

**REGIONAL APPROACH TO TRANSITIONAL JUSTICE?
EXAMINING THE SPECIAL COURT FOR SIERRA LEONE AND
THE TRUTH & RECONCILIATION COMMISSION
FOR LIBERIA**

*Matiangai Sirleaf**

This Article re-conceptualizes the idea of transitional justice mechanisms as varying approaches meant solely to address the legacy of abuse in one nation, and proposes that transitional justice mechanisms can also encompass regional and transnational efforts to respond to mass human rights violations occurring across societies. This Article focuses on the challenges posed by trials and truth seeking mechanisms in conflicts where massive human rights violations have occurred across nations and argues that where these mechanisms have been established without regard to the regional or transnational nature of human rights violations, such mechanisms will encounter problems of coordination including legal primacy, information sharing, and access to detainees. This Article analyzes these critical issues by examining the transitional justice mechanisms in Liberia and Sierra Leone and highlights the challenges posed by the failure to take a regional approach. The Article proposes that adopting a regional approach when designing transitional justice mechanisms in the aftermath of mass atrocity across societies is the best means for achieving long-term peace, stability, and respect for human rights within the affected region.

I.	INTRODUCTION.....	210
II.	HISTORICAL CONTEXT.....	217
III.	JUSTICE IN SIERRA LEONE & TRUTH IN LIBERIA?.....	221
	A. <i>Establishment of the TRC-SL and the SCSL</i>	222
	B. <i>Establishment of the TRC-L</i>	226

* International Center for Transitional Justice (ICTJ), Bernstein Fellow (Yale Law School 2008-2009). The opinions expressed in this report are those of the author and do not reflect the views of the ICTJ. I gratefully acknowledge the comments and suggestions of W. Michael Reisman, Oona Hathaway and Andrea Armstrong. This Article also greatly benefited from the support of Chaz Arnett. This Article was awarded the Raphael Lemkin Prize 2006-2007 for best paper on international human rights at Yale Law School.

IV.	CENTRAL CHALLENGES POSED BY THE FAILURE TO TAKE A REGIONAL APPROACH TO TRANSITIONAL JUSTICE IN SIERRA LEONE & LIBERIA	229
	A. <i>The Question of Legal Primacy</i>	233
	1. The SCSL and the TRC-SL	233
	2. The SCSL and the TRC-L	234
	B. <i>Information Sharing</i>	251
	1. The SCSL and the TRC-SL.	251
	2. The SCSL and the TRC-L.	253
	C. <i>Access to Detainees</i>	257
	1. The SCSL and the TRC-SL: The Case of Hinga Norman.	257
	2. The SCSL and the TRC-L: The Case of Charles Taylor.	262
V.	RECOMMENDATIONS.	271
VI.	CONCLUSION	280

I. INTRODUCTION

The Special Court for Sierra Leone has a responsibility to Liberia to promote justice, to ensure that Taylor has a fair trial, and to ensure that justice is done to him and justice is done to Liberia. And, in doing justice to Liberia the Truth & Reconciliation Commission (TRC) should have access to Taylor if the TRC so desires, and Taylor should have access to the TRC if he also so desires.¹

Massive human rights violations are often not limited to one state but affect other states. Post-conflict transitional justice mechanisms are usually set up to address legacies of abuse in one nation, but this does not necessarily reflect the reality of some conflicts and the interconnectedness of some conflicts. The Special Court for Sierra Leone's (SCSL) prosecution of former Liberian President Charles Taylor for his alleged role in the conflict in Sierra Leone poses a number of challenges. The Truth & Reconciliation Commission for Liberia (TRC-L) was created to investigate the legacy of gross

1. Interview with Jerome Verdier, Chairman, TRC-L, in Monrovia, Liberia. (Jan. 11, 2007).

violations of human rights abuses, to ensure accountability, as well as, to promote reconciliation in Liberia. Significantly, no explicit provision in the Act creating the TRC-L addressed exactly what the relationship would be between the TRC-L and the SCSL.

Liberia and Sierra Leone, like other societies pursuing accountability for mass atrocities and human rights abuses, have chosen to employ transitional justice mechanisms. The International Center for Transitional Justice (ICTJ) defines transitional justice as a term that “refers to a range of approaches that societies undertake to reckon with legacies of widespread or systematic human rights abuse as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights.”² As a field, transitional justice focuses on a number of approaches to confronting the past, including trials and truth-seeking mechanisms.³ This Article focuses on the challenges posed by trials and truth seeking mechanisms in conflicts where massive human rights violations have occurred across nations. It argues that post-conflict trials and truth commissions can not be formulated along national lines where the conflicts cross them and massive human rights violations have occurred across nations. This Article’s central premise is that it is a fundamental mistake to establish national institutions for regional or transnational abuses, or to utilize international institutions, which fail to consider this.

Proponents of trials after massive human rights violations argue that, “prosecution is the only real means of retribution.”⁴ Additionally, the familiar refrain that “there is no durable peace without justice” is based on the assumptions that trials, “build up a sturdy peace by, first, purging threatening . . . leaders; second, deterring war criminals; third,

2. Int’l Ctr. for Transitional Justice, What is Transitional Justice?, <http://www.ictj.org/en/tj/> (last visited Apr. 4, 2009); see also Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing With the Past*, 20 LAW & SOC. INQ. 1 (1995); David Little, *A Different Kind of Justice: Dealing With Human Rights Violations in Transitional Societies*, 13 ETHICS & INT. AFFAIRS 65 (1999); TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES (James McAdams ed., 1997); see generally NEIL J. KRITZ, TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (U.S. Institute of Peace 1995) (collecting in three volumes materials on transitional justice, including scholarly commentary, country studies, and primary sources).

3. Truth seeking mechanisms investigate violations of human rights, whether the investigations are conducted via official national inquiries such as truth commissions or via international commissions of inquiry or NGO efforts.

4. GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY THE STRUGGLE FOR GLOBAL JUSTICE 247 (2000).

rehabilitating . . . countries; fourth, placing the blame for atrocities on individuals rather than on whole . . . groups; and fifth, establishing the truth about wartime atrocities.”⁵ Despite these claims, it is far from clear whether trials have all of these desired effects in the short or long term.⁶ In particular, trials can never establish a thorough historical record as they focus on individual cases, and not the complex relationships that exist between individuals, groups, and institutions that make massive human rights violations possible. Indeed, trials are not aimed at determining the “truth,” but rather, whether a particular criminal standard of proof has been met based on the charges before the court. There are also procedural and operational limitations to using trials particularly in post- conflict situations.⁷ Notwithstanding these limitations, this author believes that trials create some sense of accountability, justice, and establishing the rule of law. As Martha Minow, Professor of Law at Harvard, whose research focuses on human rights in transitional societies, aptly put it, while “legal responses are inevitably frail and insufficient [,] . . . inaction by legal institutions means that the perpetrators prevailed in paralyzing the instruments of justice.”⁸ Indeed, “guilty verdicts afford public acknowledgment of what happened, and its utter wrongfulness.”⁹ They are a way of conveying that “a society is not willing to overlook the suffering inflicted on the victims of grave abuses nor turn a blind eye to the cruelties committed by those with the highest responsibility for causing that suffering.”¹⁰

It is partly because of the limitations of trials, that some countries have turned to truth seeking mechanisms as a way to respond to past atrocities. A “truth commission” is the general designation used to describe an official organ organized for a limited time and for the specific purpose of examining serious human rights violations that occurred in the past.¹¹ The notion of a “truth commission” began in

5. GARY BASS, *STAY THE HAND OF VENGEANCE THE POLITICS OF WAR CRIMES TRIBUNALS* 286 (2000).

6. *Id.* at 286 – 304 (for a further discussion of the weaknesses of these arguments).

7. *See generally* E. Gyimah-Boadi, Executive Director, CDD-Ghana, Paper Presentation at the British Hall Council: Reconciliation: Comparative Perspectives, 5 (June 13, 2005) (on file with author) (The author drafted this lecture while interning at CDD-Ghana).

8. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 5 (1998).

9. *Id.* at 123.

10. *See* Aryeh Neier, Emilo Mignone Lecture on behalf of the International Center for Transitional Justice at New York University School of Law, 6 (Oct. 15, 2008).

11. *See* PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS FACING THE CHALLENGE OF TRUTH*

Argentina, although the most familiar body is the South African Truth and Reconciliation Commission.¹² Truth commissions can have a number of goals attached to them including, to

Overcome communal and official denial of the atrocity and gain public acknowledgment; obtain the facts in an account as full as possible in order to meet victims' need to know, to build a record for history, and to ensure minimal accountability and visibility of perpetrators; end and prevent violence . . . forge the basis for a domestic democratic order that respects and enforces human rights; . . . promote reconciliation across social divisions; promote psychological healing for individuals, groups, victims, bystanders, and offenders; [and] restore dignity to victims . . .³¹

It is similarly ambiguous whether truth commissions actually achieve these goals in the short or long term. Additionally, due to funding, and time constraints, truth commissions are highly limited in investigations, statement taking, and transcribing information.¹⁴ As such, the commission's report and its ability to deliver the "truth" will often be inadequate. Furthermore, while truth commissions can possibly contribute to the respect for human rights and democratization, these initiatives are inevitably plagued with problems of implementation of their recommendations.¹⁵ Despite the numerous limitations of truth commissions, this author believes that truth commissions can have an independent value in that they emphasize the experiences of those victimized, the development of a comprehensive historical record, and the reform of societies after mass atrocity.

Trials and truth seeking mechanisms serve different functions and fulfill different roles. Truth commissions focus on restorative justice, while trials focus on retributive justice. As Professor Minow explains, "all of the practical dimensions of prosecutions could work against the goals of healing, reconciliation, and full truth-telling."¹⁶ Indeed, truth commissions are not judicial bodies and do "not presume to try people

COMMISSIONS 14 (2002).

12. *Id.* at 5 (noting that none of the other commissions up to that point had held hearings in public or offered individualized amnesty).

13. MINOW, *supra* note 8, at 88.

14. Gyimah-Boadi, *supra* note 7, at 7.

15. *See id.* at 8.

16. MINOW, *supra* note 8, at 89.

or establish guilt and innocence.”¹⁷ Priscilla Hayner, Director of the Peace and Justice Program for the ICTJ maintains, “nonjudicial truth bodies do not and should not be seen to replace judicial action against perpetrators While their subject matters may overlap in that they both investigate past crimes, trials and commissions serve different purposes, and neither can fill the role of the other.”¹⁸ Often times after mass atrocity, “truth” is juxtaposed in opposition to “justice,” but in fact many truth commissions have forwarded their case files to prosecuting authorities and have recommended prosecution.¹⁹ Indeed, there is no inherent reason why truth commissions cannot contribute to later trials, or must be seen in opposition to justice.²⁰ This Article does not assume that one approach to transitional justice is inherently better than the other given the limitations of both trials and truth commissions. Indeed, different conflicts require different approaches to transitional justice. Ultimately, this author believes that whatever transitional justice approach adopted should be guided by the desires of those most affected by the conflict(s) and the abuses, human rights victims. However, difficult legal questions arise where trials and truth commissions operate concurrently, namely around legal primacy, information sharing, and access to detainees. The way these issues are resolved can have a considerable impact on the effectiveness of both institutions.

While some practitioners and scholars have written articles on the relationship between truth commissions and courts,²¹ nothing has been

17. *Id.* at 87.

18. HAYNER, *supra* note 11, at 87.

19. *Id.* at 90, 102.

20. *Id.* at 102. “The Spanish judge, who brought charges against Augusto Pinochet, relied heavily on the Chilean truth commission report.” *Id.* Similarly, human rights groups attempting to bring charges against the former ruler of Chad, Hisssein Habre, began their efforts by examining the truth commission’s report in Chad. *Id.*

21. The majority of the scholarship in this area has focused on the concurrent operation of transitional justice mechanisms within the same country and context. For example, in East Timor a truth commission and trials coincided. See generally Piers Pigou, Int’l Ctr. For Transitional Justice, *Crying Without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations*, Occasional Paper Series, Aug. 2003. The bulk of the literature has focused on the concurrent operations of the SCSL and the TRC-SL; William A. Schabas, *Truth Commissions and Courts Working in Parallel: The Sierra Leone Experience*, 98 AM. SOC’Y INT’L L. PROC. 189 (2004); HUMAN RTS. WATCH, POLICY PAPER ON THE INTER-RELATIONSHIP BETWEEN THE SIERRA LEONE SPECIAL COURT AND THE TRUTH AND RECONCILIATION COMMISSION (2002), available at www.hrw.org; Solomon Berewa, *Addressing Impunity Using Divergent Approaches: The Truth and Reconciliation Commission and the Special Court*, in TRUTH AND RECONCILIATION IN SIERRA LEONE: A COMPILATION OF ARTICLES ON THE SIERRA LEONE TRUTH AND

written about the concurrent operation of these bodies to address related events in different countries. Elizabeth M. Evenson, a human rights lawyer, has recommended a loose framework for making coordinating decisions between the truth commissions and trials operating in the same country.²² Evenson concluded that “where institutions are created simultaneously . . . coordination can be explicitly written into the statutes of each” and where the establishment of one institution is “subsequent to the establishment of another, the legislation of the later in time institutions should be drafted clearly to outline and resolve potential areas of conflict.”²³

An even more compelling argument can be made for situations where massive human rights violations are not limited to one state, but affect other states. While Evenson’s work presents an important contribution to the literature on coordination between truth commissions and trials, her framework fails to consider regional or transnational approaches. Evenson’s framework is indicative of the largely parochial focus of transitional justice scholars. It is almost as if transitional justice processes take place completely divorced from one another in a vacuum. This Article distinguishes itself from previous scholarship because it argues that where massive human rights violations have occurred across nations, transitional justice mechanisms cannot simply be “coordinated,” rather these institutions must be designed to reflect the reality of conflict lines.

In order to test this hypothesis, this Article will focus on the case of Liberia and Sierra Leone. The conflicts that occurred in Sierra Leone and Liberia are intimately related. In fact, they formed a “regional conflict complex.”²⁴ The interactions between the conflicts suggest that where transitional justice mechanisms have been established without regard to the regional or transnational nature of massive human rights violations, such mechanisms will encounter problems of coordination. Liberia opted to use a truth seeking mechanism, the TRC-L, and Sierra Leone utilized a combination of a truth seeking mechanism, the Truth & Reconciliation Commission for Sierra Leone (TRC-SL), and criminal

RECONCILIATION COMMISSION (UNAMSIL, Freetown, 2001); INT’L CRISIS GROUP, THE SPECIAL COURT FOR SIERRA LEONE PROMISES AND PITFALLS OF A ‘NEW MODEL, AFRICA BRIEFING NO. 16 AUG. 2003.

22. Elizabeth M. Evenson, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court*, 104 COLUM. L. REV. 730, 758 (2004).

23. *Id.* at 760-1.

24. A regional conflict complex is a term used to describe contemporary armed conflicts, which are more transnational than “civil.” See Peter Wallensteen & Margareta Sollenberg, *Armed Conflict and Regional Conflict Complexes*, 5 J. PEACE RESEARCH 35, 621-34 (1998).

trials through the SCSL. This Article analyzes the most critical issues posed by the failure to take a regional approach in Sierra Leone and Liberia. For example, whether the SCSL or the TRC-L holds legal primacy is unclear. Additionally, it is uncertain whether information that the TRC-L collects will be shared with the SCSL, or whether the TRC-L's power to grant confidentiality to sources could protect it from requests or subpoenas from the SCSL. Another crucial question is whether the SCSL will grant the TRC-L access to Taylor for the purpose of completing its own investigations and establishing a complete record of the human rights violations that occurred in Liberia. I use interviews conducted with individuals involved with the transitional justice mechanisms in both Sierra Leone and Liberia to explore these issues.²⁵

The case of Liberia and Sierra Leone will demonstrate the importance of an integrated approach to transitional justice in regional conflicts. In short, this Article re-conceptualizes the idea of transitional justice mechanisms as varying approaches meant solely to address the legacy of abuse in one nation, and proposes that transitional justice mechanisms can also encompass regional and transnational efforts to respond to mass human rights violations occurring across societies. Part I of this Article has introduced the problem, and analyzed the different roles and purposes of trials and truth commissions. Part II summarizes the interconnectedness of the conflicts in Liberia and Sierra Leone. Part III examines the creation and mandates of the transitional justice mechanisms in Sierra Leone, and in Liberia.

25. During a research trip to Sierra Leone in July of 2005 with support from the Fulbright Fellowship, I conducted interviews with personnel at the SCSL, the TRC-SL and relevant civil society groups for my thesis, *National Reconciliation and Transitional Justice Processes in West Africa: A Comparative Study of Sierra Leone and Ghana* (Oct. 4, 2005) (unpublished M.A. dissertation, University of Ghana Legon Centre for International Affairs) (on file with author). I also went on a research trip to Liberia in January 2007 with support from the Streicker Student Fund at Yale Law School, and conducted interviews with personnel from the TRC-L and civil society groups. *See* Appendix I for list of interviewees. More recently, I conducted assessment missions on a separate project for the ICTJ in late 2008 and early 2009 in Sierra Leone, Liberia, and Ghana focusing on truth telling, prosecutions, and reparations. I interviewed over one hundred human rights victims, relevant actors from truth commissions, courts, government agencies, and civil society groups amongst others. The information gathered from the missions in Liberia and Sierra Leone also informs this Article. Interviewees expressed varying degrees of comfort with being quoted directly, as such; citations are generally not attributed to specific individuals. *See* Matiangai Sirleaf, *Transitional Justice in West Africa: A Comparative Assessment of Transitional Justice Experiences in Ghana, Sierra Leone and Liberia*, app. Int'l Ctr. for Transitional Justice (forthcoming publication 2009) (for full list of interviews).

Part IV explores the troubled relationship of the SCSL and the TRC-SL, focusing on the three key challenges: legal primacy, information sharing, and access to detainees. Part IV also examines the problems posed by failing to take a regional approach when designing the SCSL and TRC-L regarding the aforementioned issues, focusing specifically on the case of Taylor before the SCSL. Part V proposes that a “regional approach” in designing transitional justice mechanisms would be superior for addressing situations where massive violations have occurred across borders. Finally, Part VI concludes that a regional approach to transitional justice in the aftermath of mass atrocity across societies is the best means for achieving the goals of the mechanisms in the affected region

II. HISTORICAL CONTEXT

In order to fully grasp the interrelatedness of the transitional justice processes in both Liberia and Sierra Leone, it is necessary to briefly discuss the interconnectedness of the conflicts. This Article begins with the understanding that the conflicts in Liberia and Sierra Leone were part of a “regional conflict complex.” Regional conflicts are formed through a number of factors including: regional states competition in a weak or collapsed third state; competition for access to extra-regional resources; state collapse in one or more states; the existence of a parallel transnational informal economy; trans-border social networks; the availability and “lootability” of natural resources; militarization and arms trafficking in the region; as well as the existence of trans-border armed groups.²⁶ This Part focuses on a number of these factors to demonstrate the regional nature of the conflicts in Liberia and Sierra Leone.²⁷ To assert that the conflicts were regional in nature does not

26. *See generally* CENTER FOR INT’L COOPERATION, POLICY APPROACHES TO REGIONAL CONFLICT FORMATIONS, CONFERENCE SUMMARY OF NY MEETING 5-7 (2002), *available at* <http://www.cic.nyu.edu/archive/pdf/FINAL2.pdf>.

27. This Article will not go into detail about the well documented ways in which both civil wars were financed through “conflict diamonds” and the arms trafficking that occurred between Liberia and Sierra Leone. *See generally* PAUL COLLIER & ANKE HOEFFLER, GREED AND GRIEVANCE IN CIVIL WAR, (World Bank, 2001); PAUL COLLIER & ANKE HOEFFLER, JUSTICE SEEKING AND LOOT-SEEKING IN CIVIL WAR, (World Bank, 1999); DAN SMITH & RACHEL STOHL, CTR. FOR DEF. INFO., PRESENTATION AT THE FAILED STATES AND INTERNATIONAL SECURITY CONFERENCE, SMALL ARMS IN FAILED STATES: A DEADLY COMBINATION (1999), *available at* <http://www.cdi.org/issues/failedstates/march99.html>; BRIAN WOOD & JOHAN PELEMAN, THE ARMS FIXERS: CONTROLLING THE BROKERS AND SHIPPING AGENTS BASIC RESEARCH REPORT NO. 99 (PRIO), *available at*

ignore the unique and individualized reasons that lead to conflicts in each country. Rather, recognizing the interconnectedness of the conflicts suggests that a regional or transnational approach should have been adopted in designing the transitional justice mechanisms.

The conflicts in Liberia and in Sierra Leone were tragedies of immense proportions, resulting in nearly 300,000 deaths, and creating millions of refugees and internally displaced people.²⁸ In December 1989, a band of rebels known as the National Patriotic Front of Liberia (NPFL), led by Charles Taylor invaded northern Liberia.²⁹ The stated goal of Taylor's NPFL was overthrowing the corrupt regime of President Samuel Doe, who gained power through a coup in 1980 that overthrew the elected President William Tolbert Jr. Sierra Leone's conflict began in 1991, when Former Army Corporal Foday Sankoh and his Revolutionary United Front (RUF) invaded Sierra Leone from Liberia with the assistance of Taylor's NPFL. The RUF incursion led to the breakdown of state authority in Sierra Leone, destabilizing the regime of President Momoh.³⁰ For all practical purposes, Liberia became a failed state as warlords throughout the country competed for political power and economic resources.³¹

The Economic Community of West African States (ECOWAS) brokered a cease-fire in Liberia in 1990, which was to be implemented by the Cease-Fire Monitoring Group (ECOMOG).³² The Momoh regime in Sierra Leone took a prominent role in ECOMOG, hosting their first meeting in July 1990.³³ "Taylor wanted to weaken ECOMOG, which he (correctly) believed to be blocking his attempts to take control of the capital" of Liberia.³⁴ Taylor vowed that Sierra Leone would soon "taste the bitterness of war."³⁵ The International Crisis Group reports that out

<http://www.nisat.org/publications/armsfixers/Chapter1.html>.

