Chapter Nine

Ending Impunity
The Case for War Crimes Trials in Liberia

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> "That international law imposes duties and liabilities upon individuals as well as upon states has long been recognised. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced …"[2]

INTRODUCTION

This chapter discusses how accountability for serious crimes committed in Liberia during the country's 14-year civil conflict could contribute to civilian protection and lay a foundation for a lasting peace based on the rule of law. The analysis is carried out against the backdrop of the cessation of hostilities, which culminated in the conclusion of the Comprehensive Peace Agreement (CPA)[3] by the warring parties in Accra, Ghana in August 2003 and the establishment of the National Transitional Government of Liberia (NTGL). It is argued that while the international community's current preoccupation with entrenching the newly found peace; ensuring the demobilisation, disarmament and reintegration of former combatants; the provision of relief to internally displaced civilians; the return of displaced Liberians from outside the country back to their communities and livelihoods; and the establishment of an electoral process to return the country to full democratic rule are well placed and important, these processes are unlikely to lead to a durable peace without an accountability process through which those who have committed egregious crimes during the war would be brought to justice.

Indeed, it is conjectured that accountability for violations of human rights and humanitarian law during Liberia's civil war is integral to a lasting peace and national reconciliation for all Liberians. Individual

accountability for gross human rights abuses will also signal to potential future violators that their actions will not go unpunished and therefore deter such violations. In addition, bringing to justice those "bearing the greatest responsibility"[4] for atrocities against innocent civilians in Liberia will add momentum to the fight against impunity that the Special Court for Sierra Leone (the Special Court) initiated with the indictment of Charles Taylor in 2003.

The chapter proceeds from the premise that extensive human rights and humanitarian law violations have been committed against the civilian population by all sides to the Liberian conflict.[5] According to Human Rights Watch (HRW), "[b]oth the government of Liberia and Liberian rebel forces are responsible for violations of international humanitarian law amounting to war crimes and other serious human rights abuses … Recent human rights abuses committed by both sides include the forced recruitment of children …, forced labour, assault and sexual violence against civilians, as well as attacks on humanitarian workers."[6] Since fighting broke out in 1989, Armed Forces of Liberia (AFL) troops and rebel groups such as the National Patriotic Front of Liberia (NPFL) and its splinter groups, including the Independent National Patriotic Front of Liberia (INPFL) and the United Liberation Movement for Democracy in Liberia (ULIMO), deliberately targeted civilians and committed large-scale torture, extra-judicial killings, rape, looting and destruction of civilian property without military necessity or justification, conscription of civilians especially children, and other gross human rights violations. This cycle of violence and intimidation of civilians continued after Charles Taylor, leader of the NPFL, was elected president in 1997 following disputed multiparty elections. Indeed, a fresh wave of fighting broke out with the advent in 2000 of a group calling itself Liberians United for Reconciliation and Democracy (LURD) – which vowed to oust Taylor from power by force of arms. LURD later gave birth to another splinter group – the Movement for Democracy in Liberia (MODEL) in 2003.

To contextualise our discussion on individual criminal responsibility, Part II of the chapter starts with an overview of the more serious crimes committed during the Liberian conflict and argue that those offences, and many others, so seriously offend universal humanitarian norms and values that they render an international legal response indispensable to any quest for a sustainable peace in Liberia. Part III then explores the legal foundations of the humanitarian and human rights law violations in Liberia and argue that an effective and durable peace cannot be

attained without holding key perpetrators accountable. It is submitted that, at a minimum, the military and political leadership of the Doe and Taylor regimes, as well as those of all warring groups operating in Liberia from December 1989 to June 2003, should be brought to trial to answer for their individual acts or omissions and to bear responsibility for the actions of their subordinates.

Part IV evaluates various accountability options and makes recommendations on the most appropriate fora, legally and politically, in which to prosecute those accused of war crimes in Liberia, taking into account continental and sub-regional dynamics as well as recent institutional developments at the international level, including the establishment of a permanent International Criminal Court (ICC). While individual criminal responsibility is crucial in the quest for civilian protection and lasting peace in Liberia, other accountability mechanisms which are beyond the scope of this chapter, for example truth commissions (the subject of Chapter Ten of this volume), may play an important role in facilitating Liberia's transition from collective trauma to collective peace. In particular, a Truth and Reconciliation Commission (TRC) for lower-ranking rebels, government soldiers, and child combatants could identify those responsible, enable those individuals to publicly acknowledge and atone for their crimes and bring closure to surviving victims and their families. In addition, the establishment of a TRC for Liberia would assist to set the historical record straight and promote forgiveness and reconciliation. However, it is maintained that a TRC for post-conflict Liberia would be more effective if it complements rather than serves as an alternative to prosecution. Part IV also considers the status and effect of the amnesty anticipated by the CPA and concludes that an amnesty granted under domestic law will not extinguish Liberia's obligation to investigate and punish serious international crimes. Finally, Part V offers some tentative conclusions regarding a way forward in the fight against impunity in Liberia.

AN OVERVIEW OF SERIOUS HUMAN RIGHTS VIOLATIONS COMMITTED IN THE LIBERIAN CONFLICT

KILLING OF UNARMED CIVILIANS

The Liberian civil war can be roughly divided into two main epochs.[7] The first ran from 1989 to 1990 and saw fighting largely between the AFL under then President Samuel Doe and rebel militia under the

leadership of the NPFL and its various splinter and opposition groups.[8] The second period was from 2000 to 2003 during which Charles Taylor, having won disputed elections in 1997, converted his former rebel force into a private army, and fought for control of territory and the survival of his government against the newly formed LURD and MODEL.[9] During both periods, all parties to the conflict adopted a deliberate policy of targeting unarmed civilians who were killed, raped, tortured and sexually violated on a routine basis.[10]

There is evidence that after the initial attack by Charles Taylor's forces on the village of Butuo, Nimba County, in December 1989, the AFL forces, including the elite Special Anti-Terrorist Unit, launched a major offensive aimed at crushing the rebellion. During this attack, government forces deliberately killed civilians on a large scale, targeting members of the Gio and Mano tribes who were accused of complicity with the rebels. In response, NPFL rebels killed civilians belonging to Doe's ethnic group, the Krahn. They also targeted Mandingoes for allegedly informing the government of rebel activities in Nimba County.[11] One report explained that "NPFL rebels rocketed houses and shot people in their beds. Sick people or the elderly who couldn't run were killed …"[12]

LURD, MODEL and NPFL government forces committed similar atrocities from 2000 to 2003. In northwest and central Liberia occupied by LURD during the period, wide-scale extrajudicial killings were reported. In one incident, LURD reportedly set a camp for displaced persons on fire to force them to leave. In Lofa County and Gbarnga men had to go into hiding for fear of being "cut to pieces, pieces, pieces" by LURD forces.[13] A local woman from Gbarnga reported summary executions of local men by LURD rebels in her area. In Buchanan, MODEL forces are said to have killed and severely maimed the local population when the rebel group first took over the town.[14]

RAPE AND OTHER FORMS OF SEXUAL VIOLENCE

Rape and other forms of sexual violence against women and girls was a common instrument of war used by all sides to the Liberian conflict.[15] While there were apparently fewer reported incidents of sexual violence in the first phase of the conflict, this ugly side of the Liberian war was all-pervasive following the resumption of hostilities in 2000.[16] Often, when government soldiers or rebel militia captured territory, they would embark on systematic rape either to show force, to intimidate locals, to

punish those who might have been suspected of supporting opposing forces, or to facilitate looting and plunder. Women and girls of all ages, some as young as five, others over fifty, were subjected to this brutal treatment. In many cases, women were raped in the presence of their husbands or other family members who are forced to watch. Such family members would subsequently be killed.

Alongside the rape of women and girl civilians during military offensives, rebel forces and AFL troops forcibly recruited young girls to perform domestic chores and serve as sex slaves. These "bush wives", as they came to be referred to in rebel parlance, would typically be assigned to a male rebel commander or officer to serve as his sexual partners in addition to their normal battle duties.[17]

CONSCRIPTION OF CHILD SOLDIERS[18]

While the use of children in armed conflict goes back to World War II when the Third Reich and underground movements both resorted to large-scale use of children in battle,[19] in the post-World War II period Liberia surely ranks among the worst users of child combatants. According to UN estimates, approximately 15,000 children were involved in the Liberian civil war.[20] Most of them were forcibly recruited and then sent into training camps, where they were either beaten or drugged to commit various atrocities. Following the fresh bout of fighting in 2000, all the key protagonists – the AFL, LURD[21] and MODEL – widely used child soldiers, some of them as young as nine years.

Over the course of the Liberian conflict, government forces and rebels conscripted children whenever they took over territory from opposing forces or during recruitment drives.[22] Other children were simply kidnapped from their homes, on their way to school or the city, while others 'volunteered' to join the forces as the only means of protection and survival for themselves and their family, or as a means of taking revenge for personal loss. Indeed, the situation became so bad during the rebel offensive against Monrovia in 2002 that parents in and around the city stopped sending their children to school for fear that they would be kidnapped and sent to the war front.

