policy on Liberia remained unclear throughout Liberia's war. After a small deployment of troops to Liberia, nothing more was heard of the United States' plans for its future relationship with Africa's oldest republic, despite how at other times in US-Liberia relations, the U.S. has vowed to remain a close ally to Liberia.⁴⁵⁴

American newspapers caught on and understood that unequal policies were being applied between Sierra Leone and Liberia.⁴⁵⁵ The fate of Liberia has been a direct product of Liberia's peculiar history. As explained above, the British took the lead in corralling international intervention for Sierra Leone, its former colony.⁴⁵⁶ The French did the same for Cote d'Ivoire.⁴⁵⁷ For nearly 150 years, Liberia remained a virtual American colony, and during the Cold War it ranked among Washington's most useful allies.⁴⁵⁸ But the United States has never recognized itself as an imperial power, let alone a colonial one despite clear historical evidence attesting to the fact.⁴⁵⁹

Whether it will admit it or not, the United States has a historic connection to the Liberian nation. The United States is constantly reminded of this relationship by the Liberian people and by members of the United

⁴⁵¹ *Id.*

⁴⁵² *Open Letter, supra* note 386.

⁴⁵³ *See, e.g.,* Christopher Marquis & Thom Shanker, *Pentagon Leaders Warn of Danger for U.S. in Liberia*, N.Y. TIMES, July 25, 2003, at A1; *but see*, Chinua Akukwe, *Liberia: The Failure of Africa and United States Leadership*, PERSPECTIVE, July 25, 2003.

⁴⁵⁴ O'Connell, *supra* note 77 at 241, 244.

⁴⁵⁵ Somini Sengupta, *Liberia Seen As Icon of World's Neglect of Africa*, N.Y. TIMES, May 21, 2003, at A4.

⁴⁵⁶ O'Connell, *supra* note 77 at 241.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* at 209.

⁴⁵⁹ *Id.* at 209.

States Congress, especially African-American members.⁴⁶⁰ Liberian heads of state clearly and continually have availed themselves of the unique historic fact that Liberia was an experiment in U.S. repatriation policy.⁴⁶¹ Furthermore, Liberian people remained hopeful towards the end of the civil war that the United States would intervene on their behalf.⁴⁶² This hope persisted as civil society groups in Liberia depended on the United States to play the lead role in intervention during Liberia's transition period.⁴⁶³ Rebels in Liberia have even commented that they were more willing lay down their arms if the United States asked them.⁴⁶⁴ Part of the Liberian people's willingness to respect the force of the United States stems from the idea that the United States helped create the modern Liberian state.⁴⁶⁵ These feelings and the rationale for U.S. involvement have also been echoed by some in the United States.⁴⁶⁶

Despite the fact that some see the obvious role that the United States could and should play in Liberia, the official voice of U.S. policy in Liberia is ambivalent. On the one hand, members of the U.S. Department of State have stated clearly that the United States must play the lead in humanitarian assistance in Liberia.⁴⁶⁷ During a recent hearing on U.S. policy toward Liberia, Assistant Secretary of State for African Affairs, Walter Kansteiner stressed that America is willing to put American "boots on the ground" in Liberia, that it would project force when necessary, and that it would participate in diplomatic negotiation with rebel groups and tough

⁴⁶⁰ In the midst of the second Liberian civil war, Charles Taylor attempted to invoke the sympathy of the United States and President George Bush by drawing upon the historical relationship between the two countries: "Our capital is named after your President Monroe. Our flag is a replica of yours. Our laws are patterned after your laws. We in Liberia have always considered ourselves 'stepchildren' of the United States. We implore you to come help your stepchildren who are in danger of losing their lives and their freedom." PHAM, *supra* note 1, at 100.

⁴⁶¹ PHAM, *supra* note 1, at 100.

⁴⁶² *Open Petition to the United States Government*, PERSPECTIVE, July 24, 2003, at <http://www.theperspective.org/openpetitionus.htm>.