28. In Sierra Leone more than 50,000 people were killed, while in Liberia over 250,000 people were estimated to have died during the civil war.

29. ABIODUN ALAO ET AL., *PEACEKEEPERS, POLITICIANS, AND WARLORDS: THE LIBERIAN PEACE PROCESS* 20 (U.N. University Press, 1999).

30. Robert Mortimer, *From ECOMOG to ECOMOGII*, in *AFRICA IN WORLD POLITICS: THE AFRICAN STATE SYSTEM IN FLUX* 191 (John Haberson & Donald Rothchild eds., Westview Press 2000).

31. POLITY IV, *COUNTRY REPORT 2000: LIBERIA (2001)*, available at <http://www.bsos.umd.edu/cidcm/inscr/polity/Lbr1.htm>.

32. *See generally* FESTUS ABOAGYE, *ECOMOG: A SUB-REGIONAL EXPERIENCE IN CONFLICT RESOLUTION MANAGEMENT AND PEACEKEEPING IN LIBERIA*, (1999).

33. Mortimer, *supra* note 30, at 189.

34. ERIC BERMAN, *REARMAMENT IN SIERRA LEONE: ONE YEAR AFTER THE LOMÉ PEACE AGREEMENT* 3 (2000).

35. INT'L CRISIS GROUP, *AFRICA REPORTS NO. 43, LIBERIA THE KEY TO ENDING REGIONAL*

of the 100 fighters of the RUF that invaded Sierra Leone initially, almost 50 of them were Liberian and Burkinabe mercenaries.³⁶ Gibril Foday-Musa, a former RUF combatant and part of the initial group, confirms, “they were merely fulfilling an initial agreement that we will help you fight and then you create a base for us and then we can attack.”³⁷ After the onset of Taylor’s NPFL insurgency in Liberia, the RUF were also able to receive regular training in NPFL held territories, which was made possible by the porous borders between the two countries.³⁸ Christopher Clapham, Professor of Politics and International Relations at Lancaster University in the United Kingdom, who has written extensively on security dilemmas in African states, asserts that Sankoh’s connections with Charles Taylor might well have been instrumental in enabling him to emerge as the head of the RUF.³⁹ There is extensive documentation on the level of support the RUF received from Taylor’s NPFL through the provision of training, weapons, and a safe haven amongst others.⁴⁰

With pressure from ECOMOG, the warring parties in Liberia signed the Abuja II Accord in August 1996.⁴¹ Despite the serious challenges that had derailed the preceding peace agreements, the Abuja II Accord’s implementation resulted in the disarmament of about 23,000 combatants.⁴² On July 19, 1997, Charles Taylor won the Liberian elections with a convincing 75% majority.⁴³ Many Liberians were afraid of the consequences of a disillusioned Taylor “returning to the bush” if

INSTABILITY 2 (2002).

36. *Id.*

37. Interview with Gibril Foday-Musa, Former RUF combatant, in Freetown, Sierra Leone (Dec. 2002).

38. See, e.g., U.N. Sec. Council, *Report of the Panel of Experts pursuant to Security Council Resolution 1343 Concerning Liberia*, ¶, at 26, U.N. Doc. S/2001/1015 (Oct. 26, 2001) [hereinafter U.N. Panel of Experts-Liberia Report], available at <http://www.un.org/Docs/sc/committees/Liberia2/1015e.pdf> (discussing the porous nature of the borders between Liberia, Sierra Leone, and Guinea causing Liberia to close its borders with Sierra Leone and Guinea in mid-March 2001).

39. See Christopher Clapham, *Sierra Leone: the Global-Local Politics of State Collapse and Attempted Reconstruction*, in FAILED STATES CONFERENCE REPORT 9 (2001), available at http://www.comm.ucsb.edu/research/mstohl/failed_states/2001/papers/CLAPHAM2.pdf.

40. U.N. Sec. Council, *Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1306, in Relation to Sierra Leone*, ¶ 192, at 33, U.N. Doc. S/2000/1195 (Dec. 20, 2000) [hereinafter U.N. Panel of Experts-SL Report].

41. See ALAO ET AL., *supra* note 29, at 90.

42. *Id.*

43. See *Election Watch*, 8 J. OF DEM., 4 Oct. 1997, available at http://muse.jhu.edu/journals/journal_of_democracy/election_watch/v008/index.html (discussing Taylor’s 75.3% victory in 1997).

he felt isolated from the peace process.⁴⁴ Meanwhile in Sierra Leone, as a result of the conflict, several coups took place, eventually leading to wartime elections that brought Ahmed Tejan Kabbah to office in March 1996.⁴⁵ Disgruntled soldiers led by Major Johnny Paul Koroma, leader of the Armed Forces Revolutionary Council, and affiliated with the RUF, overthrew Kabbah in May 1997. The arrival of peacekeepers and internal resistance in Sierra Leone enabled President Kabbah to return to power in February 1998.⁴⁶

Even after Taylor's election, as President of Liberia, RUF combatants trained alongside Liberia's special governmental forces, dubbed the "Anti-Terrorist Unit," and Taylor frequently used RUF combatants for his own personal security details.⁴⁷ The RUF-Liberian relationship was "also strategic for [the] RUF. . . . Liberia offer[ed] sanctuary and a location to store weapons and keep armed units active and trained . . ."⁴⁸ Certainly, the role that Liberia played as a safe haven for the RUF was vital to the insurgents' survival and ability to continue to foment war in Sierra Leone. Sierra Leone's conflict was a battle between successive civilian and military governments, in alliance with the government-aligned Civil Defense Force against the RUF. After several unsuccessful peace accords, the government and the RUF signed the Lomé Peace Agreement in July 1999. However, even this agreement faced severe problems of implementation.

Due to Taylor's support for the RUF,⁴⁹ both Sierra Leone and Guinea supported dissident refugee populations within their borders to unseat Taylor from power.⁵⁰ Notably, some of the members of the rebel

44. A popular campaign slogan expressed many Liberians rationale, "He killed my Pa, He killed my Ma, I'll vote for him." See Douglas Farah, *Standing by as a Brutal Warlord Plots His Return*, WASH. POST, Oct. 2, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/30/AR2005093002085.html> (discussing how Taylor's support was based on fear).

45. Mortimer, *supra* note 30, at 191.

46. Regional forces (ECOMOG II), led by Nigerian troops, which withdrew in April 2000, a 17,500 strong U.N. peacekeeping contingent sent to the country in November 1999, and a small contingent of British troops that entered Sierra Leone in May 2000, provided a modicum of stability.

47. U.N. Panel of Experts-SL Report, *supra* note 40, ¶ 183, at 33.

48. U.N. Panel of Experts-Liberia Report, *supra* note 38, ¶ 115, at 28.

49. Taylor admitted his support of Liberia's affiliation with the RUF in 2002, and announced that he had closed down the RUF liaison office in Monrovia, as well as its bank account. Tiawan Gongole, *The Liberian Government Finally Admits Support to RUF*, PERSPECTIVE, Nov. 27, 2002, at 2, available at <http://www.globalpolicy.org/security/issues/liberia/2002/1202taylor.htm>.

50. SURVIVORS' RIGHTS INT'L, SRI BACKGROUND ALERT: LIBERIA (2003), available at http://www.survivorrightsinternational.org/ms_word_files/liberiabackgrounden.org.

group, Liberians United for Reconciliation and Democracy, fought for Kabbah's government in Sierra Leone against the RUF before fighting to remove Taylor from power.⁵¹ The fighting led by Liberians United for Reconciliation and Democracy and its splinter group, the Movement for Democracy in Liberia,⁵² continued intermittently in Liberia. On January 18, 2002, President Kabbah officially declared Sierra Leone's conflict over and lifted the four-year state of emergency, ahead of the general elections in May 2002, which he convincingly won.⁵³ The intensity of Liberia's conflict heightened during 2002, forcing Taylor to declare a state of emergency and engage in peace negotiations with the rebel groups. Taylor eventually stepped down from power in August of 2003.⁵⁴ Shortly thereafter, the interim government and rebel groups signed the Comprehensive Peace Agreement in Ghana, and the United Nations launched a massive peacekeeping mission to Liberia. This brief synopsis provides some insight into the regional nature of the conflicts. While the regional conflict complex affected Côte d'Ivoire and Guinea, this Article does not examine these countries, since transitional justice mechanisms were not established or operating at the time of writing. In Sierra Leone and Liberia, three distinct transitional justice mechanisms, with separate and overlapping mandates, were created.

III. JUSTICE IN SIERRA LEONE & TRUTH IN LIBERIA?

In order to understand fully the challenges posed by the failure to adopt a regional approach in Liberia and Sierra Leone, it is necessary to analyze the respective and overlapping mandates of the transitional justice mechanisms created. This Part examines the factors that influenced Liberia and Sierra Leone's approaches to transitional justice,

51. SURVIVORS' RIGHTS INT'L, SRI COUNTRY BRIEFING: LIBERIA 22 (2003), available at http://www.survivorrightsinternational.org/pdfs/Liberia_report.pdf.

52. Côte d'Ivoire supported this group in Liberia because of Taylor's support for two rebel groups in Côte d'Ivoire composed mostly of ex-RUF and Liberian soldiers. See Lansana Gberie, *Diamonds Without Maps: Liberia, the UN, Sanctions and the Kimberly Process*, P'ship Afr. Can. Occ. Paper 11, 5, June 2004.

53. *Sierra Leone Ends State of Emergency*, BBC NEWS, Mar. 2, 2002, at 32, available at http://news.bbc.co.uk/1/hi/english/world/africa/newsid_1850000/1850735.stm. See also Ofeibea Quist-Arcton, *Sierra Leone: Kabbah is Declared Victor and Sworn in for New Term*, ALL AFRICA COM, May 20, 2002, available at <http://allafrica.com/stories/200205200001.html>.

54. See Ofeibea Quist-Arcton, *West Africa: Taylor Confirms He Will Step Down in Liberia August 11*, ALL AFRICA COM Aug. 2, 2003, available at <http://allafrica.com/stories/200308020064.html>.

discussing briefly key provisions in their respective peace agreements. Additionally, it discusses the creation of the transitional justice mechanisms in both Sierra Leone and Liberia, highlighting important sections of their enabling documents.

A. *Establishment of the TRC-SL and the SCSL*

The creation of the TRC-SL and the SCSL proceeded in a haphazard manner in Sierra Leone. Initially, the Lomé Peace Agreement signed in 1999, granted blanket amnesty to all the fighters.⁵⁵ The common belief was that the RUF would not sign the agreement if there were any prospect of legal action against its members.⁵⁶ At the time of signing, the Special Representative of the Secretary General of the United Nations appended a disclaimer,

The United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.⁵⁷

This reservation apparently meant that the “full amnesty” granted to all fighters was in fact not so full. Article XXVI of the Lomé Peace Agreement made provision for creating the TRC-SL,

[T]o address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story . . . in order to facilitate genuine healing and reconciliation . . . This Commission shall, among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations.⁵⁸

55. Lomé Accord art. IX (3), Sierra Leone - RUF, July 7, 1999 [hereinafter Lomé Peace Agreement], available at <http://www.sierra-leone.org/lomeaccord.html>.

56. See Berewa, *supra* note 21, at 55.

57. The statement by the U.N. SRSG does not appear in the actual text of the Agreement as it was published by the United Nations (U.N. Doc. S/1999/777). The TRC-SL was given a copy of the agreement to which the statement was appended in handwriting. See TRUTH & RECONCILIATION COMMISSION, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION, [hereinafter TRC-SL REPORT], vol. 3B, ch. 6, 364 (2004), available at <http://www.trcsierraleone.org/pdf/start.html>.

58. See Lomé Peace Agreement, *supra* note 55, art. XXVI.

The blanket amnesty that the warring parties granted themselves in the Lomé Peace Agreement concomitant with the creation of the TRC-SL makes it clear that the warring parties envisioned the truth-telling process to be an alternative mechanism to trials.

Sierra Leone's Parliament passed The Truth and Reconciliation Act on February 22, 2000.⁵⁹ The functions of the TRC-SL as outlined in Article 6 (2) of the Act include:

[I]nvestigate and report on the causes, nature and extent of the violations and abuses . . . to the fullest degree possible, including their antecedents, the context in which the violations and abuses occurred . . . whether those violations and abuses were the result of deliberate planning, policy or authorization by any government, group or individual;⁶⁰

In order to carry out these functions, the TRC-SL was to undertake research and investigations, hold hearings, and take individual statements.⁶¹ In mid-2000, the implementation of the Lomé Peace Agreement was threatened when RUF fighters confronted U.N. peacekeepers and took 500 of them hostage.⁶² With the RUF fighters' action, the political landscape changed dramatically, as President Kabbah sent a letter to petition the Secretary General requesting a Special Court:

[T]o try and bring to credible justice those members of the [RUF] and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of [U.N.] peacekeepers as hostages.⁶³

59. The Truth and Reconciliation Act of 2000, Feb. 22, 2000 [hereinafter TRC-SL Act], available at http://www.usip.org/library/tc/doc/charters/tc_sierra_leone_02102000.html.

60. *Id.* art. 6(2).

61. *Id.* art. 7(1).

62. Paul Allen, Criminal Trials and Truth Commissions in Period of Transitions: A Case Study of the Operational Relationship between the Sierra Leone Truth and Reconciliation Commission and the Special Court (Nov. 30, 2004) (unpublished M.A. thesis, Central European University) (on file with author).

63. TRC-SL REPORT, *supra* note 57, vol. 3B, ch. 6, 366 (citing Letter from Alhaji Dr. Ahmad Tejan Kabbah, President of Sierra Leone to Kofi Annan, Secretary General of the United Nations (June 12, 2000)).

The Secretary General's report called for the establishment of a court by a treaty between the United Nations and Sierra Leone.⁶⁴ The agreement between the United Nations and Sierra Leone stipulated that the SCSL was to "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."⁶⁵ The Statute of the SCSL actually went further, stating plainly, "an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in Articles 2 to 4 of the present Statute shall not be a bar to prosecution."⁶⁶ By agreeing to the Statute, the Government effectively repudiated the amnesty provided in the Lomé Peace Agreement. The creation of the SCSL also left uncertain the status of the TRC-SL, before this body had even begun effectively operating.⁶⁷

The Statute of the SCSL indicates that the court is a hybrid body that uses both international and Sierra Leonean law.⁶⁸ It lacks enforcement powers that would enable it to compel other States to cooperate in the investigation of crimes and the apprehension of suspects.⁶⁹ In addition, "the jurisdiction of the Court is limited to the territory of Sierra Leone, meaning that even if it had the power to compel extradition, it could not consider cases arising from events taking place outside the country,

64. The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, delivered to the Security Council*, U.N. Doc. S/2000/915 (Oct. 4 2000).

65. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court For Sierra Leone, Sierra Leone-U.N., art. 1, Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter SCSL Agreement], available at <http://www.specialcourt.org/documents/Agreement.htm>.

66. Statute of the Special Court for Sierra Leone art. 10, Jan. 16, 2002 (referring, under articles 2-4, to crimes against humanity, war crimes and other serious violations of international humanitarian law), available at <http://www.specialcourt.org/documents/SpecialCourtStatuteFinal.pdf>.

67. See *infra* discussion Part IV (A)(1).

68. See Patricia M. Wald, *International Criminal Courts – A Stormy Adolescence*, 46 VA. J. INT'L L. 319, 337-39 (2006) (discussing how hybrid tribunals "represent one powerful model through which national and international legal systems are communicating and influencing one another."); see also Jenia I. Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 37-38 (2005) (discussing the ability of hybrid bodies to engage with local populations and raise awareness in a way that international tribunals cannot).

69. See Mark E. Wojcik et al., *International Legal Developments in Review: 2004 Disputes*, 39 INT'L LAW. 279, 291 (2005). In this respect, the SCSL differs from both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY), which were both created under Security Council Resolutions. *Id.*

even if they involved atrocities related to the conflict.”⁷⁰ The SCSL is the first international tribunal to sit in the country where the war crimes took place.⁷¹ The SCSL has a temporal jurisdiction, which limits its mandate to events occurring after November 30, 1996, although the conflict began in 1991.⁷²

The SCSL and the TRC-SL were to fulfill different roles in Sierra Leone regarding transitional justice. Initially, scholars and practitioners thought that they could fulfill complementary roles. The Court would try (and convict) only the key perpetrators, while the TRC-SL would provide a more complete record of the conflict.⁷³ Additionally, scholars and practitioners expected criminal trials to contribute to the promotion of individual accountability, while the TRC-SL would fulfill an equally important role in making positive recommendations for legal, political, and administrative reform.⁷⁴

In December 2001, the United Nations assembled a Group of Experts to discuss and propose recommendations that would guide the relationship between the TRC-SL and the SCSL.⁷⁵ The Group recommended that, “[t]he modalities of cooperation should be institutionalised in an agreement between the TRC and the Special Court and, where appropriate, also in their respective rules of procedure. They should respect fully the independence of the two

70. Chandra L. Sriram, *Wrong Sizing International Justice? The Hybrid Tribunal in Sierra Leone*, 29 *FORDHAM INT’L L.J.* 472, 482 (2006) (footnotes omitted).

71. Both the ICTY and the ICTR the first international tribunals created are located in The Hague, Netherlands and Arusha, Tanzania respectively. *See generally* Turner, *supra* note 68 (discussing the limitations of international tribunals located outside of the relevant society). The SCSL is distinct from the Serious Crimes Unit and Special Panel for Serious Crimes, in East Timor, which processes perpetrators of offences through the domestic criminal justice system. *See generally* Pigou, *supra* note 21.

72. *See* James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 *FORDHAM INT’L L. J.* 616, 639-40 (2005) (discussing the date of the Abidjan Accord as an arbitrary distinction between those who will be punished and those who will not because many serious violations occurred before this date); *see also* Allen, *supra* note 62, at 484 (discussing how this date implied that only fighting in Freetown mattered).

73. *See* THIERRY CRUVELLIER, INT’L CTR. FOR TRANSITIONAL JUST., *THE SPECIAL COURT FOR SIERRA LEONE: THE FIRST EIGHTEEN MONTHS* 11 (2004), available at <http://www.ictj.org/images/content/1/0/104.pdf>.

74. *See id.*

75. The Office of the High Commissioner for Human Rights and the Office for Legal Affairs of the United Nations organized an expert meeting on the Relationship Between the TRC-SL and the SCSL in New York on Dec. 20-21, 2001. *See* TRC-SL REPORT, *supra* note 57, vol. 3b, ch. 6, at 374.

institutions and their respective mandates.”⁷⁶ Neither institution heeded this advice. The TRC-SL, in its Final Report noted, “the two institutions themselves . . . might have given more consideration to an arrangement or memorandum of understanding to regulate their relationship.”⁷⁷

B. *Establishment of TRC-L*

The Comprehensive Peace Agreement called for the creation of the TRC-L,

[T]o provide a forum that will address issues of impunity, as well as an opportunity, for both the victims and perpetrators of human rights violations to share their experiences, in order . . . [to] deal with the root causes of the crises in Liberia, including human rights violations . . . [and] among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations.⁷⁸

The negotiations surrounding the Comprehensive Peace Agreement took place at the height of the Liberian conflict in 2003.⁷⁹ The parties made a conscious decision during the talks to privilege a truth commission over trials.⁸⁰ In addition, the language of the agreement left the possibility of amnesty open,⁸¹ but unlike Sierra Leone, amnesty was not granted to any of the parties.⁸² Paul Allen, who is a Program Associate in ICTJ’s field office in Liberia, stated, “people who negotiated the peace were the very people,” who “were going to be targeted” if there were prosecutions, “so one would understand why

76. *Id.* (citing U.N. Doc. E/CN. 4/2002/3, ¶ 70) (discussing the guiding principles agreed upon by the Expert Group).

77. *Id.* at 375.

78. Peace Agreement between the Government of Liberia, The Liberians United for Reconciliation and Democracy, The Movement for Democracy in Liberia and the Political Parties art. XIII, Aug. 18, 2003 [hereinafter *Comprehensive Peace Agreement*], available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/MHII-62F8J6?OpenDocument>.

79. *Id.* pmbl.

80. *Id.* art. XIII.

81. *Id.* art. XXXIV. The Transitional Government “shall give consideration to a recommendation for general amnesty to all persons and parties engaged or involved in military activities during the Liberian civil conflict that is the subject of this Agreement.” *Id.*

82. *See supra* discussion at Part III (A).

they” opted for a truth commission.⁸³ Indeed, warring parties dominated the negotiations, although there was some participation from the international community and Liberian civil society. Ezekiel Pajibo, a Liberian human rights activist, who was involved in the discussions to create a truth commission in Liberia, asserted that based on the, “kinds of atrocities in this country, the best transitional mechanism would have been a war crimes tribunal, but given the context under which we were operating we knew that would not be feasible.”⁸⁴

The National Transitional Legislative Assembly passed the TRC-L Act in May 2005 and formally approved its provisions on June 10, 2005.⁸⁵ The TRC-L Act mandates the Commission to investigate gross human rights violations, violations of international humanitarian law, and abuses that occurred in Liberia from January 1979 to October 14, 2003.⁸⁶ In addition, the TRC-L is mandated to create, “an independent, accurate and objective record of the past and make recommendations reflective of the truth to re-unify and reconcile contending groups and/or the peoples of Liberia.”⁸⁷

The TRC-L functions and powers include “[g]athering information and receiving evidence from any person or persons . . . through the taking of statements and through evidence gathered through the conduct of both public and confidential hearings upon request of witnesses, informants, petitioners . . . subject to the exclusive discretion and authority of the TRC.”⁸⁸ While the TRC-L’s powers include the standard “truth-telling” functions, the Act also includes some retributive elements. For example, the TRC-L powers include

83. Interview with Paul Allen, Consultant, Int’l Center for Transitional Justice, in Monrovia, Liberia (Jan. 12, 2007).

84. Interview with Ezekiel Pajibo, Former Executive Director, Center for Democratic Empowerment in Monrovia, Liberia (Jan. 9, 2007).