These children, both boys and girls, performed various tasks assigned by their commanders including cooking, cleaning, fetching water, sex, and of course combat duty. Many have died as a result. Others have endured serious physical and psychological trauma. At the same time, child soldiers have committed numerous horrible crimes during the

war. Many similar stories, including other inhumane acts, could be recounted but the above incidents illustrate the utter brutality of the Liberian conflict.

LAW APPLICABLE TO THE LIBERIAN CONFLICT

International humanitarian law and international human rights law both apply to the conflict in Liberia. These two areas of law have evolved significantly in the past half-century with the shared, if not always explicitly stated purpose, of protecting human life and human dignity.[23] The crucial distinction between the two is that while humanitarian law is the *lex specialis* that applies in times of armed conflict, human rights law applies at all times, including during conflict. At such times, the two bodies of law overlap (though humanitarian law does not permit any derogations for special emergencies while human rights law does). But under both, states have solemnly pledged to the individuals within their territories and to each other that they will ensure that certain fundamental human security tenets would be protected. As part of this, states undertake to punish those who violate those basic standards of human decency within their territories. A failure to do so would attract some form of responsibility for the state. The following sections set out the main provisions from international humanitarian law and international human rights law that are applicable to the conflict in Liberia.

INTERNATIONAL HUMANITARIAN LAW

The core of modern international humanitarian law was codified in the four Geneva Conventions of 1949 and their Additional Protocols of 1977.[24] The principal objective of the conventions, sponsored by the International Committee of the Red Cross (ICRC), was to set standards for the humane treatment of non-combatants or those placed *hors de combat* by sickness, injury, weakness or surrender. The Conventions reflected a desire to prevent and punish violations of universal humanitarian values, in addition to the interests of individual States.[25] The grave breaches of the provisions contained in the Geneva Conventions and Additional Protocol I therefore criminalise violations of these humanitarian standards.[26] Customary international law now recognises that individuals responsible for grave breaches are subject to universal jurisdiction. In other words, such individuals could be arrested and tried in any country willing to do so, or surrendered to

international judicial processes established by states.[27] The acceptance of universal jurisdiction for grave violations of the laws and customs of war is grounded on the notion that human society shares certain common values, including respect for human life and dignity and the inviolability of the rights of civilian women and children. Violations of these common values anywhere offend human conscience everywhere and, thus the whole of humanity has an interest in suppressing and punishing them.[28]

Geneva Convention IV, in particular, addressed the protection of civilians in times of conflict. The overall objective is to temper the effects of war and to ensure that civilians or combatants no longer engaged in hostilities are treated humanely and with respect. The Geneva Conventions therefore prohibit killing defenceless civilians or captured members of enemy forces, mutilation, cruel treatment, torture, hostage taking, humiliating and degrading treatment, as well as summary executions or trials conducted without judicial guarantees of fairness (Article 3). In addition to these general protections, the Convention also contains a large number of provisions relating to protection of children.[29]

The humanitarian law protections enshrined in Common Article 3 of the Geneva Conventions, the only aspect that applied to internal armed conflicts, were further enhanced by Additional Protocol II.[30] Together, these two instruments embody the international humanitarian law applicable in non-international armed conflicts.

Article 4 of Additional Protocol II sets out the fundamental guarantees for the protection of all civilians in times of armed conflict.[31] The provision substantially reflects Common Article 3 of the Geneva Conventions and provides that all persons who do not take part in hostilities, or who no longer do so, are entitled to respect for their person, honour, convictions and religious practices. The provision enumerates categories of prohibited conduct in respect of civilians, including violence to life, health, and physical and mental well-being; murder; cruel treatment; torture; mutilation and corporal punishment. Similarly prohibited are collective punishment; hostage taking; acts of terrorism; outrages upon personal dignity; humiliating and degrading treatment; rape; enforced prostitution; pillage and threats to commit any of the foregoing acts.[32] Under Article 13, civilians shall be protected from the dangers of military operations, and they shall not be the object of attack so long as they do not take a direct part in hostilities.

The protocol provides specifically for the protection and welfare of children during internal armed conflicts. Parties to such conflicts are

required to provide children with care, aid and education, and to take steps to re-unite them with their families. More importantly, it is clearly prohibited to recruit children below fifteen years of age to take part in hostilities. However, where they do take part in hostilities and are captured, the special protections provided under the protocol continue to apply to them.[33]

Some scholars have argued that these provisions are inadequate for several reasons: first, they fail to account for the special position of many child soldiers as both victims and perpetrators; second, children who take part in hostilities lose the general protections afforded to members of the civilian population even though some of them might have engaged in hostilities against their own volition and; third, that setting the age limit at which children could engage in conflict at fifteen years, introduces an artificial distinction between children because most domestic jurisdictions and international instruments recognise eighteen years as the age of maturity.[34]

LIBERIA'S DUTY TO PROSECUTE VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

Historically, states have recognised that the apprehension and punishment of certain types of criminal further the common objectives of the international community as a whole. From the seventeenth century, customary international law has recognised universal jurisdiction of states to arrest and try pirates because piracy was deemed to affect the individual and collective interests of all states. By bringing pirates to justice, the state exercising jurisdiction protected both its people and the collective interests of all states in preserving free maritime navigation.

The normative underpinnings of universal jurisdiction shifted in the middle of the twentieth century when, after World War II, the Allied Powers concluded an Agreement in London to try the major war criminals of the European Axis.[35] The Charter of the Nuremberg War Crimes Tribunal, annexed to the London Agreement, established individual criminal responsibility for crimes against peace, war crimes, and crimes against humanity and provided that neither the official position nor governmental nor superior orders shall be a defence to any of the crimes within the tribunal's jurisdiction.[36]

Following the Nuremberg war crimes trials, the International Law Commission compiled the principles of international law that emanated from the trials.[37] Significantly, the principles recognised the *individual responsibility* of persons for crimes against peace, war crimes and

crimes against humanity. They also provide that the official position of perpetrators, whether as head of state or government official, shall not provide a defence, nor shall superior orders be a defence.

It was partly in the interests of safeguarding these universal humanitarian values that the UN Security Council established the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR respectively), and collaborated with the Government of Sierra Leone to establish the Special Court to bring to justice those suspected of committing serious violations of international humanitarian laws.[38] The adoption of the Rome Statute of the ICC (Rome Statute)[39] in 1998, and its entry into force in 2002, marks the latest manifestation of the international community's determination to institutionalise accountability for gross violations of international law.

The body of international humanitarian law contained in Common Article 3 of the Geneva Conventions and Additional Protocol II has been integrated into the ICTR Statute. Under the ICTR Statute, which addressed an internal armed conflict, genocide is punishable under Article 2, crimes against humanity under Article 3, and violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II are punishable under Article 4. The Rome Statute similarly confers jurisdiction to try the most serious crimes of concern to the international community, including war crimes under Article 8, irrespective of whether committed in an international or internal armed conflict. Articles 3 and 5 of the Statute of the Special Court also provides for individual criminal responsibility in respect of serious violations of humanitarian law committed in an internal conflict.

This chapter assumes that the essential character of the conflict in Liberia between 1989 and 2003 remained an internal armed conflict, even though at various times, international troops were actively engaged in hostilities.[40] We submit that this limited international involvement, to the extent that it relates specifically to troops[41] from various states deployed by the Economic Community of West African States (ECOWAS) and the UN, did not change the essential character of the Liberian conflict, especially since both the ECOWAS and UN peacekeeping operations in Liberia were motivated by the overriding concerns for humanitarian protection. [42]

Assuming the Liberian conflict was essentially internal, it follows that the conduct of all the warring factions, both government troops and rebel militia, was subject to the provisions of Common Article 3 of the Geneva Conventions and of Additional Protocol II. In our view, the

principles of individual criminal responsibility, universal jurisdiction, the non-availability of official immunity and superior orders as defences should apply to the perpetrators of crimes committed during the Liberian war, despite the initial provenance of those principles in the context of international armed conflicts.[43] This is particularly so because the distinction drawn by the Geneva Conventions with respect to the duty to prosecute and punish certain grave breaches is becoming less relevant, in view of the evolutionary statutes and jurisprudence[44] of the international criminal tribunals established by the UN in the 1990s and the development of a sharper accountability sensitivity in the international community more generally (in large measure due to the CNN factor). Moreover, when viewed from the *raison d'être* of international human rights and humanitarian law (that is, protection of individuals in times of peace and war), it becomes difficult to find a principled basis upon which to justify a distinction between an obligation to prosecute or extradite in respect of grave breaches in international, but not similar serious violations, in internal[45] armed conflicts.[46]

The near-universal criminalisation of war crimes and their incorporation in all the leading instruments of international criminal and humanitarian law strongly suggest that they are part of customary[47] international law.[48] The fact that these crimes reflect the common convictions and conscience of the majority of humankind implies that states that engage in armed conflict have an obligation not to derogate from humanitarian law norms. As a corollary to this obligation to abide by basic humanitarian values, we also argue that states such as Liberia have an obligation to apprehend and bring to justice those suspected of committing serious violations. Where states fail or are unable to commence such prosecutions, they have an obligation to render perpetrators to other national jurisdictions or international judicial processes established to try suspected war criminals. This, we submit, is the essence of the *aut dedere aut judicare* principle.[49] We further submit that recent events such as ethnic cleansing in the former Yugoslavia, genocide in Rwanda, and the September 11, 2001 attacks on the United States have sharpened international sensitivity to serious crimes. This in turn has rendered states more responsive to the need to try or extradite persons accused of serious criminal conduct at the international level.