⁴⁶³ Todd Howland & Abdelilah Kadili, *Liberia: The Need for a Robust Intervention and Planning for an Effective Transition*, CENTER FOR HUM. RTS NEWSLETTER 1 (2003).

⁴⁶⁴ *U.S. Policy Toward Liberia*, *supra* note 7, at 9 (statement of Walter Kansteiner).

⁴⁶⁵ See also O'Connell, *supra* note 77, at 244 (arguing that the United States bears some responsibility for Liberia's disintegration. By supporting Samuel Doe, the United States sent the message that there was no point to moderate opposition and that only rebellion could oust him. This continual support of corrupt leaders in Liberia might give the US some moral responsibility to provide a small portion of military and financial resources to help Liberia rebuild).

⁴⁶⁶ *U.S. Policy Toward Liberia*, *supra* note 7, at 5 (statement of Donald Payne).

⁴⁶⁷ *Id.* at 8 (statement of Walter H. Kansteiner).

governments.⁴⁶⁸ Kansteiner also acknowledged that security is key to Liberia's transition and that ECOWAS was providing the forces to secure Liberia.⁴⁶⁹

On the other hand, President Bush's policy in Liberia at the end of the war was to merely lend support to ECOWAS under certain conditions: "the departure of Charles Taylor from office and from Liberia, a cease-fire between rebel groups and Liberian government forces, and the firm commitment by West African countries to provide leadership and the bulk of the troops for any peacekeeping effort."⁴⁷⁰ The result of Bush's policy was ECOWAS' deployment of the ECOWAS military mission in Liberia (ECOMIL) instead of U.S. troops on the ground.⁴⁷¹ In June 2003, the Department of State sent 1,800 personnel to Liberia where they waited offshore to assist if needed in securing the U.S. Embassy and evacuating Americans and foreign nationals due to the threat posed by rebels.⁴⁷² The largest contingency of American "boots on the ground" in Liberia was never more than the offshore, 2,100-person U.S.S. Iwo Jima Amphibious Readiness Group.⁴⁷³

African-American members of Congress have continually highlighted the policy of the United States in refusing to deploy ground troops in Liberia despite the United States' economic, military, and political interests in Liberia since the beginning of 1822.⁴⁷⁴ They have often suggested that the United States has two policies: an Iraq policy and a Liberia (Africa) policy.⁴⁷⁵

I highlight the tensions in U.S. policy toward Liberia for several reasons, but primarily as a call to the United States to live up to its history in Liberia. After all, Liberia is a part of America's slave history. But, there are other important reasons. First, U.S. policy needs to be clarified. It is clear that U.S. policy is inconsistent and that members of Congress and other branches of the U.S. government have wildly divergent views on how the

⁴⁶⁸ *Id.* at 7.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 12 (statement of Theresa Whelan)

⁴⁷¹ *Id.*

⁴⁷² *Id.* at 11.

⁴⁷³ *Id.* at 12.

⁴⁷⁴ *Id.* at 18 (statement of Donald M. Payne). Yet Payne expressed his frustration with the Department of Defense's dual policy foreign policy: "We have our hands full in Iraq, there is no question about it, but I think it is absolutely disgraceful that Secretary Rumsfeld continually arguing against deploying a single person in Liberia. It is disgraceful, it is unconscionable, and it just makes me feel that if it is a black person dying in Africa, Rumsfeld doesn't think they are worth our men on the ground."

⁴⁷⁵ *Id.* at 21 (statement of Gregory Meeks).

United States should relate to Liberia.⁴⁷⁶ Second, the disparity in U.S. policy in different countries should be recognized: for example, the United States gives freely to development programs in Iraq but is stingy when it comes to aid for Liberia.⁴⁷⁷ Whereas the international community seems to be firmly dedicated to peace in Sierra Leone—maintaining at least 13,000 U.N. peacekeeping troops to ensure the security of the Sierra Leonean people as the government there tries to implement their various transitional justice mechanisms—there is no equal commitment to Liberia.⁴⁷⁸ In Sierra Leone, just as in colonial times, and after Sierra Leone’s independence, the British have remained to aid the government in an advisory capacity.⁴⁷⁹ Yet, Liberia finds itself in a precarious position with no superpower on which to lean.