85. An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia, Nat’l Transitional Legislative Assembly, May 12, 2005 [hereinafter TRC-L Act]. The author served as a legal intern during the summer of 2006 with the TRC-L. The confidentiality clause of the TRC-L Act § 41(a) states, “. . . every member of the staff of the Commission shall, with regard to any matter dealt with by him or her, or information which comes to his or her knowledge in the exercise, performance or carrying out of his or her powers, functions or duties” must “preserve and assist in the preservation of those matters which are confidential in terms of the provision of this Act or which have been declared confidential by the Commission.” *Id.* at art. IX, § 41(a). The author has not disclosed any confidential information gained from interning at the TRC-L. All of the information referenced in this Article was gathered from public documents or from the author’s field research.

86. *Id.* art. IV, § 4(a).

87. *Id.* art. VII § 26(i).

88. *Id.* art. VII § 26(e).

- b. Identifying where possible persons, authorities, institutions and organizations involved in the violations;
- c. Determining whether such violations were the result of deliberate planning on the part of the state, authority, or political organization, movement or group of individuals; and
- d. Ensuring accountability, political or otherwise, for any such violation.⁸⁹

Significantly, the TRC-L is empowered to make recommendations for prosecution in “particular cases[,] as [it] deems appropriate.”⁹⁰ In addition, the TRC-L’s Act also includes an ambiguous amnesty clause, which empowers the Commission to recommend,

amnesty under terms and conditions established by the TRC upon application of individual persons making full disclosures of their wrongs and thereby expressing remorse for their acts and/or omissions, whether as an accomplice or a perpetrator, provided that amnesty or exoneration shall not apply to violations of international humanitarian law and crimes against humanity in conformity with international laws and standards.⁹¹

The effect of the amnesty provision is unclear because the TRC-L is primarily investigating violations of international humanitarian law and crimes against humanity.

The TRC-L’s Act was passed after the SCSL’s Statute, and does not address potential areas of conflict with the SCSL. The drafters of the Act may not have envisioned any relationship with the SCSL, or perhaps they deemed it unnecessary to include in the Act. In fact, the establishment of all three transitional justice mechanisms in Liberia and Sierra Leone were done without regard to the regional nature of human rights violations. This Article argues that this failure in the institutions’ designs will be readily apparent given the concurrent operation of the TRC-L and the SCSL. The following Part provides an in-depth analysis of the central challenges posed by the failure to take a regional approach.

89. *Id.* art. VII, § 26(b)-(d).

90. *Id.* art. VII, § 26(j)(iv).

91. *Id.* art. VII, § 26(g).

IV. CENTRAL CHALLENGES POSED BY THE FAILURE TO TAKE A REGIONAL APPROACH TO TRANSITIONAL JUSTICE IN SIERRA LEONE & LIBERIA

The concurrent operation of the SCSL and the TRC-SL has tremendous relevance for the operations of the SCSL and the TRC-L. At the outset, the relationship between the SCSL and the TRC-SL was cordial; however, the two transitional justice mechanisms were soon to find themselves at loggerheads. This Part examines the retrospective challenges of coordination faced by the TRC-SL and the SCSL, and the prospective challenges for the SCSL and the TRC-L. Before launching into a detailed discussion of the challenges posed, the following paragraphs provide a brief overview of the operations of the SCSL and the TRC-L to date.

The SCSL's first indictments and arrests targeted top commanders of armed groups. By September 2003, the Court had indicted thirteen individuals in leadership positions.⁹² Of those indicted, nine are currently in the Court's custody.⁹³ The indictment of the prominent Deputy Defense Minister and National Commander of the Civilian Defense Force, Chief Samuel Hinga Norman, was unexpected and was a surprise to most Sierra Leoneans.⁹⁴ The other controversial indictment was unsealed as Liberian President Taylor traveled to Ghana for peace talks in mid-2003.⁹⁵ Prosecutor David Crane served an arrest warrant on Ghanaian authorities, and transmitted the warrant to Interpol.⁹⁶ The

92. SPECIAL COURT FOR SIERRA LEONE, SECOND ANNUAL REPORT OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE 37 (2005), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=pmp4ckQZ098%3d&tabid=176> (listing persons indicted by the Special Court for Sierra Leone from the RUF – Charles Taylor, Foday Sankoh, Issa Sesay, Sam Bockarie (Maskita), Morris Kallon and Augustine Gbao; from the Armed Forces Revolutionary Council - Johnny Paul Koroma, Alex Tamba Brima, Ibrahim “Bazzy” Kamara and Santigie Borbor Kanu; and from the Civilian Defense Forces - Chief Sam Hinga Norman, Moinina Fofana and Alieu Kondewa).

93. *Id.* (stating that Johnny Paul Koroma is currently “at large”). See also David M. Crane, *White Man's Justice: Applying International Justice After Regional Third World Conflicts*, 27 CARDOZO L. REV. 1683, 1685 (2006) (discussing Foday Sankoh's death by natural causes while in custody of the SCSL and the alleged murder of Sam Bockarie by Taylor).

94. See J. Peter Pham, *A Viable Model for International Criminal Justice: The Special Court for Sierra Leone* 19 N.Y. INT'L L. REV. 37, 96-97 (2006); see also Cockayne, *supra* note 72, at 642 (explaining that many Sierra Leoneans believed Norman and the CDF saved the country).

95. See Kathy Ward, *Might v. Right: Charles Taylor and the Sierra Leone Special Court*, 11 NO. 1 HUM. RTS. BRIEF 8, 9 (2003).

96. See *id.* (discussing the ICTY's indictment of Slobodan Milosevic for war crimes as the first of a sitting Head of State). Taylor's trial marked the first of an African Head of State. See Jennifer Easterday, Charles Taylor Trial Report (December 1, 2008 to February 28, 2009), 3 (U.C. Berkeley War Crimes Studies Center, Sierra Leone Trial Monitoring Program), available at

SCSL indicted Taylor for his alleged role in facilitating and fueling the Sierra Leone civil war through his support of the RUF rebels.⁹⁷ Diplomats regarded Taylor's arrest as untenable due to the conflict raging in Liberia.⁹⁸ Taylor immediately returned to Liberia, withdrawing from negotiations.⁹⁹ Nigeria then brokered a deal, granting Taylor asylum in return for his resignation.¹⁰⁰ Taylor acquiesced and took up residence in a seaside villa in Nigeria.¹⁰¹ Taylor's indictment "effectively removed" him as a "factor in any future Liberian dispensation."¹⁰²

The SCSL took Taylor into custody on March 29, 2006.¹⁰³ Previously, Taylor had successfully engaged in a series of obstructionist tactics to avoid the SCSL's jurisdiction. Taylor filed a motion under protest claiming sovereign immunity and requesting the Trial Chamber to quash the indictment and declare null and void the warrant of arrest and order for transfer of detention.¹⁰⁴ When the Nigerian President finally agreed to turn Taylor over for extradition, after the Government of Liberia's request, Taylor attempted to flee to Cameroon.¹⁰⁵ After his

<http://charlestaylortrial.files.wordpress.com/2009/03/taylor-trial-monitoring-report-dec-08-jan-09.pdf>.

97. See SPECIAL COURT FOR SIERRA LEONE, BACKGROUND ON PROSECUTOR V. CHARLES GHANKAY TAYLOR (2008) [hereinafter SCSL BACKGROUND ON TAYLOR], available at <http://www.sc-sl.org/CASES/CharlesTaylor/tabid/107/Default.aspx>. Taylor was indicted with eleven counts for crimes against humanity, war crimes, and violations of international humanitarian law. *Id.*

98. See Ward, *supra* note 95, at 9-10 (discussing how some diplomats viewed the indictment as naïve, as they had already pressed Ghana to guarantee Taylor's immunity).

99. Pham, *supra* note 94, at 99 (discussing the two month siege to unseat Taylor that took place after he withdrew from talks).

100. See Ward, *supra* note 95, at 10 (discussing the details of the exile agreement).

101. See *Pressure Mounts for Taylor to Face Trial*, U.N. INTEGRATED REG'L INFORMATIONAL NETWORKS, Aug. 12, 2003, available at <http://www.globalpolicy.org/intljustice/tribunals/sierra/2003/0813trial.htm>.

102. Priscilla Hayner, Director, Peace and Justice Program, International Center for Transitional Justice, Paper Presentation at The International Peace Institute High-Level Retreat for Senior International Decision-Makers: The Case of West Africa: Considering Liberia and Sierra Leone [hereinafter *Considering Liberia and Sierra Leone*], 4 (Jan. 16-17, 2009) (copy on file with author).

103. SCSL BACKGROUND ON TAYLOR, *supra* note 97.

104. Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 53 (May 31, 2004) (The Appeals Chamber held that Taylor's official position was not a bar to his prosecution by the Court). See also Mikhail Wladimiroff, *Former Heads of State on Trial*, 38 CORNELL INT'L L.J. 949, 963-64 (2005) (discussing Liberia's initial complaint to the International Court of Justice against Sierra Leone for violating the immunity of its Head of State).

105. See *Taylor Missing from Nigerian Home*, BBC NEWS, Mar. 28, 2006,

arrest,¹⁰⁶ Liberia transferred Taylor to the SCSL, which subsequently moved him to The Hague due to security concerns,¹⁰⁷ mainly emanating from Liberia, since it was just emerging out of conflict and there were fears of a backlash from Taylor supporters. The International Criminal Court (ICC) agreed to let the SCSL use its facilities for the trial.¹⁰⁸ The removal of Taylor's trial from the region has caused controversy, since many Sierra Leoneans "believe that he should be standing trial in Freetown," where the SCSL is located, and where the alleged "crimes took place."¹⁰⁹ Removing what is arguably one of the Court's most important trials from the region,¹¹⁰ diminishes the objective of making justice more locally relevant.¹¹¹

<http://www.globalpolicy.org/intljustice/wanted/2006/0328missing.htm>.

106. See generally Micaela Frulli, *A Turning Point in International Efforts to Apprehend War Criminals: The UN Mandates Taylor's Arrest in Liberia*, 4 J. INT'L CRIM. JUST. 351, 352 (2006) (discussing the UN Security Council's Resolution which expanded UNMIL's mandate to apprehending and detaining Taylor).

107. See Lansana Fofana, *Mixed Feelings Over Charles Taylor's Transfer to the Hague*, INTER PRESS SERVICE, June 20, 2006, available at <http://www.globalpolicy.org/intljustice/wanted/2006/0620mixedfeelings.htm> (quoting a British Diplomat in Freetown. "It is clear to us that Charles Taylor still does command massive support in the sub-region. We need to build on the hard-won peace here rather than prepare its collapse."); see also HUMAN RTS. WATCH, TRYING CHARLES TAYLOR IN THE HAGUE: MAKING JUSTICE ACCESSIBLE TO THE MOST AFFECTED 2 (2006) (citing Press Release, Special Court for Sierra Leone, Special Court President Requests Charles Taylor be Tried in the Hague (Mar. 30, 2006), available at <http://www.hrw.org/legacy/background/ij/ij0606/ij0606.pdf>; U.N. Sec. Council, *Letter dated 31 Mar. 2006 from the Permanent Representative of the Netherlands to the United Nations to the President of the Security Council*, Annex II, U.N. Doc. S/2006/207 (Apr. 3, 2006) (expressing fear that trying Taylor in Sierra Leone would destabilize the region); Michelle Faul, *Prosecutor: Escape-Savvy Taylor Secure*, ASSOCIATED PRESS, Mar. 31, 2006.

108. See *Britain Offers to Jail Taylor, Paving Way for War Crimes Trial*, AGENCE FRANCE PRESSE, June 15, 2006, available at <http://www.globalpolicy.org/intljustice/wanted/2006/0615britoffer.htm> (discussing the condition imposed by the Netherlands for the SCSL to use the ICC's facilities; the Hague required another country to jail Taylor if the SCSL found him guilty).

109. Centre for Conflict Resolution, *Peace Versus Justice? Truth and Reconciliation Commissions and War Crimes Tribunals in Africa* [hereinafter *Peace Versus Justice*], 32, May 17-18, 2007.

110. Taylor is the only high-profile defendant before the Court, as the SCSL has not concluded trials against most of the top leaders of the other warring factions, for example, Foday Sankoh of the RUF is dead, while Johnny Paul Koroma of the AFRC remains "at large."

111. Interviews from Sierra Leone Assessment Mission, 19 interviews conducted with: former staff of the TRC-SL, current staff of the SCSL, commissioners of the Human Rights Commission for Sierra Leone (follow-up mechanism for TRC-SL), civil society leaders that worked with the TRC-SL, human rights victims, professors, lawyers, and civil servants amongst others (November 3-13, 2008) [hereinafter Interviews from Sierra Leone Assessment Mission]; see Sirleaf, *supra* note

Taylor's trial was set to begin on June 4, 2007,¹¹² but the SCSL delayed it until January 7, 2008 because of Taylor's concerns regarding adequate time and facilities to prepare a defense.¹¹³ The trial was to conclude in mid-2009, however, the SCSL has faced significant funding challenges, which have delayed the trial.¹¹⁴ The Prosecution rested in February 2009, with 91 witnesses testifying,¹¹⁵ and the Defense set to begin its case soon thereafter.¹¹⁶ The trial is scheduled to conclude in 2010.¹¹⁷

The TRC-L was formally inaugurated on February 20, 2006. The TRC-L faced serious fiscal, administrative, logistical, management, and human resources difficulties during its first year of operation,¹¹⁸ but by 2008 had undergone significant restructuring¹¹⁹ and received \$4.2 million for its operations.¹²⁰ The TRC-L has collected some 20,000 statements, including approximately 1,500 statements from Liberians in the Diaspora.¹²¹ As of December 2008, 800 people have narrated their

25, app. (for full list of interviews). Several interviewees noted that the impact of the trial has been less since the trial is not being held in the country (35% of 14 interviewees). *Id.*

112. Prosecutor v. Taylor, Case No. SCSL-2003-01-PT, Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence, ¶ 21 (Jan. 23 2007), available at <http://www.sc-sl.org/Documents/SCSL-03-01-PT-164.pdf>.

113. Scott Worden, *Special Court of Sierra Leone Briefing: The Taylor Trial and Lessons from Capacity-Building and Outreach*, U.S. INST. OF PEACE, Aug. 2007, http://www.usip.org/pubs/usipeace_briefings/2007/0821_special_court.html.

114. The Court was facing a major budget shortfall from May 2009 because a number of the Court's highest donors have had to reduce contributions due to the global financial crisis. See Ozioma Erukoha, *Liberia: Financial Crisis Court Considers Releasing Taylor*, ALL AFRICA COM, Feb. 24, 2009, available at <http://allafrica.com/stories/200902250129.html>.

115. See Easterday, *supra* note 96, at 1.

116. See Scott Stearns, *Special Court Rejects Acquittal of Former Liberian President*, VOA NEWS, May 5, 2009, available at <http://www.voanews.com/english/2009-05-04-voa19.cfm> (noting that the Defense case is scheduled to begin in June 2009).

117. The Court has secured funding to see it to completion in 2010.

118. Press Release, The TRC-L, Statement of the TRC on the Current State of Affairs (Nov. 26, 2007), available at <https://www.trcofliberia.org/news-1/press-releases/statement-of-the-trc-on-the-current-state-of-affairs-11-26-2007/>.

119. A TRC Working Group was formed to oversee the reassessment, this Group includes the TRC-L, the International Contact Group of Liberia whose membership includes the following: the African Union, the Economy Community of West African States, the European Union, the U.S. Embassy in Liberia and the U.N. Mission in Liberia. *Id.*

120. See Amnesty Int'l, *Liberia Towards the Final Phase of the Truth and Reconciliation Commission* [hereinafter *Final Phase TRC-L*], AI Index: AFR 34/002/2008, 8, July 29, 2008 (discussing how the Government is the largest single contributor to the TRC-L, particularly considering its total national budget of \$200 million).

121. See TRUTH & RECONCILIATION COMMISSION, FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF LIBERIA (TRC) FINAL REPORT VOLUME I: FINDINGS AND

experiences during the conflict before the TRC-L's public hearings.¹²² The TRC-L will conclude its work in June of 2009 and release its final report.¹²³ The Initial Report released by the Commission on January 24, 2009, indicated that it will make recommendations regarding prosecution, reparations, national reconciliation, and amnesty.¹²⁴ The TRC-L's recommendations regarding prosecution and the form of the prosecutorial mechanism are greatly anticipated. Indeed, the SCSL's indictment of Taylor, and his subsequent arrest and transfer, captured the imaginations of Liberians and raised the specter of justice. The SCSL's trial of Taylor, former President of Liberia and warlord, will pose a significant constraint on the transitional justice process in Liberia. The subsequent sections examine the most pressing of these issues: the question of legal primacy, information sharing, and access to detainees. Each section examines one of these challenges by first looking at the experience of the SCSL and the TRC-SL as a guide, and then discussing the ways in which the relationship between the SCSL and the TRC-L will face similar and unique challenges.

A. *The Question of Legal Primacy*

1. The SCSL and the TRC-SL

A provision of the SCSL Agreement states, "Notwithstanding any other law, every natural person, corporation or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court."¹²⁵ Several practitioners maintained that this provision "indicates that the relationship between the Special Court and the Commission is therefore dictated by the broad powers of the Special Court."¹²⁶ Others pointed to the SCSL's Statute, which only gave it

DETERMINATIONS, [hereinafter TRC-L INITIAL REPORT] vol. 1, at 46 (Jan. 24, 2009), available at www.trcofliberia.org/reports/final. (No longer available on website as of Apr. 23, 2009).

122. *Id.* at 55.

123. *Id.* at 6 (discussing end of its mandate).

124. See TRC-L INITIAL REPORT, *supra* note 121, at 76-77.

125. Special Court Ratification Act of 2002, § 21(2) [hereinafter SCSL Ratification Act], available at <http://www.sc-sl.org/Documents/SCSL-ratificationact.pdf>.

126. Marieke Wierda et al., Int'l Ctr. for Transitional Justice, Exploring the Relationship between the Special Court and the Truth and Reconciliation Commission for Sierra Leone 4-5 (2002) (revised version of paper presented to the U.N. Expert Group on the Relationship between the TRC-SL and the SCSL in New York on Dec. 20-21, 2001), available at <http://www.ictj.org/images/content/0/8/084.pdf>.

primacy over national courts.¹²⁷ The rationale was that since the TRC-SL was not a national court, the SCSL could not have primacy over it.¹²⁸ In essence, those who favored prosecutorial strategies saw the TRC-SL as an investigative arm of the Court or similar to a grand jury, while those that favored a truth-telling process insisted on the necessity of an independent and dynamic Commission. The legal status of the TRC-SL was an essential question because it in effect answered all others: whether the confidentiality granted to statement givers by the TRC-SL would be honored by the SCSL in its prosecutions, whether the SCSL would grant access to detainees, and who would sit as the arbiter, if a conflict arose. While in theory neither institution had legal primacy over the other, in practice the TRC-SL was in many ways subordinate to the SCSL.

2. The SCSL and the TRC-L

The SCSL is a hybrid court, akin to an international criminal tribunal,¹²⁹ while the TRC-L is a national body. The SCSL's Statute establishes its primacy over national courts,¹³⁰ however, no provision in the enabling documents of the SCSL and the TRC-L sheds light on exactly what the relationship between the two bodies should be. The most fundamental question raised by this circumstance is whether the truth-telling process represented by the TRC-L, is subordinate to the international criminal justice process represented by the SCSL.¹³¹ This section examines the "duty to prosecute" and the "right to truth" under international law and discusses which process, if any should take prominence over the other.

127. Statute of the Special Court for Sierra Leone art. 8(2), Jan. 16, 2002.

128. Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission* 6 *YALE HUM. RTS. & DEV. L.J.* 139, 151-52 (2003).

129. See *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 1 (May 31, 2004) (Taylor's counsel argued that the SCSL, as a national court, did not have jurisdiction to indict Charles Taylor. The Court held that the SCSL is not part of Sierra Leone's judicial system but is a true international criminal court formed under international law).

130. See Statute of the Special Court for Sierra Leone art. 8(2), Jan. 16, 2002 (establishing the SCSL's primacy over national courts, however, the TRC-L is not a national court or "any other body organized under Sierra Leonean law").

131. See U.N. Comm'n on Human Rights, *Impunity*, Comm'n on Human Rts. Res. 2002/79, ¶ 10, 58th mtg., E/CN.4/RES/2002/79 (Apr. 25, 2002), available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2002-79.doc (discussing the duty to "prosecute or extradite" and noting that truth commissions are complements, not substitutes for a justice process).

i. The “Duty to Prosecute”

Many scholars of international law maintain that there is a “duty to prosecute,” grave international crimes.¹³² Some of these legal obligations are enshrined in international treaties, such as the duty to prosecute genocide in the Convention on the Prevention and the Punishment of the Crime of Genocide.¹³³ In addition, the 1949 Geneva Conventions provides that States have an obligation to search for war criminals and to bring them before their own courts or else extradite them for trial in another jurisdiction.¹³⁴ Crimes against humanity were first recognized in the Charter and Judgment of the Nuremberg Tribunal.¹³⁵ Several international tribunals include crimes against humanity within their jurisdiction, including the ICTY,¹³⁶ and the ICC.¹³⁷ The Rome Statute of the ICC marked the first time ever that crimes against humanity were articulated in a treaty text.¹³⁸

Some scholars argue that customary international law also requires prosecution for crimes against humanity. They claim that this duty can be implied from international instruments like the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and the Principles of International Co-operation in

132. See, e.g., M. CHERIF BASSIONI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 20-25 (Dordrecht: Martinus Nijhoff Publishers, 1995); Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537, 2537 (1993); Naomi Rhot-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 *CAL. L. REV.* 449, 451 (1990).