In sum, the obligation of a state such as Liberia to ascribe criminal accountability for a small category of heinous crimes under international humanitarian law is effectively mandatory both under international treaty and customary international law. Thus, assuming that the parties adhere

to the timetable in the CPA, whatever new government assumes power in early 2006 would be shirking obligations owed to the international community as a whole if it fails to punish at least the top echelon who masterminded the horrendous crimes committed during the course of the brutal conflict witnessed in Liberia in the nineties.[50]

INTERNATIONAL HUMAN RIGHTS LAW

The concept of human rights has been traced to antiquity. However, it was not until after World War II, beginning with the establishment of the UN in 1945, that the human rights movement came of age. As part of the core purposes of the new organisation, the member states of the UN pledged in Article 1(3) of the Charter of the United Nations (UN Charter)[51] to promote and encourage respect for human rights. In Article 2(2), members undertook to "fulfil in good faith the obligations assumed" under the charter. Articles 55 and 56 then committed all member states to take action, whether jointly or separately, "to ensure universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion".[52] The subsequent adoption of the International Bill of Rights,[53] starting with the landmark Universal Declaration of Human Rights (UDHR) in 1948, redefined the contours of the relationship between states and individuals within their territories, and in the process elevated that relationship into binding commitments owed to the individual and the international community as a whole. Thus, violations of the rights enshrined in the International Bill of Rights entail responsibility under international law in respect of both the aggrieved individual and in respect of other states.

The various instruments comprising the International Bill of Rights do not impose a direct obligation on states to investigate, prosecute or redress human rights violations.[54] However, the bodies established to monitor state compliance with human rights treaty obligations, for instance the Human Rights Committee (HRC) established pursuant to the International Covenant on Civil and Political Rights (ICCPR), have required states to punish serious crimes such as torture and extra-judicial executions. Treaty bodies have also asserted that states have a duty to ensure that victims of human rights abuses and or their families receive reparations, including compensation. This position is a logical corollary of victims' right to an effective remedy for gross human rights abuses codified in key human rights provisions such as Articles 8 of the UDHR[55] and 2(3) of the ICCPR.[56]

Under Article 2(1) of the ICCPR, a state shall respect and "ensure to all individuals within its territory" the various rights contained therein. Article 2(2)[57] obligates states to undertake the necessary steps, including the adoption of legislative and other measures, to give effect to the rights in the ICCPR. It is settled in human rights practice that the duty to ensure respect for rights generates both negative and positive obligations for states. The HRC recently reiterated this position in General Comment 31[58] by noting that states must "*refrain* from violation of the rights recognised, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant" [sic].[59] This negative obligation makes sense given that historically, but perhaps to a lesser extent now given the marked increase of violence against individuals by armed non-state groups in internal conflicts, the state and its agents were typically the primary source of human rights abuses against individuals.

Whatever the case, states must also take positive steps, including the adoption of "legislative, judicial, administrative, educative and other appropriate measures",[60] to give practical meaning to their human rights treaty commitments. We argue that among the 'other measures' envisaged by this provision is the duty to investigate and redress violations of human rights. Indeed, as the HRC has observed, "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not *just against violations of Covenant rights by its agents*, but also against *acts committed by private persons* or *entities*" (emphasis added). [61] It follows that states such as Liberia will incur international responsibility if they permit or fail to take appropriate measures to prevent, investigate, punish, or redress the harm caused by private persons or entities within their territories or effective control, even if not situated within their territorial jurisdiction.

Furthermore, where investigations reveal violations of certain rights, the HRC has maintained that states parties to the ICCPR are obligated to "ensure that those responsible are brought to justice".[62] As with a failure to investigate, "a failure to bring to justice perpetrators"[63] of human rights abuses is sufficient to give rise to a separate breach of the ICCPR. In addition, the duty to investigate and to prosecute mirrors the gravity of the violation so that a higher burden is placed on states "notably in respect of those violations recognised as criminal under either domestic or international law", including, in particular, torture and similar cruel, inhumane and degrading treatment, summary and arbitrary killing and enforced disappearance.[64] In the final analysis, as

the HRC concluded, confronting impunity for human rights abuses is a crucial aspect of any strategy aimed at preventing recurrence of serious human rights violations.

LIBERIA'S DUTY TO PROSECUTE VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW

In the context of the current peace process, the CPA signed in Ghana reaffirmed Liberia's commitment to human rights, in particular guarantees of basic civil and political rights found in the UDHR as well as human rights principles enunciated by the UN, the AU and ECOWAS, and under the laws of Liberia. As part of the peace process, the parties undertook to ensure respect for the right to life and liberty, freedom from torture, the right to a fair trial, freedom of conscience, expression and association, and the right to take part in the governance of one's country. Significantly, the parties also reaffirmed their commitment to abide by the norms of international humanitarian law.[65]

Liberia only formally became a party to many of the UN-sponsored human rights instruments mentioned above in September 2004 – long after widespread human rights violations had been committed, especially by the rebels of the NPFL, INPFL, ULIMO, LURD and MODEL. For this reason, positivist international lawyers, who argue that no rule can be binding on states if they have not given their express or implied consent, would likely object that the obligations contained in the universal human rights instruments do not engage responsibility for Liberia since the treaties only entered into force outside the relevant period of the conflict. But even positivists would agree that at a minimum, Liberia is required under Article 18 of the Vienna Convention on the Law of Treaties[66] "to refrain from acts which would defeat the object and purpose" of the human rights treaties that it signed before the start of the war in 1989. Allowing agents of the state and rebel groups operating within its territory who engaged in gross human rights abuses against innocent civilians to go unpunished clearly frustrates the human security objectives of the relevant rights treaties.

The human rights norms codified in multilateral treaties and their purposive interpretation by treaty bodies serve as sources of binding legal obligations for Liberia to investigate and prosecute serious crimes committed in its territory. Customary international law, which is another source of law under Article 38(1)(b) of the Statute of the International Court of Justice, generates equally binding commitments for Liberia to do so consistent with the universal human rights treaties because there

are said[67] to be sufficient state practice and *opinio juris*[68] for the duty to investigate, prosecute and redress serious crimes to attach.[69] The virtually universal reach of the core human rights instruments, especially the International Bill of Rights and numerous UN declarations, resolutions, general comments, expert reports and other documents, have been cited as evidence of the status of customary international law in this respect. On this view, a particular state need no longer become a formal party to the core rights treaties for it to be bound by the obligations contained in them because these rights are now a part of customary international law.

Some distinguished international lawyers have gone much further to even suggest that states are duty bound to at least the mandatory aspects of the International Bill of Rights as a logical extension of the human rights obligations that they assumed under the UN Charter. For instance, according to Louis Sohn:

> "Though the Covenants [that is, the ICCPR and the ICESCR] resemble traditional international agreements which bind only those who ratify them, it seems clear that they partake of the creative force of the [UDHR] and constitute in a similar fashion an authoritative interpretation of the basic rules of international law on the subject of human rights which are embodied in the Charter of the United Nations."[70]

Aside from the UN-based treaties, Liberia's duty to investigate, punish and redress the human rights violations committed in the course of the war also flows, without any qualifications, from the Banjul Charter,[71] to which Liberia acceded in 1983. Under Article 1 of that treaty, the parties "shall recognise the rights, duties and freedoms enshrined" therein "and shall undertake to adopt legislative or other measures to give effect to them". Article 2 entitles everyone "to the enjoyment of the rights and freedoms" recognised by the Banjul Charter without any distinction. Article 3 affirms everyone's equality before the law. Under Article 3(2), "Every individual shall be entitled to equal protection of the law". Article 4 reaffirms that "human beings are inviolable" so that "every human being shall be entitled to respect for his life and integrity of his person". It is clear that human rights would be devoid of meaningful content if one, like the many innocent Liberians killed during the conflict, could be arbitrarily deprived of the fundamental right to life.

Additional provisions in the Banjul Charter impose a duty on states parties to prohibit all forms of exploitation and degradation of

individuals, particularly slavery, slave trade, torture, cruel, inhuman or degrading treatment and punishment (Article 5); to ensure that everyone can have his cause heard, including the right to an appeal to competent national organs against acts violating fundamental rights guaranteed by conventions, laws, regulations and customs in force (Article 7(a)); to ensure that everyone enjoys the right to national peace and security (Article 23(1)) as well as a general satisfactory environment favourable to his/her development (Article 24).

In our view, all these fundamental rights would be violated if Liberia fails to investigate and punish the serious crimes committed between 1989 and now. This position is supported by the jurisprudence of the African Commission on Human and People's Rights.[72] Indeed, under the jurisprudence of the commission, Liberia is not only obligated under the Banjul Charter to investigate and punish the perpetrators of serious crimes, it must also provide reasonable compensation to the victims and/or their families.[73]

As the Banjul Charter does not permit any state derogations from human rights treaty obligations, whether during civil wars or other emergencies, we note finally that a failure to fulfil the rights discussed above may attract legal consequences for Liberia, whether through the individual-state human rights complaint mechanisms authorised by Articles 56 to 58 of the Banjul Charter, or through the state-to-state complaints mechanisms under Articles 47 to 53. Unlike other regional human rights systems, in the African system, Liberians as well as non-Liberians, groups of individuals or NGOs could all initiate cases against the government alleging violations of the Banjul Charter. Complainants need not even be related to the victim(s) to have standing before the commission. In addition, the procedure to initiate cases is simple enough that it could be undertaken without the assistance of lawyers.