Contrary to popular opinion, the involvement of the United States in Liberia would not create huge costs for the United States. Jamie O’Connell, law clerk to the Honorable James R. Browning, argues that U.S. leadership in the reconstruction of Liberia might actually lead to some political gains.⁴⁸⁰ O’Connell argues that U.S. leadership in Liberia would counter the view that the “U[.]S[.] shirks its international responsibilities.”⁴⁸¹ O’Connell ultimately argues that a U.S. intervention in Liberia would require only modest military, economic, and political resources.⁴⁸² This would cost about \$200 million per year for the first five years of reconstruction, and perhaps \$100 million per year thereafter for 10 years—\$1.5 billion over ten years.⁴⁸³ To get a sense of how small these figures are, O’Connell observes that the United States is spending \$18.6 billion on reconstruction in Iraq, roughly \$480 billion on defense and homeland security in 2004 and \$5.4 trillion dollars from 2004 to 2013.⁴⁸⁴

In sum, sustainable nationbuilding demands more than a quick fix. It requires a long-term commitment from the developed world to building capacities, strengthening security, and developing human resources. The uncomfortable but necessary lesson from Liberia’s partially effective attempts at rebuilding the Liberian state is that the revival of failed states will prove more successful if a regional or international organization or superpower

⁴⁷⁶ See, generally *U.S. Policy Toward Liberia*, *supra* note 7.

⁴⁷⁷ *Id.* at 21 (statement of Gregory Meeks).

⁴⁷⁸ Bravin, *supra* note 273, at A1.

⁴⁷⁹ O’Connell, *supra* note 77, at 241, 246.

⁴⁸⁰ *Id.* at 207, 208.

⁴⁸¹ *Id.* at 208.

⁴⁸² *Id.*

⁴⁸³ *Id.* at 244.

⁴⁸⁴ *Id.* (citing Congressional Budget Office, *The Budget and Economic Outlook, An Update 8* (2003)).

takes charge of oversight and financial support of the process, and only gradually relinquishes authority to a transitional administration.⁴⁸⁵

CONCLUSION

Liberia's civil war is officially over, yet the war criminals are free and some are even helping run the transitional government under CPA authority. Meanwhile, Charles Taylor relaxes in Nigeria's resort city of Calabar. By contrast, Sierra Leone's brave step to implement the SCSL is commendable because it signals a desire to begin the transition to rule of law and the end of rule by impunity. Sierra Leone can be a model for Liberia.

Legal mechanisms do have their limits and cannot function alone. It goes without saying that tribunals are not and should not be a substitute for early global intervention. An effective post-war regime must include institutions for monitoring abuses, conflict avoidance measures, sustainable peace, protection of minority rights, election supervision, and other functions.⁴⁸⁶ Legal mechanisms will not work without strong political mechanisms and economic support to combat Africa's post-colonial weak state syndrome.⁴⁸⁷ Still, by revisiting the colonial period and the growth of the post-colonial African political ruling style, we can see the growth of a culture of impunity. Rule by African elites without answering to their own people has directly caused a failure of their states.

Liberia has become the quintessential example of an African failed state. The goal of this article has been to show that Liberia can begin to end the culture of impunity and ring in a sustainable peace. This will happen if the intervention of the transitional government of Liberia and the international community focuses on changing the behavior of political elites instead of focusing exclusively on reconciliation among the masses. Unfortunately, Liberia's present CPA does precisely that; it focuses exclusively on reconciliation. Ultimately, positive change is far more likely in Liberia through the use of judicially punitive mechanisms such as prosecution in a hybrid Special Court of law.

⁴⁸⁵ ROTBERG, *supra* note 108, at 4.

⁴⁸⁶ Abbott, *supra* note 425, at 376.

⁴⁸⁷ LEONARD & STRAUS, *supra* note 4, at 1-20.