133. Convention on the Prevention and Punishment of the Crime of Genocide arts. 1, 4-6, Dec. 9, 1948, 78 *U.N.T.S.* 277.

134. See, e.g., Geneva Convention Relative to the Prosecution of Civilian Persons in Times of War, art. 146 Aug. 12, 1949, 75 *U.N.T.S.* 287 [hereinafter Geneva IV] (The duty to prosecute “grave breaches” of the Geneva Conventions is located in common article 146 of the Geneva Conventions). The most extensive definition of “grave breaches” is in Geneva IV, art. 147 it includes willful killing, torture or inhuman treatment, and willfully causing great suffering or serious injury. *Id.* art. 147.

135. *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 *Y.B. Int’l L. Comm’n* 97, Principle VI (c), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf.

136. Statute of the International Tribunal art. 5, May 25, 1993, 32 *I.L.M.* 1192.

137. Rome Statute of the International Criminal Court art. 5, July 17, 1998 37 *I.L.M.* 999 [hereinafter Rome Statute].

138. *Id.* art. 7 Crimes against humanity “means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” The crimes include murder, extermination, enslavement, torture, rape, deportation, or forcible transfer of a population, and other inhumane acts. *Id.*

the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity.¹³⁹ However, customary international law is slow forming and has a high threshold: State practice must have been both extensive and virtually uniform on the sense of the norm invoked and should have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved (*opinio juris*). State practice does not necessarily confirm the view that there is a “duty to prosecute” crimes against humanity. In fact, even where international law obligations are clear on the duty to prosecute those accused of grave international crimes, a cursory glance at history exhibits that prosecutions of alleged perpetrators is uncommon.

One of the strongest examples of an obligation to prosecute violations of international human rights is enshrined in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁴⁰ The main human rights treaties have no explicit provisions outlining the obligation to prosecute. Some scholars have interpreted the provision of Article 2 of the International Covenant on Civil and Political Rights, which states that victims of human rights violations “shall have an effective remedy,”¹⁴¹ to support the “duty to prosecute.”¹⁴² Additionally, the U.N. Draft Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 18 asserts that States have an obligation to investigate violations and to act appropriately in respect of perpetrators to ensure that States prosecute, put on trial, and duly punish perpetrators.¹⁴³ Even in situations where there may not be a “hard” international legal “duty to prosecute” in the aftermath of mass atrocity, this Article has outlined the strong moral, social, and political reasons to pursue trials.¹⁴⁴

139. See, e.g., ROBERTSON, *supra* note 4, at 250; Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT’L L.J. 297, 314 (2002).

140. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment arts. 5, 7, 12 & 14, Dec. 10, 1984, 23 I.L.M. 1027.

141. International Covenant on Civil and Political Rights [hereinafter ICCPR], art. 2, para. 3, Dec. 16, 1966, 999 U.N.T.S. 171.

142. See ROBERTSON, *supra* note 4, at 248-49.

143. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. On Prevention of Discrimination & Prot. Of Minorities, The Administration of Justice & Human Rts. of Detainees, *U.N. Draft Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, Annex II, princ. 18, U.N.Doc.E/CN4/Sub2/1997/20/Rev1 (Oct. 3, 1997).

144. See *supra* Part I, for a discussion of the benefits and goals of trials.

When there are competing national claims for prosecuting grave international crimes, which country should exercise its jurisdiction? It is extremely difficult to determine “[w]ho should take precedence [,] [t]he state that has [the] most victims [,] [t]he state whose nationality the offender is from so that it can effect its own democratic transition?”¹⁴⁵ In the case of Sierra Leone and Liberia, both countries have multilateral treaty obligations which might weigh in favor of exercising jurisdiction over Taylor. For example, Liberia and Sierra Leone are State Parties to the four Geneva Conventions and its Additional Protocols.¹⁴⁶ The duty to prosecute war crimes under the Geneva Conventions requires an international armed conflict, because under the Conventions there simply is no duty to prosecute for non-international armed conflicts.¹⁴⁷ Given the regional nature of the conflicts in Liberia and Sierra Leone, the conflicts are sufficiently “international” in character for the four Geneva Conventions to apply.¹⁴⁸

The Geneva Conventions do not compel a State to bring individuals accused of war crimes before its own courts in order to comply with its obligations.¹⁴⁹ Rather, the Conventions allow a State “if it prefers, and in accordance with the provisions of its own legislation, [may] hand

145. Frédéric Mégret, *In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice*, 38 CORNELL INT’L L.J. 725, 734 (2005).

146. INT’L COMM. OF THE RED CROSS, STATE PARTIES TO THE MAIN INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES 9-10 (2008), available at http://www.icrc.org/eng/party_ccw.

147. See Protocol Additional (NO. II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6, para. 5, Dec. 7, 1978, 16 I.L.M. 1442 (1977) (noting that “at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”).

148. INT’L INST. OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 2 (2006), available at <http://www.michaelschmitt.org/images/Manual%5B1%5D.Final.Brill.pdf>. Non-international armed conflicts do not include conflicts in which two or more States are engaged against each other. Nor do they encompass conflicts extending to the territory of two or more States. When a foreign State extends its military support to the government of a State within which a non-international armed conflict is taking place, the conflict remains non-international in character. Conversely, should a foreign State extend military support to an armed group acting against the government, the conflict will become international in character. *Id.*; see also *supra* Part II (discussing the regional dynamics of the conflicts in Liberia and Sierra Leone).

149. Geneva IV, *supra* note 134, art. 146. “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.” *Id.*

such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.”¹⁵⁰ This provision of the Geneva Conventions embodies the *aut dedere, aut judicare* principle, which is a jurisdictional agreement among contracting States to extradite or prosecute offenders who commit the acts proscribed by the treaty. The Government of Liberia apparently preferred to hand Taylor “to another High Contracting Party,” as opposed to exercising its own jurisdiction over war crimes. It would certainly not be difficult for Sierra Leone to make out a “prima facie case” for the exercise of its jurisdiction over Taylor. In addition to the Geneva Conventions, Sierra Leone could point to the SCSL’s Statute, which enables it to “prosecute persons who committed” crimes against humanity, war crimes, and other serious violations of humanitarian law in the territory of Sierra Leone.”¹⁵¹ The above analysis might lead to the presumption that the SCSL’s prosecution of Taylor fulfills both Liberia and Sierra Leone’s “duty to prosecute.” However, given the limited mandate of the SCSL, this conclusion would be problematic.

The SCSL’s trial of Taylor does not cover grave international crimes occurring in the territory of Liberia. The SCSL’s jurisdiction for grave international crimes is limited to events occurring in “the territory of Sierra Leone”¹⁵² and only “since 30 November 1996.”¹⁵³ Additionally, its temporal jurisdiction does not cover events occurring for the bulk of the conflicts in both Liberia and Sierra Leone, which began in late 1989 and 1991 respectively.

This has led to calls for the creation of a “Special Court for Liberia.”¹⁵⁴ After Taylor’s arrest in 2006, a group called The Forum for the Establishment of a War Crimes Court in Liberia was formed.¹⁵⁵ The

150. *Id.*

151. Statute of the Special Court for Sierra Leone art. 2-4, Jan. 16, 2002.

152. SCSL Agreement, *supra* note 65, pmbl.

153. *Id.* art. 1.

154. See Rena L. Scott, *Moving from Impunity to Accountability in Post-War Liberia: Possibilities, Cautions and Challenges*, 33 INT’L J. LEGAL INFO. 345, 387-88 (2005) (discussing the benefits of a Special Court for Liberia).

155. Interview with Sampson Towe, Co-Chair, Forum for the Establishment of a War Crimes Court in Liberia, in Monrovia, Liberia. (Jan. 19, 2007). The motivations of this organization are questioned within Liberia. *Id.* Interviews from Liberia Assessment Mission, 87 interviews (66 in rural areas: Lofa (21), Nimba (12), Bong (18) and Grand Gedeh (15) counties, as well as Montserrado (21)). The author conducted interviews with: human rights victims, staff of the TRC-L, civil society leaders that work with the TRC-L and human rights victims, professors, lawyers, civil servants, members of the diplomatic community, and U.N. personnel, amongst others

Forum collected signatures and filed a petition to the Liberian Legislature.¹⁵⁶ The Forum also attempted to submit its petition to Secretary General Kofi Annan, but they were rebuffed because any request for the creation of such a court would have to come from the Government.¹⁵⁷ In addition, the Chairman of the TRC-L, Jerome Verdier commented that adopting a criminal justice approach at that stage in Liberia's transitional justice process would,

Undermine the reconciliation and peace building process that the TRC is envisaged to undergo. . . . [A] parallel process of prosecution and reconciliation . . . did not work for Sierra Leone and there is no reason why it should work for Liberia With [Liberians] input, monitoring and active participation, there will be a clear indication as to which way the country should go in terms of addressing impunity.¹⁵⁸

The Liberian Government shared the belief that the TRC-L should finish its work before questions about prosecution are raised.¹⁵⁹

During the TRC-L's proceedings, the internal dysfunction of the TRC-L concomitant with alleged perpetrator behavior at public hearings,¹⁶⁰ led to further questions about whether a truth commission was the best option for Liberia as opposed to prosecutions. At a commemoration of a massacre, a leader of the Catholic Church stated that there can be "no reconciliation without justice," and called for a

(December 8-22, 2008; January 5-8 2009) [hereinafter Interviews from Liberia Assessment Mission]; see Sirleaf, *supra* note 25, app. (for full list of interviews). Popular opinion variously holds that the group is sponsored by former Taylor cronies seeking revenge for Taylor's indictment, or the Congress For Democratic Change (the main opposition party) in order to undermine the Johnson Sirleaf administration. *Id.* Its advocacy efforts are regarded as political and confrontational. *Id.* Due to this sentiment, much of the group's advocacy efforts are not taken seriously. *Id.*

156. See Franz Wild, *Liberians Call for Own War Crimes Court*, VOA NEWS, Apr. 12, 2006, <http://www.voanews.com/english/archive/2006-04/Liberians-Call-for-Own-War-Crimes-Court.cfm>.

157. Interview with Thomas A. Bureh, Chairman, Human Rights Protection Forum, in Monrovia, Liberia (Jan. 11, 2007). (discussing the Secretary General's reaction).

158. Interview with Jerome Verdier, *supra* note 1.

159. See PRISCILLA HAYNER, INT'L CTR. FOR TRANSITIONAL JUSTICE, CTR. FOR HUMANITARIAN DIALOGUE, *NEGOTIATING PEACE IN LIBERIA: PRESERVING THE POSSIBILITY FOR JUSTICE* 25 (2007), available at <http://www.ictj.org/static/Africa/Liberia/HaynerLiberia1207.eng.pdf>.

160. See Sirleaf, *supra* note 25, at 16-19, 21-26 (discussing alleged perpetrators behavior at the TRC-L's proceedings and the infighting within the Commission).

war crimes tribunal.¹⁶¹ After the Commission's "naming and shaming," wherein the TRC-L published a list of "Perpetrators or Alleged Perpetrators," that the Commission deemed it needed in order to respond to allegations of violations of human rights and international humanitarian law levied against them by victims of the civil war,¹⁶² another demand for prosecutions was issued.¹⁶³

After the TRC-L investigations of violations occurring in Liberia, it may recommend prosecutions in its final report "in particular cases as [it] deems appropriate."¹⁶⁴ The Initial Report of the TRC-L indicates that it will make recommendations for prosecutions of "individuals," "groups," or "entities,"¹⁶⁵ who have committed "egregious" domestic and "gross" violations of international human rights law as well as "serious" humanitarian law violations.¹⁶⁶ The Commission will not recommend amnesty for gross violations of human rights or serious international humanitarian law violations, instead it "reserved the right"

161. See Press Release, TRC-L, Catholic Church Wants War Crimes Tribunal After TRC . . . As Lutheran Massacre Commemoration Begins (July 16, 2008), available at www.trcofliberia.org/news-1/press-releases/catholic-church-wants-war-crimes-tribunal-after-trc-as-lutheran-massacre-commemoration-begins. The commemoration was mired in controversy due to the invitation of known perpetrators to make statements. Interviews from Liberia Assessment Mission, *supra* note 155.

162. See Press Release, The TRC-L, TRC Publishes List of Alleged Perpetrators and Persons of Interest [hereinafter "List of Perpetrators" and "Persons of Interest"] (Nov. 30, 2008), available at <https://www.trcofliberia.org/news-1/press-releases/list-of-perpetrators-or-alleged-perpetrators-who-have-been-invited-but-refused-to-appear-before-the-trc>; <https://www.trcofliberia.org/news-1/press-releases/list-of-persons-of-interest-to-the-trc-inquiry-process-who-are-required-to-appear-before-the-trc-because-of-their-unique-experiences-and-knowledge-of-events-of-the-past-covering-the-period-1979-2013-2003>. The "List of Perpetrators" includes several internal repetitions so it totals less than 198. *Id.* The TRC-L defined, "Persons of Interest," as "those required to appear" because of their "unique experiences and knowledge of events of the past." *Id.* This List similarly includes internal repetitions totaling less than 139. *Id.* However, there do not appear to be any repetitions between the "List of Perpetrators," and the "List of Persons of Interest." *Id.*

163. See Press Release, Amnesty Int'l, Liberia: Will Those Investigated by the Truth and Reconciliation Ever Be Prosecuted? AI Index: AFR 34/010/2008 (Dec. 5, 2008) (noting that the large number highlights the scale and gravity of the crimes committed in Liberia and calling on the government of Liberia to investigate and prosecute all persons "reasonably suspected of serious human rights violations.").

164. TRC-L Act, *supra* note 85, art. VII, § 26(j) (iv).

165. See TRC-L INITIAL REPORT, *supra* note 121, at 76. The TRC-L did not indicate in its report what the distinction was between "groups" or "entities." *Id.*

166. Annex II, defining "egregious" domestic crimes, which include mercenarism, official repression, kidnapping, sexual assault, rape, offenses against property, theft, and/or illegal disbursement of public money, and misuse of public money amongst others. See *id.* at 77, 80-88. Gross human rights violations and serious international humanitarian law violations are defined respectively in Annex 4 and 5. *Id.* at 76, 89-107.

to recommend to a future prosecutorial mechanism, persons that it determines are responsible for committing “domestic and international crimes,”¹⁶⁷ but due to the “truthful,” and “remorseful,” nature of the testimony should not be prosecuted.¹⁶⁸

Further, the Commission stated that it would submit a “comprehensive recommendation on the competence, jurisdiction, structure, function, and other authority of the recommended criminal court to the National Legislature and the President of Liberia.”¹⁶⁹ The TRC-L did not specify if the court will be national, hybrid, or international, in nature, yet given the high costs of establishing any court and the political will required for creating and funding a court, its creation in Liberia is likely very low.

Yet, the SCSL’s prosecution of Taylor may have practically blocked the TRC-L from making any recommendation regarding him. Many Liberians want Taylor to be prosecuted for events occurring in their own country.¹⁷⁰ As Ezekiel Pajibo, a Liberian human rights activist eloquently stated,

The criminal acts for which Mr. Taylor is being tried in Sierra Leone [are] related to the criminal acts, which he committed there and the Sierra Leonean people deserve justice, . . . but that does not exonerate Taylor for the crimes he committed here. Being tried in Sierra Leone does not amount to being tried in Liberia. You can not try someone for crimes committed in Sierra Leone and say that they are for Liberia too. The people of this country are aggrieved and we want justice in this country.¹⁷¹

The SCSL’s indictment charged Taylor with individual criminal responsibility for alleged acts of terrorism, murder, rape, sexual slavery and violence, outrages upon personal dignity, violence and cruel treatment, other inhumane acts, conscripting children into the armed forces, enslavement, and pillaging, occurring in the territory of Sierra

167. The Commission did not define “domestic and international crimes.” *Id.* at 77.

168. *Id.* In interpreting the amnesty and prosecutorial provisions of the TRC-L Act discussed above, the Commission effectively attempts to make participation with and conduct in the truth telling process another factor in determining whether an individual should face prosecutions. *Id.*

169. *Id.* at 76.

170. See HAYNER, *supra* note 159, at 24.

171. Interview with Ezekiel Pajibo, *supra* note 84.

Leone.¹⁷² Whether these charges constitute the same offense as crimes allegedly committed in Liberia raises questions about the principle of *non bis in idem* or the prohibition of double jeopardy.¹⁷³

The International Law Commission has stated that the [A]pplication of the *non bis in idem* principle under international law is necessary to prevent a person who has been accused of a crime from being prosecuted or punished more than once for the same crime. This fundamental guarantee protects an individual against multiple prosecutions or punishments by a given State for the same crime.¹⁷⁴

Furthermore, recent international criminal tribunals recognize the right of an accused not to be placed in double jeopardy.¹⁷⁵ The only circumstances when the principle of *non bis in idem* would not apply is when a perpetrator of international crimes has not been duly tried or punished by a national court, where the justice system has not functioned independently or impartially or where the proceedings were designed to shield the accused from international criminal responsibility.¹⁷⁶ There is no indication that the SCSL's prosecution of Taylor is not being conducted in good faith and in accordance with international norms and standards.

Thus, if the TRC-L decided to recommend prosecution of Taylor for crimes allegedly committed in Liberia, it may have to demonstrate that crimes allegedly committed in Sierra Leone and those in Liberia do not constitute "the same crime." The TRC-L could stress that any recommendation for prosecution of Taylor for crimes allegedly

172. See Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Amended Indictment (Mar. 16, 2006).

173. See, e.g., ICCPR, *supra* note 141, art. 14 (7), "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." *Id.*

174. *Report of the International Law Commission on the Work of its Forty-Eighth Session*, 51 U.N. GAOR Supp. (No. 10) at 37, U.N. Doc. A/51/10 (1996), reprinted in [1996] 2(2) Y.B. INT'L L. COMM'N 37, U.N. Doc. A/Cn.4/SER.A/1996/Add.1, available at http://untreaty.un.org/ilc/documentation/english/A_51_10.pdf.

175. See, e.g., Rome Statute, *supra* note 137, art. 171; Statute of the Special Court for Sierra Leone art. 9, Jan. 16, 2002.

176. *Report of the International Law Commission on the Work of its Forty-Eighth Session*, *supra* note 174, at 38. The International Law Commission reasoned that "[t]he international community should not be required to recognize a decision that is the result of such a serious transgression of the criminal justice process." *Id.*

committed in Liberia, is in no way related to his current trial at the SCSL and does not conflict with the prohibition of double jeopardy, given that the alleged crimes are actually dissimilar – affecting different victims, occurring in another country etc... If the TRC-L adopted this approach, any such recommendation would be largely symbolic, if it comes after conviction in the SCSL.

The Liberian President may have preempted the TRC-L, when she announced that it would be unnecessary for Liberia to prosecute Taylor. The Liberian President concluded that,

[O]ur war was regional . . . so if you get charged in Sierra Leone, chances are the war was part of the same Liberian war . . . [i]f you get charged there, you get judged guilty or acquitted there. It has the same kind of implication and ramifications for the other countries that were involved in this cross-border war.”¹⁷⁷

Indeed, this Article has maintained that the conflicts in Liberia and Sierra Leone formed part of a regional conflict complex with massive human rights violations taking place in both States. However, since the transitional justice mechanisms created in Liberia and Sierra Leone did not follow the reality of conflict lines, it is inaccurate to assert that the SCSL’s prosecution of Taylor for alleged crimes committed “in the territory of Sierra Leone” has the same implications for Liberia. Former Prosecutor for the SCSL David Crane commented, “Certainly I respect President Sirleaf’s intentions and strategic looking forward, but . . . [Taylor] destroyed two countries and the [SCSL] is addressing what he did to Sierra Leone. And now it’s eventually time for justice to be done in Liberia.”¹⁷⁸ The Prosecutor, who drafted Taylor’s initial indictment, recognizes that the SCSL has not charged and is not prosecuting Taylor for any alleged crimes occurring in the territory of Liberia and committed against the people of Liberia. Recognizing this paradoxical situation, some scholars have advocated for an amendment of the SCSL’s statute to be able to try war crimes and crimes against humanity committed in Liberia.¹⁷⁹ This proposal has not been met with any

177. *Liberia’s President Says No Reason for her Country to Try Charles Taylor*, ASSOCIATED PRESS, Jan. 15, 2007.

178. Joe De Capua, *A Call for a Special Court in Liberia for Charles Taylor*, VOA NEWS, Jan. 16, 2007, <http://www.voanews.com/english/archive/2007-01/2007-01-16-voa38.cfm>.