On the other hand, the state-to-state complaints mechanism in the Banjul Charter has rarely been invoked by African governments to compel scrutiny of another state's human rights record.[74] Furthermore, because decisions of the commission are not binding upon states, they have in most cases not been implemented or observed by African governments. But even with their limited direct impact, it remains true that commission decisions play a vital role in advancing the cause of human rights in Africa because they often serve as a method of monitoring respect for human rights on the continent; establishing an accurate historical record (particularly when governments participate in the proceedings); collecting information that could be used by later investigators (whether from

within the country or from abroad); mobilising shame by publicising credible information about gross human rights abuses; contributing a body of human rights jurisprudence that would no doubt be useful for the planned African Court of Human and Peoples' Rights; and by providing, where governments abide by the decision, much needed relief for the victims and/or their surviving families.

Overall, as the foregoing discussion has demonstrated, the Liberian government owes a duty under Africa's main human rights instrument to investigate, prosecute and remedy the serious violations of international law that were committed against its population. In addition, this duty also attaches for Liberia in respect of the International Bill of Rights to the extent that it is bound by those obligations at customary international law. In any event, as party to the Geneva Conventions and its Additional Protocols, it cannot escape the fundamental obligation to prosecute those who masterminded, directed or aided and abetted certain particularly heinous crimes such as torture, crimes against humanity, war crimes, and possibly, genocide.

Experience from elsewhere strongly suggests that a failure to heed the pleas for justice for the over 200,000 victims of the grave crimes witnessed in the country could undermine Liberia's transition to a society founded on justice and the rule of law and effectively send the message that perpetrators are above the law. This would allow a culture of impunity, rather than a culture of accountability, to fester. Furthermore, while a policy of forgive and forget may in the short term appear to be one way of cementing the fragile peace, by leaving the military and security forces unscathed and unrepentant it undermines long-term stability and the foundation of the rule of law by increasing the likelihood of a resurgence of human rights abuses against innocent civilians.[75]

POTENTIAL MECHANISMS FOR ACCOUNTABILITY IN LIBERIA

So far, we have argued that Liberia owes a duty under both international humanitarian and human rights law to prosecute at least the key perpetrators of the widespread human rights abuses witnessed in that country in the 1990s. We now explore the menu of accountability mechanisms available to Liberia[76] and the international community to ensure that justice is done and seen to be done in Liberia. As will be seen shortly, a number of possibilities for prosecutions appear to exist in Liberia and internationally. Since states have a primary responsibility to ensure the enjoyment of human security by individuals within their

jurisdiction, including the duty to conduct investigations, undertake prosecutions and mete out just punishment to gross violators of human rights, we start by examining possible venues for prosecution within Liberia. This accords with the prevailing view among states, as confirmed by Article 17 of the Rome Statute, that international involvement in domestic accountability efforts should be employed as a last resort when the local justice system is unable or unwilling genuinely to carry out the investigation or prosecution.

DOMESTIC COURTS

The Liberian constitution provides for an independent third branch of government comprising a Supreme Court and such other subordinate courts as may be established by the legislature.[77] Aside from the five-member Supreme Court, which is the highest court with final appellate jurisdiction over all criminal and constitutional matters, the Liberian court system provides for criminal courts, an appeals court and magistrate courts. Magistrate's and traditional courts sit in the country's fifteen counties. Generally, the statutory courts apply statutory law while traditional courts apply customary law.

Under the constitution, judges are appointed by the president subject to the consent of the senate. They hold office during good behaviour till mandatory retirement at age seventy.[78] Article XXVII of the CPA provides that the structure of the judicial organ in Liberia shall remain unchanged. However, immediately upon the installation of the NTGL, all judges of the Supreme Court were deemed to have resigned. New appointments were to be made by the Chairman of the NTGL and approved by the members of the transitional legislative assembly.

In the normal course, it would be preferable for prosecutions to take place in Liberian courts. There are several reasons for this. First, because the courts are located in the country where the crimes took place, this eases prosecutorial investigations, facilitates the collection and presentation of evidence, reduces the cost of prosecution and ultimately assists in securing justice for all. Second, because the presence of local investigators and courts at the scene of the crime increases local engagement of and participation in the accountability process. Increased local engagement in turn leads to greater understanding of and confidence in the outcomes of trials. It may also result in increased public support and legitimacy for the trials, both of which are vital for long-term societal healing and reconciliation.

In theory, Liberia could use its domestic courts to prosecute perpetrators of serious crimes in the country. The Geneva Conventions and their Additional Protocols apply in the country under conventional international law. Domestic courts could also invoke customary international (including humanitarian) and treaty law to try offenders.[79]

The possibility of prosecutions in Liberian courts raises an important issue regarding the international legal status and effect of any amnesties that may be accorded by the transitional government, or for that matter a subsequent government, to perpetrators of grave crimes committed during the conflict. In particular, would any grant of amnesty serve as a bar to prosecution of international crimes?

THE AMNESTY QUESTION

The rationale for amnesties is that, when used properly, they may help contribute to the cessation of hostilities, reintegrate displaced civilians and former combatants into society, and promote post-conflict reconciliation.[80] Support for grants of amnesties can be found in Article 6(5)[81] of Additional Protocol II of the Geneva Conventions. Proponents of amnesty tend to argue that amnesties are a necessary evil if the international community is to succeed in eradicating the spate of violent internal conflicts in various parts of the world.

In the Liberian context, Article XXXIV of the CPA provides that the interim 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". Though the peace accord reaffirmed the commitment of the various armed groups to respect for human rights and humanitarian law, it also impliedly adopts in this provision a posture that is fundamentally inimical to those values. While as of writing we are not aware of any such amnesties having been granted by the NTGL, the broad language of Article XXXIV strongly suggests that the parties expect to preclude, at some point before the inauguration of an elected government, any accountability for perpetrators of gross human rights violations.[82] Significantly, Article XXXIV did not limit the amnesty to, for example, political offences or senior level commanders of the respective armed groups or to a specific time-period of the Liberian conflict.

In our view, the legality and legitimacy of an amnesty for crimes committed in Liberia would turn on its nature (whether conditional/

unconditional), timing, scope (the kinds of crimes it purports to amnesty), and the legitimacy of the government purporting to grant it. With respect to legality, a blanket amnesty for unspeakable atrocities committed in Liberia may be illegal under international law and definitely contradicts recent UN practice, including with respect to Liberia, insisting that amnesties are not permissible for serious international crimes.[83] In an important jurisprudential contribution, the Appeals Chamber of the Special Court has also held that the amnesty granted under Article IX of the Lomé Peace Agreement by the Sierra Leonean government does not bar the prosecution of the various accused before the Special Court for international crimes committed before July 1999. The Appeals Chamber clarified that because of universal jurisdiction, "a State cannot bring into oblivion and forgetfulness a crime, such as a crime under international law, which other States are entitled to keep alive and remember".[84]

Given the controversy surrounding amnesties, the ICRC also recently clarified the customary law status of amnesties and endorsed Russia's explanation of its vote on Article 6(5) of Additional Protocol II that the provision could not be construed to enable war criminals, or those guilty of crimes against humanity, to escape punishment.[85] The ICRC asserted that, "Such amnesties would also be incompatible with the rule obliging States to investigate and prosecute persons suspected of having committed war crimes in non-international armed conflicts."[86] The ICRC cited evolving international practice as evidence of the incompatibility of amnesties with the duty to investigate/prosecute international crimes and violations of non-derogable human rights.

Overall, as confirmed by the Special Court and the ICRC, irrespective of the amnesty granted under Liberian law, it would not preclude prosecutions for international crimes. Indeed, we could go even further to argue that in the case of most of the *jus cogens* crimes such as torture,[87] genocide, and crimes against humanity, a government purporting to grant amnesty would be acting illegally under international law.

With respect to the legitimacy of an amnesty, the transitional government, which apparently enjoys the support of the UN and ECOWAS, is constituted largely of leaders of the various rebel groups that had *de facto* control over certain parts of Liberia at the time the peace conference in Ghana was convened. While it may represent the best hope for peace in Liberia now, the transitional government clearly does not enjoy a democratic mandate derived from the people of Liberia. Thus it lacks the legitimacy to grant blanket amnesties to former combatants who are in one way or another responsible for the slaughter

of over 200,000 civilians. Such a self-serving amnesty would likely meet with strong opposition from the scores of Liberians that have directly or indirectly borne the brunt of the war.

In any event, the reality is that Liberian courts do not currently have the human, financial and infrastructural resources necessary to render credible justice that complies with due process requirements, particularly in respect of the rights of the accused, under international human rights law. The country's already weak and dilapidated judicial system has essentially been rendered nugatory by years of conflict. Indeed, according to the US Department of State, while Liberian courts functioned sporadically over the past few years, the government "was unable to revitalise the court system outside of Monrovia due to the war and a lack of trained personnel, a lack of infrastructure, and inadequate funding".[88] Furthermore, some judges and magistrates lacked legal training, though the constitution requires legal education, membership in a bar and at least three years of experience as a legal practitioner for judicial appointments. The legal and judicial systems are also characterised by a lack of proper equipment or supplies, as well as a safe and secure environment free of intimidation in which judicial functions could properly be performed. Moreover, judges and magistrates, most of whom have not been paid by the government for years, routinely exact fees from parties appearing before them to cover living and operating expenses.