179. See generally Chernor Jalloh & Alhagi Marong, *Ending Impunity: The Case for War Crimes Trials in Liberia*, 1 AFR. J. LEGAL STUD. 53, 78-79 (2005) (recommending prosecutions by

serious consideration, notwithstanding the ability to amend the jurisdiction of the SCSL.¹⁸⁰

The failure to adopt a regional or transnational approach when designing the transitional justice mechanisms in Liberia and Sierra Leone may have resulted in the privileging of victims in Sierra Leone's interests for justice. Admittedly, the prosecution of Taylor before the SCSL may have removed a threatening presence from the region benefiting both victims in Sierra Leone and Liberia. However, recalling that retribution is one of the main rationales for pursuing trials, since the SCSL is only prosecuting Taylor for crimes allegedly committed in Sierra Leone, only those victims' desires for retribution can be met. Indeed, while no public opinion studies have been conducted on Taylor's trial, field research indicates that public opinion on the trial in Liberia is mixed.¹⁸¹ When responding about the regional or continental significance of the trial, a sizable percentage of interviewees concluded that it was significant, because it "demonstrates that impunity is unacceptable," promotes the "rule of law," or for its "deterrent value."¹⁸² However, most did not believe the trial was significant for Liberia, the responses varied, but the most common response was because Taylor is "not being prosecuted for crimes allegedly committed in Liberia."¹⁸³ Interviewees that did regard the trial as significant for Liberia were mostly from rural areas and did not seem to realize that Taylor was not on trial for acts allegedly committed in Liberia.¹⁸⁴ In contrast, in Sierra Leone, half of interviewees described the Taylor trial as "very significant," for the country, with an even larger percentage thinking the trial was very important for the region, by helping to address impunity in the region, contributing to regional stability and peace in Côte d'Ivoire, Guinea, and Liberia, and putting other leaders

the Special Court for Sierra Leone as the most suitable option because of the link between the two conflicts, amongst other reasons).

180. SCSL Agreement, *supra* note 65, art. 22.

181. Interviews from Liberia Assessment Mission, *supra* note 155.

182. *Id.* (59% of 29 interviewees: "impunity unacceptable," (8); "rule of law," (4); "deterrent value" (3)).

183. *Id.* Also variously because: there is "insufficient public awareness," (4); "other actors responsible for the war in Sierra Leone but he is the only one being tried," (4); "people want to move on," (2); Taylor needed to face the TRC-L, before going to Hague" (2) "he should have been tried in the region," (2) "waste of resources," (1). *Id.*

184. *Id.* (24% of 29 respondents with only 1 from Monrovia). For example, one interviewee indicated, "Trial is fine because we want to know good and bad done in Liberia, but not only Taylor so many people were involved in the war." *Id.*

on notice that there is accountability for fomenting war in neighboring countries.¹⁸⁵

Establishing the truth about war crimes is another rationale often cited for trials after mass atrocity. The narrow mandate of the SCSL both temporally and territorially means that the already limited ability of trials to establish the truth about wartime atrocities is further inhibited since the SCSL is not examining any of the atrocities that took place in Liberia. Yet, many of the prosecution's linkage witnesses have testified about events regarding Liberia's conflict, even though Taylor is not being prosecuted for any of the alleged crimes committed in Liberia. For example, Former Vice President, and former NPFL leader, Moses Blah testified at length in Taylor's trial and made several damaging allegations about the early formation of the NPFL, detailing the involvement of Libya and Burkina Faso in Liberia's conflict, discussing the execution of high ranking individuals allegedly under Taylor's orders in Liberia, and other NPFL crimes, as well as discussing arm shipments.¹⁸⁶ Blah also testified about the role of Benjamin Yeaten, Taylor's feared "Executioner in Chief," and former Director of Taylor's Special Security Services (SSS),¹⁸⁷ whom the Government of Liberia indicted in January of 2009 for murder.¹⁸⁸

Another linkage witness and former SSS operative testified about Taylor's alleged organization of a proxy force to fight in a region in Liberia where Taylor was ostensibly engaged in peace negotiations with the main warring faction.¹⁸⁹ Testimony also involved allegations from Joseph D. Marzah, one of the initial leaders of the NPFL, who testified about the initial invasion of Liberia in 1989, the trading of diamonds for weapons, and the Camp Carter Massacre, wherein over 600 Liberian

185. Interviews from Sierra Leone Assessment Mission, *supra* note 111 (50% of 14 interviewees said trial was very significant for Sierra Leone and 93% of 13 interviewees said the trial was "very significant" for the region).

186. See Charles Taylor Trial Report (May 1 - June 2, 2008), 10-13, available at <http://charlestaylortrial.files.wordpress.com/2008/06/trial-report-may-1-to-june-2008-21.pdf>. See also Charles Taylor Trial Report (May 5-22, 2008), 8-10, available at <http://charlestaylortrial.files.wordpress.com/2008/06/may-2008-trial-report1.pdf>.

187. *Id.* at 10 (May 1 - June 2, 2008).

188. See Alloycious David, *Benjamin Yeaten Indicted for Murder*, LIBERIA WEBS, Jan. 21, 2009, available at http://liberiawebs.com/index.php?option=com_content&view=article&id=949%3Aaliberia-benjamin-yeaten-indicted-for-murder-&catid=81%3Apolitics&Item.

189. See Charles Taylor Trial Report (February 4, - March 14, 2008), 6, available at <http://charlestaylortrial.files.wordpress.com/2008/04/trial-report3.pdf> (summary of linkage witness testimony Suwandi Camara).

civilians were allegedly murdered under Taylor's orders.¹⁹⁰ Moreover, Varmuyan Sherrif, former member of a rival warring faction in Liberia, and former member of Taylor's SSS, testified about the Liberians United for Reconciliation and Democracy's attack on the country in the late 1990s, amongst others.¹⁹¹ The level of detail and important disclosures revealed at Taylor's trial, are astounding since many of the events alleged by linkage witnesses fall outside the temporal and territorial jurisdiction of the SCSL. Ultimately, the SCSL will not be adjudicating any of the crimes allegedly committed by Taylor in Liberia after subjecting the accusations to its strict evidential and procedural standards. Thus, the one-sided prosecution of Taylor has obscured his alleged involvement in atrocities in Liberia. Furthermore, it has also limited the already tenuous ability of such trials to individualize guilt, deter war criminals, and rehabilitate countries,¹⁹² since the trial does not concern any human rights abuses allegedly committed in Liberia. The above analysis illustrates some of the problems encountered when transitional justice mechanisms are not designed based on conflict lines.

ii. "The Right to Truth"

Some argue that the right to truth is a fundamental emerging principle of international human rights law, and central to the project of confronting transitions to democracy and the legacy of massive human rights violations.¹⁹³ Proponents of the "right to truth" locate it in the right to "seek, receive and impart information," in the Universal Declaration of Human Rights,¹⁹⁴ the American Convention on Human Rights,¹⁹⁵ and the African Charter on Human and Peoples' Rights, "right to receive information."¹⁹⁶ The principle of a general "right to truth," is usually traced back to the codification of the right in cases of missing persons in the Geneva Conventions.¹⁹⁷

190. *Id.* at 12.

191. See Charles Taylor Trial Report (January 7 - February 1, 2008), 3-4, available at <http://charlestaylortrial.files.wordpress.com/2008/02/trial-report1.pdf>.

192. See BASS, *supra* note 5, at 286-304 (for a further discussion of the weaknesses of the presumed goals of trials).

193. See HAYNER, *supra* note 159, at 31 (citing human rights advocates). See also Juan Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 261 (1997).

194. Universal Declaration of Human Rights art. 19, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

195. American Convention on Human Rights art. 13, Nov. 22, 1969, 1144 U.N.T.S. 123.

196. African (Banjul) Charter on Human and People's Rights art. 9, June 26, 1981, 21 I.L.M. 59 (1982).

197. See Protocol Additional (NO. I) to the Geneva Conventions of August 12, 1949, and

Given the prevalence of enforced disappearances in the 1970s, the concept of the “right to truth” has been developed through the jurisprudence of the Inter-American human rights bodies. For example, the Inter-American Court of Human Rights first addressed an independent “right to truth” in the 1988 case of the disappearance of Velásquez Rodríguez in Ecuador.¹⁹⁸ The Inter-American Court of Human Rights concluded that,

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation The duty to investigate facts . . . continues as long as there is uncertainty about the fate of the person who has disappeared. Even . . . [where] those individually responsible for crimes . . . cannot be legally punished . . . the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.¹⁹⁹

Significantly, “the right to truth” is conceived as part of the general obligation of the state to investigate or to collaborate in the investigation of crimes, as part of the state’s “duty to prosecute.” This case indicates that where there is no opportunity for judicial action against the alleged perpetrators of the crime, the “right to truth” becomes even more important. Recent decisions of the Inter-American Human Rights Court have recognized the “right to truth” about alleged human rights violations, but have held that it was unnecessary to consider this right as a separate issue, since the Court addressed the “right to truth” as part of the violation of the right to a fair trial and the right to judicial protection.²⁰⁰ Indeed, in the *Barrios Altos Case*, the

Relating to the Protection of Victims International Armed Conflicts art. 32, 33, Dec. 7, 1979, 16 I.L.M. 1391 (1977) (noting that state parties shall be “prompted mainly by the right of families to know the fate of their relatives,” and to “search” for missing persons as soon as possible).

198. See Velásquez Rodríguez Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

199. *Id.* ¶¶ 174 & 181.

200. See Barrios Altos Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 47-49 (May 14, 2001); see also *Bámaca-Velásquez v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶¶ 200 - 202 (Nov. 25, 2000).

Court held that, “the right to the truth is subsumed in the” rights provided for in “Articles 8 and 25 of the Convention.”²⁰¹

The jurisprudence of other regional bodies also supports the recognition of a “right to truth.” For example, Both the African Commission on Human and Peoples’ Rights and the European Court of Human Rights have inferred the right to truth with respect to torture, as well as the right to an effective investigation.²⁰² The recognition of the “right to truth” is also supported by several international resolutions.²⁰³ Moreover, the U.N. Office of the High Commissioner for Human Rights conducted a study, which sought to articulate the scope, content, and holders of the “right to truth,” after reviewing the legal and historical basis for the right.²⁰⁴ The study concluded that, “the right to truth about gross human rights violations and serious violations of humanitarian law is an inalienable and autonomous right,” held by “victims and their relatives,” as well as “society.”²⁰⁵ The report found that the right to truth “implies knowing the full and complete truth as to events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.”²⁰⁶

However, it is unclear whether State practice reflects recognition of the “right to truth.” Recalling that international customary law is formed when State practice is both extensive and virtually uniform on the sense

201. Barrios Altos Case, No. 75 ¶ 48 (stating that articles 8 and 25 of the American Convention on Human Rights provide for the right to a fair trial and the right to judicial protection respectively).

202. See, e.g., Amnesty International v. Sudan, Afr. C. H. P. R., Comms. No. 48/90, 50/91, 52/91, 89/93, ¶ 54 (1999) (discussing the right to truth in relation to torture); Cyprus v. Turkey, App. No. 25781/94 35 Eur. Ct. H. R. 967 ¶ 136 (2001) (discussing the right to truth in relation to an effective investigation).

203. See, e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principles 11, 22 (b) and 24, G.A. Res. 60/147, Annex, U.N. Doc. A/RES/60/147 (Mar. 21, 2006); U.N. Hum. R. Comm., Right to Truth, Res. 2005/66, U.N. Doc. E/CN.4/RES/2005/66 (Apr. 20, 2005).

204. U.N. Econ. & Soc. Council [ECOSOC], Comm’n. on Human Rights, *Promotion and Protection of Human Rights: Study on the Right to Truth* [hereinafter *Study on the Right to Truth*], Report of the Office of the U.N. Human Rights Commissioner for Human Rights, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006).

205. *Id.* ¶¶ 55, 58. The Inter-American Human Rights Commission has also maintained that, “[e]very society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future.” See INTER-AM. C. H.R., ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1985-1986 CH. V (1986).

206. *Id.* ¶ 59.

of the norm invoked and occurs in a way to demonstrate a general recognition that a legal obligation is involved (*opinio juris*). Yet, most national constitutions do not specifically recognize the “right to truth,”²⁰⁷ although, some States have laws on access to information, that have been used for disclosures on human rights violations.²⁰⁸ The increasing use of truth commissions and commissions of inquiry to investigate gross violations of human rights, with up to 40 created between 1974 and 2005,²⁰⁹ may provide some evidence of State practice. However, it is far from clear that States have created these bodies out of a sense of a legal obligation.²¹⁰ Indeed, the discussion of the establishment of the TRC-SL and the TRC-L²¹¹ highlighted the many political considerations that factor into the establishment of a truth commission, including the desire to forego prosecutions of alleged perpetrators. Thus, while an emerging norm may be developing there is no evidence of uniform State practice that a rule of international law has developed recognizing “the right to truth.” The “right to truth” is best envisaged as an “aspirational” right. Nonetheless, this Article has detailed the potential moral, political, and social imperatives for pursuing “truth-telling.”²¹²

Even if one accepts that there is a “right to truth,” where multiple victims and societies are affected, who possesses this “right”? Where massive human rights violations have been committed in multiple societies, which society’s “right to truth” should be determinative? Where massive human rights violations are not limited to one State, and one society’s pursuit of “truth” and another society’s pursuit of “justice” are in conflict, which society’s right should be privileged? Should one society’s rights be balanced against the other? These are complex questions to have to answer, yet they are presented by the absurd consequence when transitional justice mechanisms have been established without regard to the regional or transnational nature of human rights violations.

The Study on the Right to Truth found that “international criminal tribunals,” “may constitute important tools for ensuring the right to the

207. *Id.* ¶ 31.

208. *Id.* ¶ 32 (discussing the freedom of information legislation in the U.S. and South Africa).

209. *Id.* ¶ 50.

210. Only in two of these cases has the right to truth been explicitly relied upon. *Id.* ¶ 14 and n. 23 (citing the Mexican truth commission agreement, and the final report of the TRC-SL).

211. *See supra* Part III for further discussion.

212. *See supra* Part I for further discussion.

truth.”²¹³ Yet, the above discussion has shown that the SCSL’s prosecution of Taylor is not fulfilling its obligation to Liberian human rights victims and their relatives, nor Liberian society’s “right to truth.” At best, Taylor’s prosecution before the SCSL fulfills Sierra Leone’s duty to investigate facts of violations committed within its jurisdiction, and fulfills its obligation towards Sierra Leonean human rights victims and Sierra Leone’s society to truth. The SCSL’s prosecution of Taylor has also arguably prevented judicial action on the part of Liberia as demonstrated above. Consequently, the “right to truth” maybe even more salient for Liberians.

The Study on the Right to Truth proposed that criminal prosecutions utilize a “broad legal standing in the judicial process for any wronged party and to any person or non-governmental organization having a legitimate interests therein,” as “essential to ensuring the right to truth.”²¹⁴ There are no provisions in the Statute of the Special Court for Sierra Leone, which grant standing to States, organizations, or victims to participate in its proceeding.²¹⁵ While the Rules of Procedure provide for amicus curiae, the role of the “state, organization, or person to make submissions” is limited to the “issue specified by the Chamber.”²¹⁶ Further, participating as amicus curiae, and having legal standing to participate and intervene in a case are quite distinct as the former involves contributing information that may help the Court arrive at its final decision, while the latter involves having ones legal claims adjudicated. The analysis above has depicted the legitimate interest of Liberian victims and their families as well as Liberian society in the SCSL’s proceedings against Taylor. Thus, arguably the proceedings before the SCSL should have allowed some type of standing particularly regarding human rights victims, which would be directly impacted by the outcome of the trial.²¹⁷

The Study on the Right to Truth also observes that truth commissions can play “an important role in . . . uncovering truth,”²¹⁸ Section C (II) below discusses the ways in which the SCSL’s

213. *Study on the Right to Truth*, *supra* note 204, ¶ 61.

214. *Id.*

215. *See generally* Statute of the Special Court for Sierra Leone, Jan. 16, 2002.

216. *See* Special Court for Sierra Leone [SCSL], *Rules of Procedure and Evidence*, R. 74 [hereinafter SCSL Rules of Procedure and Evidence], available at <http://www.scs-sl.org/documents.html>.

217. The Study on the Right to Truth notes that some countries “allow third parties and NGOs to intervene in criminal proceedings.” *Study on the Right to Truth*, *supra* note 204, ¶ 48 & n. 135 (citing Columbia, France, and Spain).

218. *Id.* ¶ 50.

prosecution of Taylor may have limited the TRC-L's ability to do so. The next section considers the question of information sharing between the transitional justice mechanisms, examining issues of confidentiality of testimony and the perception of information sharing.

B. *Information Sharing*

1. The SCSL and the TRC-SL

The issue of whether the TRC-SL and the SCSL would share information was a critical one for the transitional justice process in Sierra Leone. Marieke Wierda, Head of the Prosecutions Program for the ICTJ, who has done significant work on the transitional justice process in Sierra Leone, proposed three conceptual models of thinking about information sharing in relationships between courts and truth commissions:

1. The "fire wall" model, in which there would be no information sharing from the Commission to the Court.
2. The "free access" model, in which all Commission information would be available to the Court.
3. The "conditional sharing" model, in which there would be some information shared between the Commission and the Court.²¹⁹

The Chief Prosecutor of the SCSL seemingly put an end to questions by making it clear that he had no plans to seek or use information collected by the TRC-SL.²²⁰ Despite the adoption of the firewall model, the perception that there was information sharing may have significantly compromised the work of the TRC-SL.

Due to administrative delays, the TRC-SL's statement-taking phase, and hearings phase coincided with the SCSL's indictments, which resulted in widespread fears by ex-combatants that the TRC-SL could

219. Wierda et al., *supra* note 126, at 8.

220. See Charles Cobb, Jr., *Sierra Leone's Special Court: Will It Hinder or Help?*, ALL AFRICA.COM, Nov. 21, 2002, <http://allafrica.com/stories/200211210289.html>.

be a covert conduit for the SCSL.²²¹ As Gavin Simpson, Former Researcher for the TRC-SL, attests,

So much time was expended convincing perpetrators that talking to the [TRC-SL] would be done without prejudice and without fear of consequence because their first impression was always that the information would be relayed to the [SCSL] either, to prosecute them, or to prosecute somebody who was close to them.²²²

The simultaneous operation of the TRC-SL and SCSL without any coordination undoubtedly led to confusion of the Sierra Leonean public and particularly ex-combatants. The final report of the TRC-SL found that many,

[W]ere reluctant to participate in the truth telling process out of fear of prosecution by the [SCSL] The Commission's ability to create a forum of exchange between victims and perpetrators was unfortunately retarded by the presence of the [SCSL].²²³

Even though the SCSL and the TRC-SL reached consensus on whether or not information would be shared between the two institutions, the mere perception of information sharing was seemingly enough to frustrate the operations of at least one of the institutions.²²⁴

221. ROSALIND SHAW, U.S. INST. OF PEACE, RETHINKING TRUTH AND RECONCILIATION COMMISSIONS: LESSONS FROM SIERRA LEONE 4 (2005); *See also* POST-CONFLICT REINTEGRATION INITIATIVE FOR DEV. AND EMPOWERMENT (PRIDE) & INT'L CTR. FOR TRANSITIONAL JUSTICE, EX-COMBATANT VIEWS OF THE TRUTH AND RECONCILIATION COMMISSION AND THE SPECIAL COURT IN SIERRA LEONE 19 (2002), available at <http://www.ictj.org/images/content/0/9/090.pdf>.

222. Interview with Gavin Simpson, Former Researcher, Sierra Leone Truth and Reconciliation Comm'n, in Freetown, Sierra Leone (July 18, 2005). *But see* William A. Schabas, *Conjoined Twins of Transitional Justice? The Sierra Leone Truth & Reconciliation Commission and the Special Court*, 2 J. INT'L CRIM. JUST. 1082, 1091 (2004) (wherein the former TRC-SL Commissioner William Schabas maintained that the impact of the SCSL on the willingness of perpetrators to come forward to the TRC-SL is impossible to assess and that many perpetrators cooperated with the Commission).

223. TRC-SL REPORT, *supra* note 57, vol. 3b, ch. 6, at 378.

224. *But see* Tom Perriello & Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny* [hereinafter *SCSL Under Scrutiny*], Int'l Ctr. for Transitional Justice, 42, March 2006 (arguing that the existence of the SCSL did not undermine the TRC-SL's ability to function, and that the coexistence of the institutions was not a policy failure). Indeed, many international observers do not regard the complications faced by the interactions between the two institutions as

2. The SCSL and the TRC-L

The issue of information sharing was unspecified between the TRC-L and the SCSL. Yet, a number of their provisions were potentially conflicting. For example, the TRC-L's Act empowers the Commission to take testimony on a confidential basis:

At the discretion of the TRC, any person, group of persons or organizations or institutions shall be permitted to provide information . . . to the TRC on a confidential or non-confidential basis and the TRC shall not be compelled by any authority to disclose any such information given to it in confidence.²²⁵

Under the Act, the TRC-L cannot be compelled to produce evidence to the SCSL.²²⁶ However, the Prosecutor could theoretically request an order for the production of evidence.²²⁷ Orders of the SCSL “shall have the same force or effect as if it had been issued by a Judge, Magistrate, or Justice of the Peace of a Sierra Leone court.”²²⁸ However, no treaty or domestic statute exists outlining the enforcement of foreign judgments or orders between Liberia and Sierra Leone.

Moreover, the TRC-L Act states that the Commission has the power to

[G]ather, by means it deems appropriate, any information it considers relevant, including the ability to request reports, assistance of foreign governments, non-resident Liberians, records, documents or any information from any source, including governmental

fundamentally affecting either institution. *Id.* This is in marked contrast to the majority of Sierra Leoneans who view the coexistence as a mistake that should not be replicated. See F. of Conscience, *Searching for the Truth and Reconciliation in Sierra Leone: An Initial Study of the Performance and Impact of the Truth and Reconciliation Commission* [hereinafter *Searching for the Truth*], 5-6 (2005).