At the same time, the defence bar, which normally acts as an additional bulwark against trampling upon the rights of accused persons by the state, or errant judges, apparently routinely encourages their clients to buy favourable decisions.[89] In such a discredited legal environment, the fundamental human rights, including due process guarantees enumerated in the constitution and international human rights law, are unlikely to be effectively enforced by the Liberian courts.

While legal considerations are crucial in the calculus of post-conflict peace-building, the question whether to prosecute human rights abusers in Liberian courts would also in part depend on a range of other variables, including an evaluation of the nature and severity of the crimes committed, the number of individuals and groups involved in their commission, the level of political support enjoyed by whatever government is elected in the fall of 2005 (and even prior regimes, including that of Taylor), the timing of the prosecutions and an assessment of the strength of governmental and civil society institutions in potentially absorbing, without provoking a relapse into conflict, the inevitable fallouts from prosecution.[90] It would also be critical that whatever prosecutions are undertaken are done in a

balanced and even-handed manner, especially since the line between perpetrators and victims during the conflict are blurred (including the role of specific groups such as children). In addition, proponents on all sides of the conflict could probably claim, with some cogency, a "rough equivalence"[91] of human rights outrages upon the civilian population in the course of fourteen years of vicious conflict.

In view of the devastation of legal institutions and structures in Liberia, such as the judiciary, the police, and prisons, as well as the paucity of material resources, it is unrealistic to expect that a new government would be able to pursue trials in domestic courts, together with the urgent need to rebuild the Liberian state and society politically, and economically. For all these reasons, we conclude that under current circumstances, Liberian courts lack the requisite independence, as well as the human and material resources, to serve as a suitable venue for prosecutions of the kinds of egregious crimes committed during the war.

INTERNATIONAL CRIMINAL COURT

In the last decade, the international community has significantly stepped up its efforts in the struggle against impunity. This includes providing alternative venues for prosecution where states are unable or unwilling to pursue human rights abusers, as is arguably the case in Liberia. The establishment of freestanding international criminal tribunals for the former Yugoslavia and Rwanda, hybrid or mixed tribunals for Sierra Leone and Cambodia, and panels for serious crimes in Kosovo and Timor Leste (East Timor) constitutes evidence of a welcome shift at the global level towards greater individual accountability for serious violations. However, it was adoption of the Rome Statute establishing a permanent ICC that was the crowning achievement of the post-World War II criminal accountability movement.

With jurisdiction complementary to that of states, the ICC is premised, as stated in the fourth recital of its preamble, on the conviction that "the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation". Under the Rome Statute, four crimes are punishable before the ICC: genocide, crimes against humanity, war crimes, and aggression (Article 5). The first three crimes were defined (Articles 6, 7, 8 respectively) and elaborated upon through the elements of crimes (Article 9) while aggression was left to be defined by the Assembly of

States Parties (as per Articles 121, 123). A state party to the ICC accepts jurisdiction in respect of these four crimes (Article 12.1). In addition, the ICC may also assert jurisdiction for crimes committed on the territory of the state in which the conduct occurred or the state of registration of the vessel or aircraft (if the crime was committed on a vessel or aircraft) or a state of which the person accused of the crime is a national (Article 12).

In keeping with its complementary jurisdiction, a case before the ICC would be rendered inadmissible (a) if it is being investigated or prosecuted by a state which has jurisdiction, unless that state is unwilling or unable genuinely to carry out the investigation or prosecution; (b) where a jurisdiction bearing state has investigated but decided not to prosecute; (c) if the person concerned has already been tried; or (d) the case is not of sufficient gravity to warrant further action by the Prosecutor (Article17).

The crimes committed in Liberia include at least two (crimes against humanity and war crimes), and possibly a third (genocide), of the four within the ICC's jurisdiction.[92] This would have made the ICC a perfect venue for Liberia to refer to the ICC Prosecutor requesting him to investigate the situation to determine whether one or more persons should be charged for crimes within the jurisdiction of the ICC (Articles 13(a) and 14).[93] However, two factors make this practically unfeasible. First, Liberia only became a party to the Rome Statute in September 2004, long after members of the respective armed groups committed the bulk of the crimes discussed earlier in this chapter. Second, the temporal jurisdiction of the ICC is limited to crimes committed after the entry into force of the Rome Statute (that is, 1 July 2002), again long after the commission of most of the grave crimes documented in Liberia.

That said, for the various crimes committed by rebels and AFL forces in the outskirts of Monrovia, during hostilities between July 2002 (entry into force of Rome Statute) and September 2004 (Liberia's ratification), the Security Council acting under its Chapter VII authority, with or without the consent of Liberia,[94] could trigger investigations by the ICC Prosecutor (Article 13(b)). Absent action from the new government, if the ICC Prosecutor does not initiate investigations *proprio motu* to pursue crimes within ICC jurisdiction committed in Liberia (Article 13(c) and 15), Security Council action would represent the only hope for a credible criminal investigation and ascription of responsibility for the egregious human rights abuses committed in Liberia.

In the current climate in which the Security Council appears to be focused on working with the parties through the UN Mission in Liberia

(UNMIL) to restore order, to facilitate the transition to peace through the conduct of democratic elections, and to establish programmes to assist in rebuilding basic infrastructure, it appears that the necessary political will does not exist at the international level for accountability to take place in Liberia. In addition, owing to USA's opposition to the ICC, referral action is unlikely to emanate from the Security Council. Indeed, human rights NGOs such as Human Rights Watch and Amnesty International have consistently called for prosecutions of crimes committed in Liberia. However, the position of the UN on accountability in Liberia appears to be ambivalent with only periodic statements of support for prosecutions,[95] including in the Chapter VII resolution[96] establishing UNMIL. Still, it appears that there is relatively greater silence on the accountability question from the UN in the Liberian context, unlike the approach advocated by the same body in the case of neighbouring Sierra Leone.

In addition, while the Security Council can clearly refer cases to the ICC Prosecutor, there is nothing in the Rome Statute to suggest that the Prosecutor owes a duty to proceed with charges against individuals following the conclusion of his independent investigation(s). Much of the Security Council's (political) energy recently appears to be focused on human rights violations in Sudan (and even in Sudan, it was only after much political pressure from the human rights community and the strong backing of some permanent members that the Security Council finally adopted a resolution to refer the situation to the ICC prosecutor). The above factors, taken together, make prosecutions before the ICC for crimes committed in Liberia a less viable option.

INTERNATIONAL OR HYBRID COURT FOR LIBERIA?

Assuming that there would be the requisite political will to deal with the two main practical limitations to ICC investigations (that is, the time of commission of crimes in Liberia and the ICC's temporal jurisdiction), the international community could establish a special criminal tribunal for Liberia. Three options would in theory appear to exist: use of an *ad hoc* tribunal similar to that for Rwanda and the former Yugoslavia; use of an independent hybrid court (similar in structure to that in Sierra Leone); and the establishment of a panel (East Timor, Kosovo) or extraordinary chambers (Cambodia) within Liberian courts.

While the momentous contributions of the ICTY and the ICTR to human security and global rule of law cannot be measured in mere

dollars and cents, the sheer costs of the ICTR and ICTY projects, which together consume almost about a quarter of a billion dollars each year (representing about 15% of the UN budget), may make the first option impractical.[97] It is also widely known that the international community has expressed concern about the pace and number of prosecutions. This leads us to consider whether hybrid courts (nationalised international criminal courts) or a panel for serious crimes or extraordinary chambers within Liberian courts (internationalised national courts) would provide a viable alternative.

With respect to the possibility of an independent nationalised tribunal for Liberia, that would appear highly unlikely in view of the political difficulties cited above, tribunal fatigue at the Security Council, including the paucity of resources for existing tribunals such as the Special Court, the need for resources for the pending Cambodia tribunal, and a solidification of the ICC (which is not fully yet established internationally). In addition, a nationalised hybrid court would require that there be at least an effectively functional and adequately resourced judicial system in Liberia. As we argued above, that does not currently exist.[98] On the other hand, an internationalised court along the lines of the Special Court would be freestanding and less dependent on national institutions. But such a court, while relatively cheaper when compared to the ICTY and ICTR, would still require strong financial backing which cannot be taken for granted, as demonstrated by the experience of the Special Court. Only time will tell whether such backing can be secured from the Security Council as currently constituted and bearing in mind the policy posture regarding international criminal tribunals by some of its permanent members.

POSSIBILITY OF TRIALS AT THE SPECIAL COURT FOR SIERRA LEONE

On 18 January 2002 the UN and the government of Sierra Leone signed a historic agreement[99] establishing a Special Court for Sierra Leone. The Special Court, authorised by Security Council Resolution 1315 in August 2000, is mandated under Article 1 of its statute "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law".[100] The Special Court is also empowered to utilise national law to prosecute those accused of masterminding the crimes committed in Sierra Leone during a decade of brutal armed conflict. For a number of reasons that have been justifiably criticised by the human rights community, the temporal jurisdiction of the Special

Court is limited to crimes committed after 30 November 1996, though the Sierra Leone war dates back to March 1991.

The crimes within the jurisdiction of the Special Court include crimes against humanity (Article 2); violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 3); other serious violations of international humanitarian law (Article 4); and crimes under Sierra Leonean law (Article 5).

As we argued above, it seems unlikely at this point that the international community will establish a free-standing criminal tribunal for individual criminal accountability in Liberia. Aside from encouraging domestic prosecutions within Liberia, which we have argued is not feasible in view of Liberia's decimated legal system, the international community could decide to empower the Special Court in neighbouring Sierra Leone to try a small number of individuals bearing greatest responsibility or most responsible for the heinous crimes committed in the course of the Liberian conflict. While we have maintained that there may not be the political will to set up a separate hybrid court for Liberia because of cost considerations, those concerns would dissipate to a large degree by using this already established tribunal. There are also various legal, political and pragmatic reasons that the international community could choose to pursue this option, which in any event is definitely better than no prosecutions at all.

First, aside from the subject matter jurisdiction which could be tailored to meet the needs of Liberia (both in respect of the use of international law and domestic (Liberian) law, if need be), it is clear that the temporal jurisdiction of the court will not suffer from the limitations we discussed earlier in respect of the ICC. The Special Court's current statute, which would presumably be amended by Sierra Leone and the UN with the participation of a democratically elected Liberian government, could address crimes that go as far back as the start of the Liberian war in 1989.

Second, there is an obvious link between the armed conflicts that engulfed Liberia and Sierra Leone.[101] This includes the fact that both conflicts started within two years of each other and that both were fuelled, if not rooted, in a desire by a few greedy men to plunder their society's natural resources for their own personal purposes (diamonds in the case of Sierra Leone and rubber and timber in the case of Liberia). The personnel (mostly child soldiers), light weapons and slash and burn tactics that were used by the warring sides also mirrored each other and reflected, in both countries, an almost unprecedented level

of human savagery. It is also known that some of the combatants have fought in both countries. In addition, given the similarities of the crimes committed, investigators from the Special Court who are already familiar with the nature of the crimes committed in Sierra Leone and the local terrain could build on their experiences to almost immediately start collecting and preserving evidence that would be needed for prosecutions on Liberia.

Third, it would be much cheaper for the international community to expand the mandate of an already functioning judicial tribunal to try a small number of individuals instead of building a new one from the ground up. This is so because, among other things, the requisite infrastructure (offices, court house, law library, etc), staff (including judges, prosecutor, registrar, and investigators), rules of procedure and cooperation agreements with international bodies such as Interpol are already in place. There is, to put it simply, no need to reinvent the wheel.

Fourth, using the Special Court to try Liberian war criminals would in the end help ensure the development of a more coherent body of international humanitarian law through an expanded common appeals chamber, as is done at the ICTR. Furthermore, all the concerns about overburdening the judges of the appeals chamber, about difficulties that may arise from one tribunal's use of varied sources of law and the use of a different official language which caused the Secretary General to recommend that the Special Court have a separate chamber instead of sharing that of the ICTY/ICTR, as was initially suggested by the Security Council, do not arise in this situation.[102] Indeed, while there is currently one appeals chamber for the Special Court with five judges, the court only has about 9[103] indictees before it (though a few more indictments are expected). This suggests that there may be scope for an increase in the workload of the judges, if accompanied by opening up of a third and even fourth trial chamber. Importantly as well, the membership of the Appeals Chamber could be increased to reflect the one or two additional trial chambers that would be added to try the Liberian cases.[104]

Fifth, by using the Special Court, the international community could train Liberians in the proper administration of justice, especially if a certain percentage of the staff positions, including judicial ones, are pegged specifically for nationals of Liberia as a way of rebuilding the capacity of the local legal system. That could provide a long-term legacy that would live on long after prosecutions are concluded and will likely assist in the restoration of the rule of law in Liberia.

Finally, as we noted in the introduction to this chapter, the Special Court has already started the accountability train for Liberia through the prosecutor's release of a 17-count indictment against Charles Taylor in June 2003. Taylor, who started the Liberian war in 1989, was sitting president at the time of his indictment. The indictment alleged that he had committed serious international crimes in Sierra Leone including crimes against humanity, war crimes and other serious violations of international humanitarian law. The indictment variously accused Taylor of responsibility for terrorising Sierra Leonean civilians, unlawful killings, sexual and physical violence, use of child soldiers, abductions, forced labour, looting, burning, and attacks on peacekeepers and humanitarian assistance workers. On 23 July 2003 counsel for President Taylor and Liberia filed a motion before the Trial Chambers of the Special Court seeking an order to quash the Indictment; to nullify the warrant of arrest; and for provisional measures restraining service of the indictment and arrest warrant on Taylor. The ground for the motion was that Taylor should enjoy absolute immunity from criminal proceedings under customary international law as the sitting head of state of Liberia at the time of his indictment. In any event, according to counsel for Taylor, the Special Court lacked jurisdiction over Taylor because it was a national not international tribunal.

In yet another historic jurisprudential contribution, the Appeals Chamber rejected those arguments. Though its reasoning was wanton in some respects, the Appeals Chamber ruled unanimously that the Special Court is an international criminal tribunal with an international mandate exercising jurisdiction over international crimes.[105] Thus, the official position of Taylor as incumbent head of state of Liberia at the time of his indictment is not a bar to his prosecution. Indeed, the Appeals Chamber concluded, Taylor was and still is subject to criminal proceedings before the Special Court.

While Taylor is currently enjoying impunity in Nigeria, it is clear that there is a desire on the part of most Liberians (and Sierra Leoneans) for him to be brought to justice. Thus, it would be critical that the Special Court, with an amended statute, be empowered to try war crimes in Liberia under a Chapter VII resolution so that Nigeria or any other state harbouring alleged war criminals could be compelled to either extradite them to the Special Court or prosecute them. That is the only way in which the international community would ensure that justice is done.

In view of the current political climate, the concern that prosecutions through Liberian courts would not meet minimum international

human rights standards, and the limitations inherent in pursuing prosecutions through the ICC, we submit that the Special Court is the most suitable venue for justice to be served in Liberia. Significantly, the use of the Special Court appears to be the preferred option of Liberian civil society.[106]

CONCLUSION

> "There must be no selectivity, no sanctuary, no impunity for those guilty of gross human rights violations."[107]

This chapter has argued that Liberia owes a duty under international law to investigate, prosecute and redress the victims that have suffered from the heinous crimes, including torture, rape, extrajudicial killings, recruitment of child soldiers, attacks against peacekeeping personnel and innocent civilians, committed in that country in the course of 14 years of vicious internal conflict. That duty, we argued, is firmly grounded in international humanitarian law as codified in the Geneva Conventions and their Additional Protocols, the bulk of which are also now customary international law. We further argued that, if necessary, Liberia could and should investigate and punish specific treaty-based crimes such as torture and genocide, all of which are *jus cogens* crimes that do not require a nexus to armed internal conflict for prosecution.

The chapter also made a second argument that was rooted in international human rights law. In this respect, we argued that there exists an additional duty for Liberia to take steps to address impunity, which duty we traced to authoritative interpretations of international treaties to which Liberia was a signatory, though those would only apply, in view of the country's recent formal party status, if those instruments can without doubt be said to be customary international law. This is important to ensure that the fundamental principles of legality and the prohibition on retroactive application of criminal legislation are absolutely adhered to. On the other hand, it is clear that under the Banjul Charter, Africa's main human rights instrument, and the way the obligations contained therein have been interpreted in the jurisprudence of the Commission, there is an unequivocal treaty-based duty for Liberia to punish, at a minimum, the senior architects of the atrocities that led to the senseless slaughter of over 200,000 persons, at least half of whom were civilians.

Assuming *arguendo* that there is indeed a duty, we catalogued the kinds of crimes that have been witnessed in Liberia and evaluated the

options for criminal prosecution. In so doing, we started with Liberia, the country with primary responsibility to protect its civilian population, even during conflict. While noting that amnesties may be granted in respect of domestic crimes, conditioned on their compatibility with the letter and spirit of international human rights law instruments to which Liberia is a party, we submitted that Liberia would run afoul of current UN practice, which has reaffirmed repeatedly that states may not grant amnesties in respect of international crimes. We also argued that a TRC could help individualise guilt and therefore promote national reconciliation. Ultimately, however, truth without accountability would establish a shaky foundation for the rule of law in post-conflict Liberia.

Having exhausted the majority of domestic options, we then turned to potential international accountability mechanisms. In this regard, we began with an examination of prosecutions through the ICC, broadened the discussion to cover the jurisdictional and political limitations inherent in the use of that forum before considering the possibility of standalone *ad hoc* international criminal and hybrid courts. All of these were found to be not politically viable in view of cost considerations and the current preoccupations of the UN, especially the Security Council. However, we concluded that a middle ground could be reached to ensure that accountability takes place in Liberia through use of the existing Special Court in neighbouring Sierra Leone, which has already started prosecution of the biggest fish in the sea of human rights abusers in Liberia: Charles Taylor. Of course, the Special Court's basic instruments would have to be amended to make this possible. In addition, the Special Court would require new resources – human, financial, and material – and a more robust Chapter VII authority to compel third states such as Nigeria to hand over senior perpetrators, for example Taylor.