225. TRC-L Act, *supra* note 85, art. VII § 26(m).

226. *Id.*

227. SCSL Rules of Procedure and Evidence, *supra* note 216. “At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.” *Id.*; see also SCSL Ratification Act, *supra* note 125, § 21(2).

228. *Id.* § 20.

authorities, and to compel the production of such information as and when necessary.²²⁹

The TRC-L Act provides for a Special Magistrate who ranks as a Circuit Judge and has the power to enforce the above-mentioned provision by issuing warrants of arrest for contempt, subpoenas, and citations, as well as fines for non-cooperation.²³⁰ The Rules of Procedure and Evidence for the SCSL, only provide for disclosure of materials by the Prosecutor to the Defense and reciprocal disclosure by the Defense.²³¹ It is unlikely that the Defense would ever voluntarily want to share its evidence with the TRC-L. While the Prosecutor cannot disclose confidential information,²³² it is feasible that during investigations the Prosecutor might come across information that is not relevant to the preparation of its case before the SCSL, which might be relevant to the TRC-L's investigations. Notwithstanding the ambiguity in their founding documents, and the potential for conflict, the SCSL and the TRC-L did not reach an agreement on whether information would be shared between the two to further their respective investigations.

Due to administrative delays, the TRC-L's hearings phase coincided with the trial of Taylor, which began on January 7, 2008.²³³ Unlike in the case of the TRC-SL, the Prosecutor of the SCSL never announced that he would not seek to use testimony provided before the TRC-L. However, given the amount of evidence amassed²³⁴ prior to the advent

229. TRC-L Act, *supra* note 85, art. VIII § 27(a); *see also id.* art. VIII § 27(e).

230. *Id.* art. VIII § 27(b)(i -ii) & § 28 The Special Magistrate "shall issue or cause to be issued a warrant of search and seizure, warrant of arrest for contempt, subpoenas, and citations to procure information and testimonies in furtherance of the work of the TRC to visit any establishment or place without giving prior notice, and to enter upon any land or premises . . . for the purpose of obtaining testimonies which may be vital to the work of the TRC. (ii) Shall conduct hearings for contempt of the Special Magistrate. . . . Any person who willfully obstructs or otherwise interferes with the work of the TRC or any of its members or officers in the discharge of their functions under this Act, commits an offence and shall be liable on conviction to a fine . . . for the first offence to include a term of imprisonment not less than six months or both fine and imprisonment depending on the gravity of the offence." *Id.* art. VIII § 27(b)(i -ii) & § 28.

231. *See* SCSL Rules of Procedure and Evidence, *supra* note 216, RR. 66 & 67.

232. *Id.* at R. 70.

233. The TRC-L began public hearings on January 9, 2008. *See* Press Release, The TRC-L, TRC Hearings (Jan. 9, 2008), *available at* <https://www.trcofliberia.org/news-1/press-releases/trc-hearings-1-9-2008/>. The SCSL delayed Taylor's trial, which began on January 7, 2008. *See* Arthur Max, *Taylor War Crimes Trial to Resume in January*, ASSOCIATED PRESS, (Dec. 12, 2007).

234. *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, § 2 ¶ 9 (ii) (May 31, 2004) (The Defense submitted that it did not have adequate time

of public hearings, such testimony was likely not deemed essential to the Prosecution. As of December 2008, of the 800 people who appeared before the TRC,²³⁵ a significant percentage has been alleged perpetrators.²³⁶ The Chairman of the TRC-L asserted that when,

People appear before the TRC, their statements, or testimonies are protected and the TRC does not and will not share its information with any prosecuting authority, nor will the TRC proffer any of its evidence in the prosecution of anybody who appears before the TRC.²³⁷

However, the Rules of Procedure and Evidence of the SCSL do not contain a rule against hearsay, so testimony before the TRC-L is potentially admissible before the SCSL.

The issue of information sharing came to the fore; soon after the TRC-L began statement taking, when the Association for the Legal Defense of Taylor took the Commission to the Supreme Court of Liberia.²³⁸ The TRC-L held a symbolic ceremony in October 2006 to mark the beginning of statement taking, and the statements given contained damaging allegations regarding Taylor and his cohorts.²³⁹ The

to prepare its defense due in part to “the volume of material disclosed by the Prosecution, including the reports of proposed experts.”).

235. See TRC-L INITIAL REPORT, *supra* note 121, at 55.

236. Interviews from Liberia Assessment Mission, *supra* note 155.

237. Interview with Jerome Verdier, *supra* note 1.

238. A Petition for a Writ of Prohibition Growing Out of the Ongoing Evidence Gathering Receipt, Recording & Publication Mechanism Of The Truth & Reconciliation Commission Against Former Liberian President Charles G. Taylor, His Excellency, Charles G. Taylor, former President of the Republic of Liberia currently facing War Crimes Charges at the International Criminal Court in the Hague, Holland represented by the Association for the Legal Defense of former President Charles Ghankay Taylor represented by its’ Chairman and Executive Director, Hon. John T. Richardson of Monrovia City, Republic of Liberia, Petitioner v. The Truth & Reconciliation Commission of the Republic of Liberia, represented by its’ Chairman, Cllr. Jerome Verdier of the City of Monrovia, Respondent [hereinafter Petition for a Writ of Prohibition] (Supreme Court of Liberia, Oct. 24, 2006) (on file with author).

239. *Day of Reckoning*, ANALYST, Oct. 11, 2006, at 7 (on file with author). Michael Biddle, son of former opposition political leader, testified that a rebel commander of Taylor’s NPFL confessed to him that he murdered his father. *Id.* Also, Mohammed Sheriff, former rebel for the United Liberation Movement of Liberia, testified that Sam Bockarie (indicted by the SCSL) was on a “military mission” in Côte d’Ivoire when Benjamin Yeaten, Director of the SSS, ordered him to return to Liberia. *Id.* Sheriff stated that at a border town between Liberia and Côte d’Ivoire, Yeaten, in the presence of Vice President Moses Blah, murdered Bockarie and ordered that his wife, mother, and two kids be killed in order to prevent them from testifying about his death before the SCSL. *Id.*

Petition for a Writ of Prohibition alleges that, among other things the “publication of prejudicial evidence may have negative effects on the ongoing trial in the Hague” of Taylor.²⁴⁰ Moreover, that evidence “covering the war years in Sierra Leone and Republic of Liberia are similar; and evidence gathered in Liberia involving the Petitioner, would easily be connective of similar crimes committed in Sierra Leone.”²⁴¹ The Association maintained that the TRC-L compromised Taylor’s right to a free and fair trial at the SCSL.²⁴²

Due to the fear that information gathered by the TRC-L would be used by the SCSL in its prosecution of Taylor, the Association requested that the Supreme Court prohibit the TRC-L

[F]rom ever receiving any witness, any evidence operating against the petitioner; and secondly that the Respondent Commission be prohibited from the official usage of any of the evidence produced and recorded at the T.R.C. . . . that all such evidences be declared . . . null and void and not usable in any Court or tribunal in and out of Liberia.²⁴³

According to the Association, “the Supreme Court ruled against our writ, stating that we were not legally clothed to protect Mr. Taylor’s rights . . . and that if Mr. Taylor had those issues he should raise them himself.”²⁴⁴ This incident demonstrates the problems caused by failing to establish how each institution would treat information from the other’s proceedings. It also highlights how a truth commission’s proceedings may negatively influence an ongoing trial. Further, it illustrates the importance of creating transitional justice mechanisms that take into consideration the regional or transnational nature of human rights violations. The next section considers the issue of the TRC-L seeking access to Taylor to further its investigations.

240. Petition for a Writ of Prohibition, *supra* note 238, ¶ 5.

241. *Id.*

242. *Id.*

243. *Id.* ¶ 8.

244. Interview with John T. Richardson, Former National Security Advisor and Former Executive Director and Chairman, Association for the Legal Defense of Former President Ghankay Taylor, in Monrovia, Liberia. (Jan. 18, 2007). The Supreme Court decision referenced in this interview is unpublished at the time of writing. The Association originally organized to assist in raising funds for Taylor’s legal defense and to advocate for a fair trial is no longer active. *Id.*

C. Access to Detainees

1. The SCSL and the TRC-SL: The Case of Hinga Norman

The crucial question that defined the nature of the relationship between the TRC-SL and the SCSL was the issue of access to the detainees of the SCSL by the TRC-SL. As the SCSL had in its custody some of the leaders from the key factions, the TRC-SL sought to capitalize on their testimonies to help it establish an impartial historical record. In some of the testimony given before the TRC-SL, the names of those detained by the Court came up as witnesses or actors in the events related to the war.²⁴⁵ Initially, the investigative arm of the TRC-SL approached the SCSL, but the Registrar of the SCSL advised the TRC-SL that the detainees did not wish to speak with the TRC-SL while their trials were pending.²⁴⁶ By August 2003, some of the detainees began to give notice of their desire to testify before the TRC-SL; Chief Samuel Hinga Norman's application to testify²⁴⁷ was followed by two others.²⁴⁸

In response to the TRC-SL's request, the SCSL created a Practice Direction,²⁴⁹ which outlined the procedures to request access to detainees. The TRC-SL believed the policies outlined in the Practice Direction undermined the confidentiality granted in its Act for testimony and presented the risk of an Accused incriminating himself, because the Registrar could forward testimony to the Prosecution. In response, the Registrar created a Revised Practice Direction, which allowed limited confidentiality and stipulated that the SCSL would grant requests if the detainee gave informed consent, and unless granting access would be against the "interests of justice" or would denigrate "the integrity of the proceedings of the" SCSL.²⁵⁰ While the

245. See Allen, *supra* note 62, at 69.

246. TRC-SL REPORT, *supra* note 57, vol. 3B, ch. 6, at 382.

247. After the Commission concluded public hearings, Norman indicated that he was interested in testifying, stating, "I would prefer to be heard by the people of Sierra Leone and also be recorded for posterity . . ." Letter from Hinga Norman, former Deputy Minister of Defense, National Coordinator for CDF and SCSL detainee, to J.B. Jenkins-Johnston, Lawyer for Norman (Aug. 26, 2003) (cited in TRC-SL REPORT vol. 3B ch. 6, at 383 n.75).

248. TRC-SL REPORT, *supra* note 57, vol. 3B, ch. 6, at 383.

249. See SCSL Rules of Procedure and Evidence, *supra* note 216, R 33(D).

250. Registrar of the Special Court for Sierra Leone, *Practice Direction on the Procedure Following a Request by a State, the Truth and Reconciliation Commission, or Other Legitimate Authority to take a Statement From a Person in the Custody of the Special Court for Sierra Leone*, ¶¶ 4 (3) & 5 (Oct. 4, 2003) [hereinafter Revised Practice Direction], available at <http://www.sc->

TRC-SL still had concerns about the potential use of testimony by the SCSL,²⁵¹ faced with the termination of its mandate, the TRC-SL in a joint application with Defense counsels resubmitted separate requests to hold public hearings.²⁵² The requests were in accordance with the Revised Practice Direction but the SCSL denied both of the TRC's requests.²⁵³

The Prosecution argued that it would not be in the interest of justice for Norman to plead his case in public before his trial, or to allow a hearing with the potential to affect witnesses adversely.²⁵⁴ The Prosecutor also noted that the hearing might upset the fragile peace in Sierra Leone due to the large number of Norman supporters.²⁵⁵ The TRC-SL responded "that any claim that a hearing would be sub judice was without factual basis and jurisprudential support."²⁵⁶ The Commission also noted that there were already strict protective measures in place for witnesses, and any claims about hearings as a forum for witness intimidation were merely speculative.²⁵⁷ The Commission argued that rather than threatening peace in Sierra Leone, the Commission actually contributed to its consolidation.²⁵⁸

Judge Thompson denied Norman's application, holding that such a proceeding would jeopardize the interests of justice and the preservation of the integrity of the proceedings.²⁵⁹ He reasoned that a public hearing with Norman on the subject of his role in the conflict would clash with his right to be presumed innocent.²⁶⁰ The Judge reasoned that the TRC

sl.org/LinkClick.aspx?fileticket=8km93ZzghVU%3d&tabid=176.

251. See Schabas, *supra* note 222, at 1094 (discussing how the Commission was dissatisfied with the Practice Direction's procedure for conducting confidential interviews, but agreed with the public hearings procedure).

252. *Id.*

253. See, e.g., Prosecutor v. Norman, Case No. SCSL-2003-08-PT, Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone ("TRC" or "The Commission") and Chief Samuel Hinga Norman JP Against the Decision of His Lordship, Mr. Justice Bankole Thompson Delivered on 30 October 2003 To Deny the TRC's Request to Hold a Public Hearing with Chief Samuel Hinga Norman JP (Nov. 28, 2003).

254. See Prosecutor v. Norman, Case No. SCSL-2003-08-PT, Decision on the Request of the Truth & Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman, ¶ 3 (Oct. 29, 2003), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=wZfWNvJbMvU%3d&tabid=153>.

255. *Id.*

256. *Id.* ¶ 1(b).

257. *Id.* ¶ 1(c).

258. *Id.* ¶ 1(d).

259. *Id.* ¶ 16.

260. Prosecutor v. Norman, Case No. SCSL-2003-08-PT, Decision on the Request of the Truth

considered Norman a perpetrator, and that this designation was incompatible, as Norman had pleaded not guilty on all seven counts.²⁶¹ Judge Thompson then decided, based on a balancing test on the institutional and societal interest in establishing an accurate historical record of the conflict and the due process entitlement to a fair and public trial that the individual defendant's right always prevailed.²⁶²

The TRC-SL appealed this decision to the President of the SCSL; interestingly, the SCSL sat as arbiter of a case, in which the Court was to decide the integrity of its own proceedings.²⁶³ President Geoffrey Robertson did not address the substantive arguments put forward in Judge Thompson's ruling, with its argument on the presumption of innocence.²⁶⁴ Instead, he noted, "It is not normally appropriate for one judge to review another's exercise of discretion."²⁶⁵ The TRC-SL argued before Judge Robertson: (i) that it was not a court of law and as such could not legally place someone in the category of "perpetrator;" (ii) that other tribunals including the ICTY and ICTR recognized the legitimacy of relying on other interests to restrict the right to a fair trial, and furthermore that these interests included Norman's right to testify, his freedom of expression, the public interest in ensuring the fulfillment of the TRC's mandate and the victims right to know the truth amongst others.²⁶⁶ The prosecution opposed the request on the same grounds as before.²⁶⁷

& Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman, ¶ 10 (Oct. 29, 2003), *available at* <http://www.sc-sl.org/LinkClick.aspx?fileticket=wZfWNvJbMvU%3d&tabid=153>.

261. *Id.* ¶ 12.

262. *Id.* ¶ 14.

263. Prosecutor v. Norman, Case No. SCSL-2003-08-PT, Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone ("TRC" or "The Commission") and Chief Samuel Hinga Norman JP Against the Decision of His Lordship, Mr. Justice Bankole Thompson Delivered on 30 October 2003 To Deny the TRC's Request to Hold a Public Hearing with Chief Samuel Hinga Norman JP (Nov. 28, 2003).

264. *Id.* ¶ 10. The TRC-SL submitted that "playing a central part" in the conflict did not necessitate the commission of human rights abuses and further, that the presumption of innocence on which Judge Thompson placed so much emphasis in the Trial Decision was not a straight jacket, "which insulates and inditee, against his wishes, from all forms of questioning prior to trial." *Id.*

265. *Id.* ¶ 3.

266. Neil Boister, *Failing to Get to the Heart of the Matter in Sierra Leone? The Truth Commission is Denied Unrestricted Access to Chief Hinga Norman*, 2. J. INT'L CRIM. JUST. 1100, 1104-5 (2004).

267. *Id.* at 1105.

Judge Robertson viewed the proposed TRC-SL hearing as, “a spectacle.”²⁶⁸

A man in custody awaiting trial on very serious charges is to be paraded, in the very court where that trial will shortly be held, before a Bishop rather than a presiding judge and permitted to broadcast live to the nation for a day or so uninterrupted The event will have the appearance of a trial, at least the appearance of a sort of trial familiar from centuries past, although the first day of uninterrupted testimony may resemble more a very long political broadcast.²⁶⁹

Judge Robertson stated that the Nuremberg Tribunal and other tribunals would not have allowed such “a spectacle” and that it would not be helpful precedent to grant public testimony for other post conflict countries.²⁷⁰ He reasoned that there was no reason to insist upon public testimony,²⁷¹ and sought to reach a compromise solution looking at the mandates of both the TRC-SL and the SCSL.²⁷² Judge Robertson maintained that there was a way of “obtaining such sworn testimony without endangering the integrity of the [SCSL],”²⁷³ and since there were alternative methods for Norman to exercise his freedom of speech, Norman could not “dictate the manner in which the [SCSL] must effectuate it.”²⁷⁴ As such, he concluded that Norman could provide testimony “in writing (with the benefit of legal advice) and sworn in the form of an affidavit.”²⁷⁵ According to this ruling, Norman retained the right to meet the TRC-SL in private and if necessary in confidence.²⁷⁶ The Judge deemed this solution would allow the TRC-SL to find out the “truth,” and while the refusal of a public hearing may have impacted on the TRC-SL’s reconciliation work, the Judge declared that

268. Prosecutor v. Norman, Case No. SCSL-2003-08-PT, Decision on Appeal, ¶ 30.

269. *Id.*

270. *Id.* ¶ 31.

271. *Id.* ¶ 32. He asserted that the TRC-SL had put forward no reason as to why it shifted from an initial request for a two-day private interview which he noted may have been granted, to a confidential interview, which he also notes may have been granted, to an application for a “televised spectacle.” *Id.*

272. Evenson, *supra* note 22, at 758.

273. Prosecutor v. Norman, Case No. SCSL-2003-08-PT, Decision on Appeal, ¶ 38.

274. *Id.* ¶ 40.

275. *Id.* ¶ 41.

276. *Id.*

reconciliation did not apply to a defendant who had plead not guilty.²⁷⁷ The TRC-SL faced with the end of its tenure on December 31, 2003, and with a Revised Practice Direction, which in the TRC-SL's view still did not allow for confidential interviews, the TRC-SL did not seek to take testimony from the detainees.²⁷⁸

The back and forth between the SCSL and the TRC-SL over access to the detainees represented a failure on the part of both institutions to recognize the unique role that each played in Sierra Leone's transitional justice process. The language of the Court's decision, although clothed in the integrity of the SCSL's proceedings, actually assumed the primacy of its proceedings. At one point, Judge Thompson notes while comparing both institutions, that "criminal courts offer the most effective remedy."²⁷⁹ However, many Sierra Leoneans felt that the SCSL had erred and erred gravely, as Norman's testimony was essential to the completion of the work of the TRC-SL.²⁸⁰ One interviewee concluded, "the fact that the [SCSL] muzzled Hinga Norman and the others not to speak before the [TRC-SL] means that it is only half-truth that we know. It is not complete"²⁸¹ The TRC-SL affirmed that the ruling had

[D]ealt a serious blow to the cause of truth and reconciliation in Sierra Leone. As a citizen of Sierra Leone and as a key role-player in Sierra Leone's recent history, Chief Hinga Norman has a right to appear before the TRC to tell his story. . . . The decision to deny . . . his right represents a grave and irreparable injustice, not only to the detainee himself but also to the people of Sierra Leone.²⁸²

While this decision may have represented one of the most contentious decisions defining the relationship between the SCSL and the TRC-SL, to Judge Robertson's credit he did make an effort to outline the

277. *Id.* ¶ 42.

278. *See* Boister, *supra* note 266, at 1108.

279. Prosecutor v. Norman, Case No. SCSL-2003-08-PT, Decision on Appeal, ¶ 33.

280. Interviews from Sierra Leone Assessment Mission, *supra* note 111. *See also Searching for the Truth*, *supra* note 224, at 5.

281. Interview with Joseph Rahall, Executive Director of Green Scenery, in Freetown, Sierra Leone (July 8, 2005).

282. Press Release, TRC-SL, Special Court Denies Hinga Norman's Right (And That Of The Other Detainees) To Appear Publicly Before the TRC, (Dec. 1, 2003) (cited in TRC-SL REPORT, *supra* note 57, vol. 3B, ch. 6, at 412).

complementary operations of both institutions, given that there were no established guidelines. With the death of Norman before the conclusion of his trial at the SCSL,²⁸³ the characterization of the decision of the SCSL by the TRC-SL as an “irreparable injustice” rings even more true. The people of Sierra Leone will never hear Norman’s story either from his testimony before the TRC-L or through his trial before the SCSL.

The concurrent operation of the TRC-SL and the SCSL proved to be problematic, as no clear and concrete regulations were in place to guide the behavior of the two institutions. The complications that these two institutions faced while operating simultaneously ultimately affected their ability to foster their respective mandates in Sierra Leone. Moreover, the Norman Appeal Decision set an important, even if less than ideal international precedent for the restriction of a truth-telling process by a justice-seeking process. The next section discusses the significance of the Norman Appeal Decision in light of the TRC-L’s attempt to seek access to Taylor.

2. The SCSL and the TRC-L: The Case of Charles Taylor

The main potential for conflict between the SCSL and the TRC-L is over the issue of access to Taylor. The TRC-L Act mandates it to investigate gross human rights violations, violations of international humanitarian law and abuses that occurred during the Liberian civil war.²⁸⁴ Many argue that the TRC-L needs to have access to Taylor, as he was “the engineer of the war in Liberia.”²⁸⁵ One interviewee commented, “I think the rewriting of Liberian history will be incomplete without Charles Taylor’s version The Liberian people will be left vague about what role he has played.”²⁸⁶ The TRC-L’s Act requires it to identify those responsible for committing gross violations, and other abuses,²⁸⁷ and the Act mandates the TRC-L to create an accurate and objective account of the past.²⁸⁸ It seems clear that access to Taylor will be essential for the TRC-L to carry out its mandate.

If Taylor is not granted the opportunity to respond to allegations regarding international crimes committed in Liberia leveled against him

283. Trial-ch.org, Trial Watch: Samuel Hinga Norman, http://www.trial-ch.org/en/trial-watch/profil/db/facts/samuel-hinga_norman_167.html (last visited Feb. 18, 2009).

284. TRC-L Act, *supra* note 85, art. IV § 4(a).

285. Interview with Thomas A. Bureh, *supra* note 157.

286. Interview with Paul Allen, *supra* note 83.

287. TRC-L Act, *supra* note 85, art. VII § 26(b), (d).

288. *Id.* art. VII § 26(i).

during the TRC-L's proceedings, this would raise important due process considerations. In the context of truth commissions, due process requires that individuals that are accused of crimes be given an opportunity to defend themselves against such allegations.²⁸⁹ However, a truth commission is not a court of law and does not have the ability to determine criminal guilt or innocence. Yet regardless of this fact, as Priscilla Hayner, Director of the Peace and Justice Program for the ICTJ notes, "those named in a truth commission report are popularly understood to be guilty, period; the distinction between criminal or legal guilt and a commission's finding of responsibility for a crime will be lost on most readers."²⁹⁰ While due process requirements differ between truth commissions and courts, Hayner outlines the three main guidelines that commissions should follow:

First, individuals who may be named in a report should be informed of the allegations against them and told that the commission intends to name them in a public report. Second, these persons should be given the opportunity to respond to the evidence against them and to offer a defense, either in writing or in an appearance before the commission, in a procedure determined by the commission The commission should state clearly that its own conclusions about individual responsibility do not amount to criminal guilt, which must be left to the courts.²⁹¹

In the instant case, the SCSL's prosecution of Taylor has essentially prevented the TRC-L from following these principles of due process. Numerous witnesses have testified before the TRC-L leveling

289. HAYNER, *supra* note 159, at 129-130 (discussing guidelines for due process); *see also Final Phase TRC-L*, *supra* note 120, at 24-25 (discussing the right to reply and the right to the presumption of innocence).

290. HAYNER, *supra* note 159, at 108.

291. *Id.* at 129-30.

allegations against Taylor.²⁹² One witness even admonished the TRC-L that

The best person to be questioned if you had to invoke the doctrine of greatest responsibility and that of the appropriate authority of government is the head of the group or government at that time. The TRC has a lot of resources to visit The Hague and discuss with Mr. Taylor.²⁹³

Indeed, the TRC-L's Act not only requires it to identify those responsible for committing gross violations but also to determine whether such violations were the result of deliberate planning.²⁹⁴ If the TRC-L is going to attribute responsibility to Taylor for gross abuses

292. See, e.g., Press Release, The TRC-L, Taylor's al Qaeda Links . . . Global Witness Opens Lid (Feb. 20, 2009), available at <https://www.trcofliberia.org/news-1/press-releases/charles-taylor2019s-al-qaeda-links-global-witness-opens-lid> (stating that Taylor received \$1 million for arranging to harbor two al Qaeda operatives in Liberia soon after the September 11 terrorist attacks on the United States); Press Release, The TRC-L, Taylor, Ghadafi, Ex-CIA Agent Organized Arms, Diamonds Smuggling Company . . . Latvian Investigative Journalist... (Feb. 18, 2009), available at <https://www.trcofliberia.org/news-1/press-releases/taylor-ghadafi-ex-cia-agent-organized-arms-diamonds-smuggling-company-latvian-investigative-journalist-reveals-documents>; Press Release, The TRC-L, Taylor's Cartel Looted & Pillaged Forest Resources (Feb. 17, 2009), available at <https://www.trcofliberia.org/news-1/press-releases/taylor2019s-cartel-looted-pillaged-forest-resources>; Press Release, The TRC-L, Taylor's Fighters Massacred Hundred In Kolahun . . . ATU Radio Operator Testified (Feb. 20, 2009), available at <https://www.trcofliberia.org/news-1/press-releases/taylors-fighters-massacred-hundred-in-kolahun-atu-radio-operator-testified>; Press Release, The TRC-L, President Taylor Ordered My Execution . . . Moses Blah Explains Ordeal, (Sept. 15, 2008), available at <https://www.trcofliberia.org/news-1/press-releases/president-taylor-ordered-my-execution-moses-blah-explains-ordeal>; Press Release, The TRC-L, Taylor, Sogbandi, Musuleng-Cooper Forced Victims to Lie to U.N. . . . Says Carter Camp Survivor, (June 12, 2008), available at <https://www.trcofliberia.org/news-1/press-releases/taylor-sogbandi-musuleng-cooper-forced-victims-to-lie-to-un-says-carter-camp-survivor> (stating that Taylor forced survivors of the Carter Camp Massacre to attribute responsibility to the Liberian Army as opposed to the NPFL); Press Release, The TRC-L, Lebanese Businessman Imported Arms For President Taylor, (Feb. 13, 2008), available at <https://www.trcofliberia.org/news-1/press-releases/201clebanese-businessman-imported-arms-for-president-taylor201d>; Press Release, The TRC-L, Former Deputy Public Works Minister's Widow Testify (Jan. 24, 2008), available at <https://www.trcofliberia.org/news-1/press-releases/former-deputy-public-works-minister2019s-widow-testify/> (stating that the widow of former Deputy Minister of Public Works, Isaac Vaye, told the TRC-L that former president Charles Taylor and General Benjamin Yeaten were responsible for the death of her husband).

293. Press Release, The TRC-L, Saah Gborlie Denies Allegations of Atrocities . . . Urges TRC To Interview Charles Taylor & Others, (Nov. 27, 2008), available at <https://www.trcofliberia.org/news-1/press-releases/saah-ghorlie-denies-allegations-of-atrocities-urges-trc-to-interview-charles-taylor-others>.

294. TRC-L Act, *supra* note 85, art. VII § 26(c).

committed in Liberia based on its investigations and testimony before it, then Taylor must be allowed to respond to such allegations should he choose to and proffer a defense. If this does not happen, then any finding made by the TRC-L against Taylor may lack legitimacy. Perhaps realizing the due process implications of its proceedings, the TRC-L issued a “last call notice,” to Taylor in a public notification to “Perpetrators,” “Alleged Perpetrators,” and “Persons of Interest,” to contact the TRC-L by the end of 2008.²⁹⁵ Implicit in this citation, wherein, the TRC-L deemed it needed the named individuals to answer allegations against them, was that failure to answer would result in the Commission using its compulsory powers. However, the public citation of Taylor is interesting, since it is clear that the TRC-L was aware of his detention in The Hague. Courtney Griffiths, Taylor’s attorney argued “the TRC would not succeed without Mr. Taylor’s testimony,” and that the Liberian government should not have sent Taylor to the Hague, if it wanted him to testify at the TRC.”²⁹⁶ While not addressing the substance of this argument, it does highlight that access to Taylor, whether confidential or public, will be essential for the TRC-L to carry out its mandate. The next sections will examine the problems posed by confidential access to Taylor or seeking public testimony from him.

i. Confidential Access to Taylor

The failure to adopt a regional approach in designing transitional justice mechanisms in Liberia and Sierra Leone, has led to the circumstance where there is ambiguity regarding whether evidence or testimony gathered from Taylor by the TRC-L would be confidential. The TRC-L’s Act states that evidence gathered “through the conduct of both public and confidential hearings,” is “subject to the exclusive discretion and authority of the TRC.”²⁹⁷ The SCSL’s Revised Practice Direction outlines the procedure following a request by a State, or “other legitimate authority” to take a statement from a person in the custody of the SCSL.²⁹⁸ The Revised Practice Direction would likely guide requests by the TRC-L for access to Taylor, because it would either qualify as a “legitimate authority,” or the Liberian Government

295. The TRC-L issued “last call” notices to 13 individuals out of the less than 337 named in both lists. See “List of Perpetrators” and “Persons of Interest,” *supra* note 162.

296. See *Liberia’s TRC not Disappointed Over Taylor’s Decision*, AFRICAN PRESS AGENCY, Oct. 17, 2008.

297. TRC-L Act, *supra* note 85, art. VII § 26(e).

298. Revised Practice Direction on Access to Detainees.

could theoretically make a request to the SCSL on the TRC-L's behalf. The Revised Practice Direction states,

[T]hat a copy of the record may be made available, upon order by the Presiding Judge, to a party or defence counsel for potential use in proceedings before the Special Court unless the questioning is covered, in whole or in part, by a confidentiality order, statute, or protocol, in which case a party or defence counsel may apply to the appropriate chamber for an order that the record of the questioning shall be disclosed in the interests of justice (which may include the interests of justice with respect to other suspects or accused before the Special Court).²⁹⁹

While the Revised Practice Direction makes it somewhat harder for either the Prosecution or the Defense to gain access to testimony or evidence obtained by a truth commission before the SCSL, as witnessed in the dispute between the TRC-SL and the SCSL, there is still potential for testimony to be used in “the interests of justice,” or to “maintain the integrity of the proceedings” before the SCSL.³⁰⁰

If Taylor were to meet in confidence with the TRC-L, the Prosecutor of the SCSL would most likely request a record of the proceedings. If Taylor were to confess about his alleged role in the conflict in Sierra Leone or make incriminating statements in confidence to the TRC-L, the Prosecutor of the SCSL would presumably argue that the testimony needs to be disclosed in the “interests of justice.”³⁰¹ Yet, releasing confidential testimony to the SCSL would undermine the statutory powers of the TRC-L, which provides that, “the TRC shall not be compelled by any authority to disclose any such information given to it in confidence.”³⁰² Moreover, the TRC-L can grant use immunity for

299. *Id.* ¶ 4 (3).

300. *Id.* ¶ 5. In the event that the detainee gives informed consent, “the request for questioning will only be rejected if the Presiding Judge is satisfied that a refusal is necessary in the interests of justice or to maintain the integrity of the proceedings of the Special Court.” *Id.*

301. See Wierda et al., *supra* note 126, at 18 (discussing confessions before the TRC-SL and suggesting that allowing indicted individuals to come before the Commission and confess and then withholding that confession from the Special Court (because of use-immunity or other barriers) would enable perpetrators to manipulate both institutions and may result in a miscarriage of justice).

302. TRC-L Act, *supra* note 85, art. VII § 26(m); see also *id.* art. VII § 26(p)(iii)(a) which provides that when the TRC-L determines to hold a hearing *in camera*, “[n]o information relating

testimony before it, which would prevent the use of testimony given before the TRC-L against that person in a criminal prosecution.³⁰³ Thus, it would be inconsistent with the Accused's protection from self-incrimination and the grant of use immunity before the TRC-L to release confidential testimony before the TRC-L, in furtherance of Taylor's prosecution before the SCSL. Critically, the TRC-L Act does not specify whether the use immunity is limited to future prosecutions occurring in Liberia, or also includes ongoing or future prosecutions taking place elsewhere. Moreover, it is uncertain whether the SCSL would actually respect the use immunity provided by the TRC-L. Thus, it is unclear whether Taylor's testimony would be confidential and whether or not the use-immunity would have any effect.

The Norman Appeal Decision indicates that the SCSL might be receptive to confidential access. On the other hand, the SCSL might find that granting the TRC-L confidential access to Taylor would be against the "interests of justice," or would jeopardize "the integrity of its proceedings." The TRC-L would be seeking access to Taylor to investigate events occurring during the Liberian conflict, which may not necessarily implicate the integrity of the SCSL's proceedings or affect the "interests of justice," given the Court's limited jurisdiction. However, if the SCSL reached a contrary conclusion, there would be no recourse for the TRC-L. The failure to adopt a regional approach in designing the transitional justice mechanisms in Liberia and Sierra Leone has led to this unfortunate situation.

Moreover, the confusion between the TRC-L's Act and the Revised Practice Direction of the SCSL regarding confidentiality and use-

to the proceedings or any part thereof held in camera shall be made public in any manner;" *see also id.* art. X § 47 which provides "[t]he archives of the TRC shall remain in the public domain except those records or documents classified by the TRC as "confidential" which shall remain classified for 20 years following the retirement of the TRC."

303. *Id.* art. VII § 30.

The TRC shall grant immunity to all persons or groups of persons, organizations or institutions from prosecution or tort actions on account of statements made or evidence given before the TRC in advancement of the public interest objective inherent in the functions and objects of the TRC and pursuant to the successful execution of its mandate, and which therefore, shall not be used in any court of law against the person making the statement.

Id.; *see also* Wierda et al., *supra* note 126, at 13 n.34 (discussing how truth commissions often grant use immunity where witnesses may be compelled to answer questions that may incriminate them).

immunity creates serious disincentives for Taylor to want to testify before the TRC-L. Indeed, Taylor has communicated to the TRC-L through his legal representative that he does not wish to give testimony³⁰⁴ until he concludes his trial before the SCSL.³⁰⁵ However, the TRC-L will likely no longer be operational at that time,³⁰⁶ thus, the first time that he speaks publicly will be at his trial,³⁰⁷ and it will not concern events occurring in both Liberia and Sierra Leone, but rather only war crimes and crimes against humanity allegedly committed in Sierra Leone. The implications of this for the transitional justice process in Liberia is exceedingly problematic, as the SCSL's prosecution of Taylor, may simultaneously result in an "irreparable injustice" to the people of Liberia. Where massive human rights violations are not limited to one state, and one society's pursuit of "truth," and another society's pursuit of "justice" are in conflict, it is impossible to determine which society's rights should be privileged. This section has explained how the failure to adopt a regional approach has negatively impacted the TRC-L's ability to seek confidential access to Taylor to further its investigations. The following section analyzes the issues raised by holding a public hearing with Taylor.

ii. A Public Hearing

The failure to adopt a regional approach in designing transitional justice mechanisms in Liberia and Sierra Leone has similarly resulted in the inability of the TRC-L to hold a public hearing with Taylor. The hearings procedure for the TRC-L allows for public hearings unless such a proceeding would be counter to the "interests of justice" or there is a likelihood that harm would ensue to persons because of a public proceeding.³⁰⁸ The hearings procedure for the TRC-L seems to be consistent with the SCSL's procedure for granting access outlined in its Revised Practice Direction and the Norman Appeal Decision. Nevertheless, there is no indication that the TRC-L will hold a public hearing with Taylor. The Chairman has stated that unlike the TRC-SL,

304. See *Liberia's TRC not Disappointed Over Taylor's Decision*, *supra* note 296.

305. Interviews from Liberia Assessment Mission, *supra* note 155.

306. See *supra* discussion Part V (introduction discussing the time-frame for the operation of the TRC-L scheduled to conclude in June 2009, and Taylor's Defense set to begin in June of 2009).

307. See Stearns, *supra* note 116 (noting that Taylor's lawyers indicate that he will testify in his defense).

308. TRC-L Act, *supra* note 85, art. VII § 26(p) (stating that hearings are public unless "(i)(a) It would be in the interests of justice; or (b) That there would be a likelihood that harm may ensue to any person as a result of proceedings being open . . .").

I do not imagine this TRC would request that Charles Taylor return to Liberia to face a public process But there should be other creative means of granting access to Charles Taylor. . .³⁰⁹

Indeed, a public hearing is impractical for a number of reasons. Most importantly, being the unwillingness of Taylor to participate in such a proceeding because of the reasons discussed above. There are also a host of other limitations, including the TRC-L lacking the requisite time and funding to conduct a public hearing in The Hague. Further, the ICC may not be willing to let the TRC-L use its facilities for this purpose.

Moreover, even if the TRC-L determined that a public hearing would be consistent with its hearing procedures, and Taylor agreed to participate in a public hearing before the TRC-L, the SCSL could rebuff the application. Significantly, if the TRC-L made a determination that a public hearing would not run counter to the “interests of justice” and that there was little likelihood of harm to persons because of a public proceeding in accordance with its own procedures, such a finding would not be enough. The SCSL would have to reach its own independent determination. The SCSL could be persuaded by arguments regarding the adverse influence of witnesses, and the possibility of public hearings involving Taylor upsetting the fragile peace in the sub-region, since, the SCSL relocated his trial due to security concerns. Further, the SCSL may regard an application by the TRC-L as inviting a “spectacle.”³¹⁰ Yet, as Neil Boister, Associate Professor at the University of Canterbury School of Law, who’s research focuses on international criminal law and interstate penal cooperation, correctly notes the SCSL’s antipathy towards a public hearing of a truth commission,³¹¹ alone would not suffice to deny the people of both Sierra Leone and Liberia’s “right to truth” from one of the key architects of the regional conflict. The “right to truth” is even more significant for Liberia because there is currently no opportunity for judicial action against Taylor for the alleged international crimes committed in Liberia.³¹²

309. Interview with Jerome Verdier, *supra* note 1.

310. Notably, numerous criminal cases allow media coverage in different jurisdictions, without such coverage damaging the “integrity of the proceedings.” Of course, where a court is dealing with highly sensitive information it will often place a ban on media coverage.

311. See Boister, *supra* note 266, at 1116 (commenting on how when Judge Robertson considers the reality of the TRC process, “he does not appear to like what he sees”).

312. See *supra* discussion Part IV(2)(ii) (discussing the *Velasquez Rodriguez* case and the *Study on the Right to Truth*, which reflects the principle that where there is no opportunity for judicial action against the alleged perpetrators of the crime, the “right to truth” becomes even more

Furthermore, The Study on the Right to Truth found that the right is a “stand-alone right,” which “should not be subject to limitations.”³¹³

Professor Boister recommends that the SCSL should have engaged in a balancing test to determine whether the SCSL’s decision to ban a public hearing had a disproportionate impact on “Norman’s right to speak and the Sierra Leonean’s public’s right to hear.”³¹⁴ Boister is essentially arguing for a balancing of the “interests of justice” against the “right to truth.” Nevertheless, how would such a balancing test apply in the case of the TRC-L and the SCSL? As noted earlier, where massive human rights violations have been committed in multiple societies, it is incredibly difficult to determine which society’s rights and interests should be determinative. If the SCSL engaged in a balancing test to determine whether a ban on a public hearing because of the “interests of justice,” would have a disproportionate impact on the public’s “right to truth,” the SCSL may regard the Norman Appeal Decision as persuasive.³¹⁵ The Court’s decision in that case was based on the perceived supremacy of international criminal justice over and above a process of truth-telling.³¹⁶ The SCSL could ostensibly reach a similar conclusion regarding Taylor. Yet, it is not evident that international or hybrid courts must always have priority over national truth commissions. This is particularly so, where massive human rights violations are not limited to one State but affect other States, and one society’s pursuit of “truth,” and the other society’s pursuit of “justice” are in conflict. The TRC-L’s investigation of gross violations of human rights law and international humanitarian law occurring in Liberia in the context of a public hearing with Taylor may not run counter to the “interests of justice” or undermine the “integrity” of the SCSL’s proceedings, since the SCSL does not have the jurisdiction to investigate crimes occurring outside of Sierra Leone.

However, if the SCSL held the contrary, there would be little to no recourse for the TRC-L. The SCSL has the power to hold suspects

salient).

313. See *Study on the Right to Truth*, *supra* note 204, ¶ 60.

314. See Boister, *supra* note 266, at 1111.

315. *Id.* at 1116-17 (discussing reasons the Norman Appeal Decision is not persuasive as precedent in other contexts).

316. Prosecutor v. Norman, Case No. SCSL-2003-08-PT, Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone (“TRC” or “The Commission”) and Chief Samuel Hinga Norman JP Against the Decision of His Lordship, Mr. Justice Bankole Thompson Delivered on 30 October 2003 To Deny the TRC’s Request to Hold a Public Hearing with Chief Samuel Hinga Norman JP, ¶ 33 (Nov. 28, 2003).

awaiting trial in custody and to regulate access to these detainees;³¹⁷ yet, the TRC-L is empowered to compel attendance at its hearings.³¹⁸ The TRC-L could hypothetically “compel” Taylor’s attendance, but such an action would have little practical effect given that the SCSL has Taylor in its custody. The failure to adopt a regional approach in designing the transitional justice mechanisms in Liberia and Sierra Leone has led to the regrettable situation of having a tribunal situated in one country inhibiting the truth-telling process in another, and has limited the potential impact of both institutions. Based on the challenges enumerated above, the following Part discusses recommendations that address the issues raised by the failure to adopt a regional approach.

V. RECOMMENDATIONS

The purpose of this Part is to provide broader guidance for the creation of transitional institutions set up to address regional conflict complexes. The issues raised in the case study regarding legal primacy, information sharing, and access to detainees demonstrate the importance of truth commissions and international/hybrid courts coordinating their operations generally. However, they also demonstrate that coordination does not suffice, and is a second best option where massive human rights violations have occurred across States, hence the need for a regional approach. Indeed, for coordination to work, both institutions would have to determine that cooperation on the above issues would not impinge on the institution’s ability to carry out its own mandate. That is each institution would have to come to an independent determination that cooperation with the other institution would result in a positive net gain. While possibilities for coordination and cooperation between truth commissions and trials might exist at a national level, such cooperation and coordination is bound to be limited given the inherent conflicts in the roles and mandates of each institution. Moreover, possibilities for coordination and cooperation are even

317. See SCSL Rules of Procedure and Evidence, *supra* note 216, R. 33(c) (empowering the Registrar to adopt and amend rules governing the detention of persons awaiting trial subject to the approval of a Council of Judges); *Id.* R. 40bis (transfer and provisional detention of suspects); see also SCSL Ratification Act, *supra* note 125, §§ 25-29 (concerning the delivery of persons arrested into the custody of the SCSL).