In sum, it should be clear from this chapter and other contributions in this volume that law and order completely broke down in Liberia in the decade of the nineties. Liberian authorities therefore owe both a legal and moral duty to take action to confront the abusers and to serve notice to potential perpetrators that outrageous conduct will not permitted or condoned. It is important that African governments and the international community weigh in to express global condemnation by supporting an accountability process for the heinous crimes committed in Liberia. The Special Court should be a logical choice, in particular because it enjoys the support of some Liberians. In the final analysis, accountability in Liberia is a threat to impunity everywhere.[108]

NOTES

1 Chernor Jalloh currently works as a barrister and solicitor in the province of Ontario, Canada. Alhagi Marong is currently a legal officer at the Chambers Support Section of the International Criminal Tribunal for Rwanda in Arusha. The authors thank Valerie Oosterveld, Julia Osei-Tutu, Joseph Rikhof, and Christopher Waters, for generously reading an earlier draft of this chapter and providing excellent comments. Needless to say, the expressions of opinion herein are those of the authors and not any organisations with which they may currently be associated.

2 Judgement of Nuremberg War Crimes Tribunal, 1947, 1 Trial of the major war criminals, p 171.

3 See Peace Agreement between the Government of Liberia (GOL), The Liberians United for Reconciliation and Democracy (LURD), The Movement for Democracy in Liberia (MODEL) and the political parties, 18 August 2003, <www.usip.org/library/pa/liberia/liberia_08182003_cpa.html> (18 March 2005).

4 As used here, we are referring to the level of command authority and the gravity and scale of the crime. Alternately, as was suggested by the UN Secretary General in the Sierra Leone context, the broader "persons most responsible" could be used to signify both a leadership/authority position of the accused and the gravity, seriousness or enormity of the crime. See Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, UN Doc S/2000/915 (2000), <www.un.org/Docs/sc/reports/ 2000/915e.pdf>, paragraphs 29–31 (Report on the Establishment of the Special Court).

5 Human Rights Watch (HRW), Liberia: A human rights disaster – violations of the laws of war by all parties to the conflict, HRW, New York, 1990; HRW, Liberia: Flight from terror – testimony of abuses in Nimba County, HRW, New York, 1990. For more recent accounts, see HRW, Liberia: Greater protection required for civilians still at risk, A HRW briefing paper, September 2003; HRW, Liberia's human rights situation still precarious, HRW press release, November 1997; and HRW, Back to the brink: War crimes by Liberian government and rebels – a call for greater international attention to Liberia and the sub region, 14(4), May 2002, <http://hrw.org/reports/2002/liberia/Liberia0402.pdf> (18 March 2005).

6 Janet Fleischman, Testimony before the Congressional Human Rights Caucus on the human rights situation in Liberia, 9 July 2003, <www.hrw.org> (18 March 2005).

7 The section relies extensively on evidence gathered by Human Rights Watch in various reports prepared on Liberia. See reports cited in supra note 5. See also HRW, How to fight, how to kill: Child soldiers in Liberia, 16(2)(A), March 2004; Amnesty International (AI), Liberia, The promises of peace for 21,000 child soldiers, AI Index: AFR 34/006/2004, 17 May 2004; AI, Liberia, One year after Accra – immense human rights challenges remain, AI Index: AFR 34/012/2004, 18 August 2004; AI, No impunity for rape – a crime against humanity and a war crime, AI Index: AFR 34/017/2004, 14 December 2004.

8 These other groups include Prince Johnson's Independent National Patriotic Front of Liberia (INPFL) and at least two groups of rebels largely based out of Eastern Sierra Leone and calling themselves ULIMO.
9 The latter was formed in 2003 after breaking away from LURD.
10 Jamie O'Connell, Here interest meets humanity: How to end the war and support reconstruction in Liberia, and the case for modest American leadership, 17 *Harv Hum Rts J*, 2004, pp 207, 215–216.
11 HRW, Liberia: Flight from terror, op cit, pp 2–5.
12 HRW, Liberia: A human rights disaster, op cit, p 2.
13 HRW, Liberia: Greater protection for civilians, supra note 4 at p 4.
14 Ibid, pp 3–4.
15 HRW, The guns are in the bushes: Continuing abuses in Liberia, HRW briefing paper, January 2003, pp 11–12. See also AI, No impunity for rape, supra note 6.
16 Cf AI, No impunity for rape, supra note 6.
17 HRW, How to fight, how to kill, supra note 6.
18 We adopt the definition under Article 1 of the Convention on the Rights of the Child (1989) that children are persons below the age of 18 years.
19 Ann Davison, Child soldiers: No longer a minor incident, 12 *Willamette J Int'l L & Disp Resol,* 2004, pp 124 at 128.
20 United Nations Integrated Regional Information Networks (IRIN), Up to 15,000 child soldiers in Liberia, UN says, 24 September 2003, <www.irinnews.org> (18 March 2005); Sarah L Wells, Crimes against child soldiers in armed conflict situations: Application and limits of international humanitarian law, 12 *Tul J Int'l & Comp L*, 2004, p 287.
21 For instance, the UN listed LURD as a user of child soldiers in Liberia.
22 HRW, How to fight, how to kill, supra note 6 at pp 8–9.
23 Legal consequences of the construction of a wall in the occupied Palestinian Territory, Advisory Opinion, 9 July 2004, General List No 131, <www.icj-cij.org/icjwww/idecisions.htm> (18 March 2005), pp 89–113; René Provost, *International human rights and humanitarian law*, Cambridge University Press, Cambridge, 2002.
24 The four Geneva Conventions relate to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I); for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (GC II); Relative to the Treatment of Prisoners of War (GC III); and Relative to the Protection of Civilian Persons in Time of War (GC IV). Two Additional Protocols were adopted in 1977. Additional Protocol I relates to the Protection of Victims of International Armed Conflicts; Additional Protocol II relates to the Protection of the Victims of Non-International Armed Conflicts. In view of the subject matter of this Article, our principal focus will be Geneva Convention IV and Additional Protocol II.
25 Liberia is a party to the four Geneva Conventions (29 March 1954) and Additional Protocols I and II (30 June 1988).
26 Article 3, Additional Protocol I.

27 See *Attorney General of the Government of Israel v Eichmann,* District Court of Jerusalem, 1961, 36 *Int'l L Reps,* p 5.
28 Antonio Cassese, *International criminal law,* Oxford University Press, New York, 2003, at 284. See also Case concerning the arrest warrant of 11 April 2000, <www.icj-cij.org/icjwww/idecisions.htm> (25 March 2005).
29 See Wells, op cit.
30 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.
31 See also the prohibition of 'adverse distinction' which criminalises the deliberate targeting of particular members of the civilian population: Article 2, Additional Protocol II.
32 Article 4(2), Additional Protocol II.
33 Article 4(3), Additional Protocol II.
34 See Davison, Child soldiers, *supra* note 18, and Wells, op cit.
35 Agreement by UK, USA, France and USSR for the Prosecution and Punishment of the Major War Criminals of the European Axis, London 1945 82 UNTS 279 (London Agreement).
36 Charter of the International Military Tribunal (The Nuremberg Charter) 1945, 82 UNTS 279, Articles 6, 7, and 8.
37 Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, UN Doc /A/CN.4/SER.A/1950/Add.1 (1950); reprinted in *Yearbook of the International Law Commission*, 1950, vol II. See in particular Principles I, III and VI.
38 See UNSC Resolutions 808, 827 (1993), 955 (1994) and 1315 (2000).
39 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, Annex II, UN Doc A/CONF.183/9 (1998).
40 See *Nicaragua v United States of America* (Merits) ICJ Rep 14 (holding that for a conflict to be deemed international, the foreign state must exercise "effective control" over the non-state party. Effective control was interpreted to mean that the foreign state had to order the non-state party to commit specific acts). For a different "overall control" test, see *Prosecutor v Tadic,* 1999, Case No Case IT-94-1-A (ICTY, Appeals Chamber), <www.un.org/icty/tadic/appeal/judgement/index.htm> (18 March 2005) [*Tadic*], paragraph 120.
41 Human rights groups report that various African governments, for example Burkina Faso, Guinea and Libya, supported some insurgent groups in Liberia. See HRW, Weapons sanctions, military supplies, and human suffering: Illegal arms flows to Liberia and the June-July 2003 shelling of Monrovia, A HRW briefing paper, 3 November 2003, <http://hrw.org/backgrounder/arms/liberia/liberia_arms.pdf> (18 March 2005).
42 It may be that upon closer examination, especially given the alleged Burkinabé, Libyan and Guinean support for Liberian rebel factions, the essential character of the Liberian conflict could change from internal to (part) international

thereby imposing a greater burden on Liberia to prosecute grave breaches of international humanitarian law. See *Tadic*, *supra* note 39 at paragraphs 84–162.

43 See ICRC, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), C*ustomary international humanitarian law*, Cambridge University Press, Cambridge, 2005 (identifying and highlighting the common core of humanitarian law applicable to all parties during conflict; confirming that there is a customary international law duty to investigate and prosecute serious humanitarian law violations committed in both international and internal armed conflicts: Rules 156 and 157), pp 568–611.