318. TRC-L Act, *supra* note 85, art. VII § 27(d). The TRC-L can, “[c]ompel attendance of any person before the TRC or any of its staff for the purpose of assisting the TRC in the conduct of its work and may publish a warrant, subpoena, or citation after diligent efforts have been exhausted to no avail in making a personal service.” *Id.*

further constrained at a regional or transnational level, where the mechanisms have been created without regard to the regional or transnational nature of abuses. In order to ensure against the haphazard operation of transitional justice mechanisms where they have been designed without regard to conflict lines, it is wholly inadequate to place the onus on the institutions to cooperate and coordinate their operations.

Indeed, when it comes to mass atrocity, “it must be recognized that the total is clearly more than the sum of the parts, and no useful purpose is served by breaking up an overall pattern of systemic criminality into select instances of that criminality.”³¹⁹ This is exactly the circumstance created by the SCSL’s prosecution of Taylor for crimes allegedly committed in the territory of Sierra Leone. In such cases, only a regional approach to transitional justice mechanisms “can do justice to the transnational complexity of events that have many dimensions to them.”³²⁰ A regional approach is useful where regional conflict complexes exist, because regional conflict complexes span territories with different sovereigns. A regional approach recognizes the interconnectedness of conflicts and does not arbitrarily create institutions with mandates, which ignore regional dynamics. A regional approach makes sense where massive violations have occurred across States because, “while international crimes are of concern to the entire international community, the peace and security implications of such crimes are often greatest within the region where the crimes occur.”³²¹

At a maximum, one could envision the creation of a regional transitional justice mechanism. This body could be a regional court or truth commission and serve as a complement or substitute to national transitional justice mechanisms depending on the will of affected communities. The victims in the affected communities would have to determine which regional transitional justice mechanism they want to utilize to address the legacy of conflict in the region. Participation from civil society groups in each country, and consultations with governmental actors, regional and international organizations as well as other key stakeholders should inform this process. As there will undoubtedly be competing demands about what approach to take, whatever institution adopted should be chosen based on consensus as much as possible, but victims’ desires should be prioritized as their

319. Mégret, *supra* note 145, at 735.

320. *Id.*

321. William Burke-White, *Regionalization of International Criminal Law Enforcement a Preliminary Exploration*, 38 TEX. INT’L L.J. 729, 733 (2003).

participation is imperative to the success of any regional transitional justice mechanism. Furthermore, broad notions of standing should be invoked in any mechanism, which will allow for the participation of victims, organizations, or States, who can demonstrate that they have a legitimate interest in the proceedings.

The normative appeal of taking a regional approach to creating transitional justice mechanisms in the aftermath of mass atrocity affecting multiple societies should be apparent. A regional approach will avoid instances where one society's pursuit of "truth" and another's of "justice" comes into conflict. It will similarly limit the difficulties of determining competing claims to the "duty to prosecute," or the "right to truth," and trying to balance one society's rights and interests over another, as well as balancing victims' rights, by attempting to adjudicate, which society "has the most valid claim in any one case."³²² A regional body would circumvent situations where several States have a keen interest in exercising jurisdiction, and where one State's exercise of jurisdiction, inevitably frustrates the aspiration of the other State(s).

A regional transitional justice mechanism's mandate or jurisdiction would be based on the reality of the conflict lines, both territorially and temporally. Significantly, this means that the founding documents of the commission would enable it to investigate, or the court to investigate and prosecute crimes occurring in all affected States. Investigations and prosecutions would examine all aspects of criminality including the transnational nature of abuses, and not arbitrarily focus on one select instance, limiting the problems posed by lop-sided prosecutions and investigations. A regional approach would also deal with double jeopardy concerns raised by the possibility of multiple prosecutions from different States. Thus, a regional body would presumably fulfill the interests of all affected States in seeking "truth" or "justice."

Significantly, a regional approach would avoid several of the challenges posed in the case of Liberia and Sierra Leone where massive human rights violations have occurred across States. A regional transitional justice mechanism would address decisively matters of legal primacy in its founding documents. A regional body would also articulate the procedures for information collected through its investigations and whether or not such information is to be shared with national or international institutions. A regional mechanism would establish clear guidelines at the outset in the event that information is to be shared, which will help to circumvent potential problems with

322. Mégret, *supra* note 145, at 739.

confidentiality and use immunity of testimony. Moreover, a regional body would prevent disputes over access to detainees, since it would be designed in a comprehensive fashion, which takes into account the “right to truth,” for victims, their families, and societies. A regional transitional justice mechanism would protect due process and facilitate “the right to reply” of individuals who have had allegations leveled against them.

A regional approach is also appealing for a number of practical reasons. The physical proximity of the regional transitional justice mechanism will ensure that affected communities can more readily access the proceedings before the regional court or commission. The “perceived legitimacy of the” transitional justice mechanism “turns on the connection of the proceedings to those most affected by the crimes being”³²³ investigated. A regional court or truth commission would likely draw on lawyers, judges, and other personnel from the region in order to ensure that the composition of both bodies reflects that of the region. The regional transitional justice mechanism could of course have international staff, but the emphasis should be on employing qualified personnel from the region. This would grant the regional transitional justice mechanism more legitimacy with local populations, because it would be less likely to be perceived as a “foreign” institution imposing its will. A regional body with staff from the region might also be “perceived as more responsive to local customs, values, and preferences,”³²⁴ which will help the institution to maintain its credibility.

A regional transitional justice mechanism would also be more cost effective because it would be able to draw resources from a number of countries, which will allow it to achieve greater results than national mechanisms which are often cash strapped, and yet not have the cost be prohibitive to its establishment as with ad hoc international tribunals. A regional body would also be efficient because it could negate the necessity of multiple commissions or prosecutions. Similarly, a regional mechanism means that judges and lawyers can be drawn from within the entire region, as opposed to being limited to the weakened and tainted judiciary and legal system of a post-conflict country. Lastly, a regional transitional justice mechanism is also more likely to be shielded from domestic political pressures.

Notwithstanding the potential benefits of a regional transitional justice mechanism, it might be difficult to implement in practice

323. Burke-White, *supra* note 321, at 737.

324. *Id.*

because it would require consensus from both victims and States that may have competing demands. Additionally, States within the “regional conflict complex” would need to conclude a treaty or similar agreement to establish such a body. However, “many parts of the world already have strong regional mechanisms in place, within which regional criminal courts”³²⁵ or truth commissions could be situated. Such institutions could become a part of the Inter-American, European, or African human rights systems or of sub-regional bodies. In addition, many regions take a regional approach to conflict prevention and maintenance of international peace and security, therefore, a regional approach to post-conflict reconstruction efforts like transitional justice mechanisms might be readily accepted. For example, in West Africa, ECOWAS has been particularly instrumental in conflict prevention and maintenance of international peace and security in the region.

Regional transitional justice mechanisms might be criticized as duplicative given the existence of the ICC. However, the principle of complementarity means that the ICC exercises its jurisdiction when States are “unwilling or unable” to exercise jurisdiction.³²⁶ The existence of a competent regional court may mean that States in the region are willing and able to exercise their jurisdiction over international crimes. In addition, the creation of regional transitional justice mechanisms may allow the ICC to concentrate its attention on the most severe international situations, allowing it to dedicate its limited resources and staff most effectively. Moreover, given the analysis above, regional action might be preferable to international action,³²⁷ particularly in situations where massive violations have taken place across societies in a region. This is particularly so in Africa, where the ICC’s prosecutions have been subject to mounting criticism.³²⁸ Furthermore, the ICC’s jurisdiction is limited temporally,³²⁹

325. *Id.* at 749.

326. Rome Statute, *supra* note 137.

327. This is so notwithstanding the fact that the ICC can sit regionally under Art. 3 of the Rome Statute, which provides “[t]he Court may sit elsewhere, whenever it considers it desirable.” *Id.* art. 3.

328. See *Peace Versus Justice*, *supra* note 109, at 36-37 (discussing common criticisms against the ICC, including the fact that despite the over 1,700 requests for investigations, the only ones pursued have been in Africa. Citing concerns that have been raised that the Court’s exercise of its jurisdiction has contributed to “neo-imperialism,” and exacerbated the unequal power relations between the North and the Continent. Noting how there is also the perception that the ICC effects “selective justice” ignoring blatant human rights violations perpetrated by powerful nations like the U.S. in Iraq, and only focusing its investigations on poorer and weaker states in Africa. Mentioning the perception that the Court’s exercise of its jurisdiction ignores or devalues traditional methods

a regional transitional justice mechanism maybe set up to prosecute or investigate historical abuses and would not face the temporal limitations that the ICC does.

Additionally, a region might determine to undergo a process of truth-telling to establish a comprehensive and accurate historical record of a regional conflict, which is not within the statutory powers or competence of the ICC. A regional truth commission can help to establish an authoritative history of the involvement of regional leaders in violence in the region, since the reality is that many of the findings of a national truth commission will be contested. Further, a regional commission with participation from relevant countries will help to ensure more “buy in” and implementation of recommendations aimed at regional actors, then recommendations from a national body.

A regional truth commission might have proven useful in the southern African region. The South African Truth and Reconciliation Commission is almost universally heralded as a success.³³⁰ However, the truth-telling process in South Africa never reached substantially beyond its borders to engage with South Africa’s illegal occupation of Namibia, its invasion in Angola and the sponsoring of surrogate rebel movements in both Mozambique and Angola.³³¹ While the countries in Southern Africa had unique reasons for their respective conflicts, through invasion, occupation, cross-border raids, sponsorship of rebel groups and destabilization of civil society, and as the base for South African liberation movements, each of these societies was intimately connected to the impacts of repression and resistance during apartheid South Africa.³³² South African military and political involvement in a

of dispute resolution, which emphasize restorative justice and whose proponents argue are more relevant in the African context than retributive justice). Inept prosecutorial policies and strategies, which have led to excessive procedural delays, insufficient evidence for charges, and inadequate victim participation have also raised alarm. *See generally* Julie Flint and Alex de Waal, *Case Closed: A Prosecutor Without Borders*, *WORLD AFFAIRS J.* Spring 2009.

329. *Id.* art. 11 (The Court has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute).

330. HAYNER, *supra* note 159, at 40-45 (discussing the achievements of the South African Commission vis-à-vis other truth commissions).

331. *See* Yasmin Sooka, Former Commissioner Truth and Reconciliation Commission for South Africa, Executive Director, Foundation for Human Rights, Presentation at the Regional Expert Meeting on the Human Right to Peace: *The Right to Truth in Article 10 of the Luarca Declaration in Light of the Southern African Experience* (Apr. 17, 2009) (copy of report of meeting on file with author) (discussing the limitations of the Commission’s investigations).

332. *See generally* Int’l Ctr. for Transitional Justice et. al., *Southern African Regional Assessment Mission Report*, 88-102 Mar. 2008 (discussing South Africa’s destabilization in southern Africa and its corresponding impact).

number of the Southern African countries during the apartheid regime remains an important issue that has not been adequately examined or addressed.³³³ A regional truth commission may have proven useful in this instance to investigate any gross violations committed and to establish a comprehensive history for the region.

Some have also recognized the need to create a regional truth commission in the Former Yugoslavia:

Given the multiplicity of states in the former Yugoslavia and the cross-border nature of the conflicts, many human rights groups in Serbia and elsewhere have long recognized the need for a regional body to investigate and document wartime atrocities. The reality is that many of the findings of any national truth commission [if one were to be created]—whether in Serbia and Montenegro, Croatia . . . would be contested in neighboring countries. If a truth-seeking effort is to succeed, it will likely have to be regional in composition and operation.³³⁴

The creation in 1993 by the United Nations of the ICTY, an ad hoc court responsible for trying high-ranking perpetrators of war crimes in the Former Yugoslavia,³³⁵ is a prime example of an institution designed to address a regional conflict in modern times. However, this effort was driven mostly by international actors and has not seemed to completely satisfy public or victim expectations for justice and acknowledgment, partially because the remoteness of the tribunal from the affected communities, has not allowed victims to be more connected to the prosecutions of the Accused.³³⁶

A prime example of where a regional court might have been useful was during the prosecution of Saddam Hussein before the Iraqi High Tribunal. The trial itself had serious administrative, procedural, and

333. *Id.* at 103-4 (providing recommendations on how to address these issues).

334. INT'L CTR. FOR TRANSITIONAL JUSTICE, SERBIA AND MONTENEGRO: SELECTED DEVELOPMENTS IN TRANSITIONAL JUSTICE (2004), available at <http://www.ictj.org/images/content/1/1/117.pdf>; see About the ICTY, <http://www.icty.org/sections/AbouttheICTY> (last visited Mar. 17, 2009).

335. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

336. See Wojcik et al., *supra* note 69, at 291.

substantive legal defects, which resulted in the failure to meet essential fair trial standards, such that the credibility of the trial process itself is doubtful.³³⁷ However, I raise the trial here to illustrate how a regional approach might have proven beneficial. Saddam allegedly committed crimes against Iran in 1980 and during the invasion of Kuwait.³³⁸ As one scholar noted,

A trial in Iraq means, first, that these other states will in all likelihood never get to try him, and, second, that these crimes are likely to be given comparatively short shrift Even if these crimes had been included, however, it is difficult not to see how a domestic Iraqi court would have been an exceedingly odd place to try them, and how the outcome might not have been heavily tilted towards an Iraqi understanding of these events, even if principles of judicial impartiality and independence had been respected.³³⁹

Although the invasion of Kuwait was included in the Tribunal's jurisdiction, it was never adjudicated because Saddam was executed after the conclusion of the Dujail trial.³⁴⁰ A regional tribunal with jurisdiction to try alleged crimes committed in Kuwait, as well as Iran and Iraq might have ensured that these alleged crimes were investigated and prosecuted and did not receive "short shrift."

The increasing trend of using an international criminal justice process to address individual criminal responsibility after mass atrocity and the creation of truth commissions to address the legacy of the past in a transitioning society indicate that the experience of Liberia and Sierra Leone will not be an isolated instance.³⁴¹ A contemporary

337. See generally Human Rts. Watch, *Judging Dujail: The First Trial Before the Iraqi High Tribunal*, Vol. 18, No. 9 (E) Nov. 2006.

338. *Iraq, Iran Blame Saddam for '80s War, '90 Kuwait Invasion*, USA TODAY, May 20, 2005 http://www.usatoday.com/news/world/iraq/2005-05-20-iran-statement_x.htm.

339. Mégret, *supra* note 145, at 750.

340. Michael Kelly, *Saddam is Dead but His Trial Should Continue*, Dec. 29, 2006, <http://jurist.law.pitt.edu/forumy/2006/12/saddam-is-dead-but-his-trial-should.php>.

341. For example, in Uganda, President Museveni invited the ICC to investigate the Lord's Resistance Army (LRA). In July 2005, the ICC issued warrants for the arrest of the top five LRA leaders for crimes against humanity, and war crimes. Some involved with the peace talks are exploring possible national alternatives to ICC to help facilitate a peace agreement, including national trials, traditional justice, truth commissions, or a combination thereof. See generally Human Rts. Watch Memorandum, *Benchmarks for Assessing Possible National Alternatives to*

example where a regional approach might be useful in adequately addressing the nature of the conflict is the Great Lakes region.³⁴² Indeed, the ICC's prosecution of Jean-Pierre Bemba Gombo a former vice president and warlord from the Democratic Republic of Congo (DRC),³⁴³ for allegedly committing war crimes and crimes against humanity in the neighboring Central African Republic,³⁴⁴ may similarly limit the transitional justice options in the DRC.³⁴⁵ As demonstrated above, nothing is to be gained from prosecuting select instances of criminality. Indeed, further attention needs to be paid to developing diverse conceptions of legal standing at the international level, which will allow victim participation from affected societies, such as human rights victims from the DRC, whose interest in Gombo's prosecution might be negatively impacted by the failure to adopt a regional approach.

The above analysis illustrates both the need for a regional approach and the applicability of this approach to regional conflicts and instances where massive human rights violations have taken place across borders. This Article does not call for the exclusive adoption of a regional approach in all circumstances. Rather, this Article has highlighted the situations where a regional approach would be both appropriate and necessary. The main challenge in adopting a regional approach to designing transitional justice mechanisms will be making sure to recognize the special characteristics of each country's conflict and

International Criminal Court Cases Against LRA Leaders, *available at* <http://hrw.org/backgrounder/ij/icc0507/>. If a truth commission is established, the ICC's prosecution of the LRA leaders may face similar challenges as the TRC-L and the SCSL.

342. The Great Lakes regional conflict complex refers to the interrelated conflicts and crises in Rwanda, Uganda, Burundi, the Democratic Republic of Congo and to some extent Sudan. *See generally* Peter Mwangi Kagwanja et al., *Regional Conflict Formation in the Great Lakes Region of Africa: Structure, Dynamics and Challenges for Policy* (Ctr. on Int'l Cooperation, N.Y.U., and African Peace Forum, Nairobi, Kenya), Nov. 2001, *available at* N.Y.U., and African Peace Forum, Nairobi, Kenya), Nov. 2001, *available at* http://www.cic.nyu.edu/peacebuilding/oldpdfs/RCF_NAIROBI.pdf.

343. *See* Int'l Ctr. for Transitional Justice, Fact Sheet: Jean Pierre-Bemba at the International Criminal Court, *available at* http://www.ictj.org/static/Factsheets/ICTJ_BembaTrial_fs2009.pdf.

344. *See* International Criminal Court, Situation in the Central African Republic, ICC-01/05, *available at* <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/>.

345. For example, in 2003, the Inter-Congolese Political Negotiations, agreement resolved to create both a truth and reconciliation commission and an international tribunal to investigate crimes that took place during the country's conflict. *See* Inter-Congolese Dialogue, Final Act Resolution nos. DIC/CPR/04-05, Apr. 2003, *available at* <http://www.iss.co.za/AF/profiles/DR Congo/icd/finalact.pdf>.

history, while also dealing with the cumulative effect of the regional conflict. More research is needed on how a regional transitional justice mechanism would function in practice to address this concern. This Part has outlined some of the potential benefits of adopting a regional approach.

VI. CONCLUSION

While post-conflict transitional justice mechanisms have traditionally been set up to address legacies of abuse in one nation, this does not reflect the reality of some conflicts and the interconnectedness of some conflicts. This Article found that “justice” in Sierra Leone is not unrelated to “truth” in Liberia. Analyzing challenges posed by the concurrent operation of the TRC-L and the SCSL, has demonstrated that where transitional justice mechanisms have been established without regard to the regional or transnational nature of human rights violations, such mechanisms may encounter problems regarding legal primacy, information sharing, and access to detainees. While this Article has focused on the experiences of Liberia and Sierra Leone, its recommendations are not limited to this case study. The need for a regional approach to designing transitional justice mechanisms is apparent where massive human rights violations have occurred across nations. A regional framework assists both practitioners and scholars in thinking about how transitional justice mechanisms should be designed in future situations.

Overlapping mandates and potential conflicts between transitional justice mechanisms, present more than just problems of coordination because the delicate balancing act that transitional justice mechanisms must employ ordinarily, when dealing with events concerning the reconstruction of one society, becomes amplified where such mechanisms impact the lives of the aggrieved, their families, and the potential transformation of multiple societies. Thus, transitional justice mechanisms can simply not afford to be designed without regard to the regional nature of the conflict, or the fact that massive human rights violations took place across borders, as this could lead to an “irreparable injustice,” for individuals and societies that are already vulnerable. In these instances, a regional approach to transitional justice is more likely to achieve the goals of long-term peace, stability, and respect for human rights within the region, than a process, which ignores the transnational nature of abuses.

Appendix

I. Table of Interviews

I conducted interviews with the following individuals to inform my analysis:

Individual Name Position/Organization Date Location

Raphael Abiem	Human Rights Officer, United Nations Mission In Liberia	1/10/07	Monrovia, Liberia
Paul Allen	Researcher, TRC-SL Program Associate, International Center for Transitional Justice	7/18/05 1/12/07	Accra, Ghana Monrovia, Liberia
Mohamed Bangura	Former Trial Attorney, Civilian Defense Forces; Current Trial Attorney, Taylor Trial, Office of the Prosecutor, SCSL	7/7/05	Freetown, Sierra Leone
Thomas A. Bureh	Former Chairman, Human Rights Protection Forum	1/11/07	Monrovia, Liberia

Individual Name Position/Organization Date Location

John Caulker	Executive Director of Forum of Conscience and National Chairman of the Truth and Reconciliation Working Group	7/11/05	Freetown, Sierra Leone
Gibril Foday-Musai	Former RUF combatant	12/28/02	Freetown, Sierra Leone
Ozonnia Ojielo	Former Chief of Information Management and lastly Executive Secretary of the TRC-SL	7/29/05	Freetown, Sierra Leone
Chariris Okafor	NGO Liaison and lastly Former Media & Public Information Coordinator, TRC-SL	7/6/05	Freetown, Sierra Leone
Ezekiel Pajibo	Former Executive Director, Centre for Democratic Empowerment	1/9/07	Monrovia, Liberia

Individual Name Position/Organization Date Location

Joseph Rahall	Executive Director of Green Scenery and Human Rights Activist	7/8/05	Freetown, Sierra Leone
John T. Richardson	Former National Security Advisor and Former Chairman, Association for the Legal Defense of Former President Charles Ghankay Taylor	1/18/08	Monrovia, Liberia
Edward Sam	Former Commissioner of the Eastern Region for the National Commission for Democracy	7/11/05	Freetown, Sierra Leone
Gavin Simpson	Former TRC-SL Researcher	7/18/05	Accra, Ghana

Individual Name Position/Organization Date Location

Alfred Tijani	Executive Director, Human Rights Center	1/12/07	Monrovia, Liberia
Sampson Towe	Co-Chair, Forum for the Establishment of a War Crimes Court in Liberia	1/19/07	Monrovia, Liberia
Jerome Verdier	Chairman of the TRC-L	1/11/07 1/19/07	Monrovia, Liberia