44 See also George H Aldrich, Jurisdiction of the International Criminal Tribunal for Former Yugoslavia, 1999, 90 *AJIL* 64, 67-68; and Steven R Ratner and Jason S Abrams, *Accountability for human rights atrocities in international law, beyond the Nuremberg legacy,* Oxford University Press, New York, 1997, pp 91–101.

45 See T Meron, International criminalization of internal atrocities, in Theodor Meron (ed), W*ar crimes law comes of age: Essays,* Oxford University Press, New York, 1998, pp 228–261.

46 Contra Joseph Rikhof, Canada and war criminals: The policy, the programme, the results, <www.isrcl.org/Papers/2004/Rikhof.pdf> (18 March 2005), p 11 (arguing that there is no explicit duty to extradite or prosecute war crimes during internal armed conflicts) and J Rikhof, Crimes against humanity, customary international law and the international tribunals for Bosnia and Rwanda, 6 *NJCL* 3, pp 233–268.

47 See *Nicaragua v United States of America*, *supra* note 39. For a recent and authoritative exposition of the customary law status of the Geneva Conventions and Additional Protocols, see *Customary international humanitarian law*, *supra* note 42; see also T Meron, The Geneva Conventions as Customary Law, 1997, 81 *AJIL* 348, 352–353.

48 Henckaerts and Doswald-Beck, *Customary international humanitarian law*, *supra* note 42.

49 L L Sunga, *The emerging system of international criminal law: Developments in codification and implementation,* Kluwer Law International, The Hague, 1997, pp 250–256; Cassese, *International criminal law*, *supra* note 27, pp 284–298.

50 We do not wish to suggest that perpetrators other than the top echelon should be absolved from responsibility. Rather, our argument is that those bearing the greatest responsibility or those most responsible should be brought to trial through international criminal processes.

51 26 June 1945, 59 Stat 1031, TS No 993, Can TS 1945 No 7. Liberia was a founding Member of the UN. It voted for the adoption of the UDHR on 10 December 1948. Aside from the International Bill of Rights, Liberia is party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (and its optional protocol); the Convention on the Prevention and Punishment of the Crime of Genocide; and the African Charter on Human and Peoples' Rights (Banjul Charter). It has also signed, but not yet ratified, the three protocols to the Banjul Charter establishing an African human rights court, elaborating the rights of African children, and the rights of African women.

52 Articles 55 and 56, UN Charter.
53 Aside from the UDHR, the International Bill of Rights consists of the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.
54 Under Article 4 of the ICCPR, a state may derogate from its obligations to the extent strictly required by the exigencies of the situation, provided that such obligations are not inconsistent with its obligations under international law and do not involve discrimination on any of the prohibited grounds. Derogations are not permitted for core rights such as the right to life; right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; right not to be subject to slavery; right not to be held guilty for an act or omission which did not constitute a criminal offence, under national or international law, at the time when it occurred.
55 While this instrument is a declaration, not a treaty, it is the foundation stone of the modern international human rights regime because it outlines rights to which every person in the world is entitled. In any event, as the Preamble confirms, states intended for the UDHR to "serve as a common standard of achievement for all peoples and all nations". Today, the UDHR is the yardstick against which compliance with international human rights norms is measured. See also Louis B Sohn, The human rights law of the Charter, 12 *Tex Int'l L.J* 129, 1977, pp 133–135 (arguing that "The UDHR not only constitutes an authoritative interpretation of the Charter obligations but also a binding instrument in its own right, representing the consensus of the international community on the human rights which each of its members must respect, promote and observe").
56 See also Article 6 of the 1965 Convention on the Elimination of Racial Discrimination; Article 14 of the 1984 Convention Against Torture; Article 39 of the 1989 Convention on the Rights of the Child, and Articles 19(3) and 68(3) of the Rome Statute.
57 State reservations to Article 2 have been construed as incompatible with the objects and purposes of the ICCPR. See Human Rights Committee, General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, Fifty-second Session (1994).
58 See Human Rights Committee, General Comment No 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004 (2187th meeting).
59 Ibid, paragraph 6.
60 Ibid, paragraph 7.
61 Ibid.
62 Ibid, paragraph 18.
63 Ibid.
64 Ibid.
65 Article XII, CPA.
66 (1969) 1155 UNTS 331 (in force 27 January 1980) [VCLT]. This treaty is considered customary international law.

67 See, for example, Diane F Orentlicher, Settling accounts: The duty to prosecute human rights violations of a prior regime, 100 *Yale LJ* 2537, 1991; Naomi Roht-Arriaza (ed), *Impunity and human rights in international law and practice,* Oxford University Press, New York, 1995; and Juan E Mendez, Accountability for past abuses, 1997, 19.2 *Hum Rts Q*, p 255.
68 Essentially, *opinio juris* is the conviction felt by states that a certain type of behaviour is required by international law.
69 Though this rule is said not to apply to the so-called "persistent objectors".
70 See Sohn, op cit, pp 133–135.
71 1982, 21 *ILM* 58 (adopted 27 June 1981; entered into force 21 October 1986). See U O Umoruzike, The African Charter on human and peoples' rights, 1983, 77 *AJIL* 902, and Vincent O Orlu Nmheille, *The African human rights system: Its laws, practice and institutions,* Martinus Nijhoff, The Hague, 2001. On 25 January 2004, a protocol to the Banjul Charter adopted in 1998 to establish an African Court of Human and Peoples' Rights came into force, arguably a necessary extension to bolster Africa's feeble rights protection regime.
72 The African Commission was established under the Banjul Charter and is based in The Gambia. The commission's website is at <www.achpr.org/> (18 March 2005).
73 Among the leading cases are *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, Comm No 74/92; *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, Comm No 48/90, 50/91, 52/91, 89/93; and *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso,* Comm No 204/97, <www1.umn.edu/humanrts/africa/comcases/allcases.html> (18 March 2005).
74 It appears that only one state-to-state human rights complaint has been launched by an African country in almost two decades of existence of the Banjul Charter. It was initiated by the Democratic Republic of the Congo against Burundi, Uganda, and Rwanda in February 1999. Even that case appeared to be motivated by political considerations instead of human rights protection.
75 See Roht-Arriaza, *supra* note 66 at pp 281–282.
76 The ensuing analysis assumes that the desired political will exists for prosecutions to take place on the part of any new government inaugurated in 2006 and on the part of the international community.
77 Four constitutions have been adopted since Liberia was founded, <http://onliberia.org/con_index.htm> (23 March 2005). The most recent, and currently in force, was adopted in 1986.
78 The appointees must be citizens of Liberia; in addition, for the Supreme Court, five years' legal practice experience is required while for lower courts three years' experience would suffice.
79 For example, torture is a separate treaty-based crime. See Ahcene Boulesbaa, *The UN Convention on Torture and the prospects for enforcement,* Martinus Nijhoff, The Hague, 1999 (assessing the efficacy of the Torture Convention as a means of enforcing the right to be free from torture).

80 Report of the Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations, UN Doc/S/2004/616 (2004), paragraph 32 (SG Rule of Law Report).
81 Article 6 (5) of Additional Protocol II states: "At the end of hostilities, the authorities in power shall endeavour 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."
82 Interestingly, the only obligation that appears to flow from the text of Article XXXIV is to give *consideration* to the *recommendation* for an amnesty. There is no obligation that the "recommendation" as such be accepted. It is uncertain whether the language used was a result of poor drafting or whether this was the intent of the parties.
83 For instance, the UN Secretary General stated in a recent report that "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights", see SG Rule of Law Report, *supra* note 79 paragraph 10.
84 See *Prosecutor v Morris Kallon, Brima Bazzy Kamara*, Case No SCSL-2004-15-PT, Case No SCSL-2004-16-PT, Lomé Amnesty Decision, <www.sc-sl.org/RUF-decisions.html> (18 March 2005), paragraph 67.
85 Henckaerts and Doswald-Beck (eds), *Customary international humanitarian law*, *supra* note 42, pp 611–614.
86 Ibid, p 612.
87 See *Prosecutor v Anton Furundzija*, Case No IT-95-17-/1-T (ICTY, Trial Chamber) (holding that a domestic amnesty law would not prevent prosecution of the *jus cogens* crime of torture before an international tribunal, foreign state, or in the torturer's home state under a subsequent regime), <www.un.org/icty/furundzija/trialc2/judgement/index.htm> (18 March 2005), paragraph 155. A *jus cogens* norm is a higher form of international law accepted and recognized by the international community of states as a norm from which no derogation is permitted. It overrides and supersedes lesser international law norms that conflict with or seek to modify it. See Articles 53, 64, 71 of the VCLT, *supra* note 65.
88 See Country Report on Human Rights Practices (2003), United States Department of State (18 March 2004), <www.state.gov/g/drl/rls/hrrpt/2003/27735.htm> (18 March 2005).
89 The US State Department put it thus: "Defense attorneys often suggested that their clients pay a gratuity to appease judges, prosecutors, and police officers to secure favorable rulings", ibid, "Denial of fair public trial".
90 Roht-Arriaza (ed), *Impunity and Human Rights*, *supra* note 66, p 282.
91 Ibid, p 281.
92 Liberia signed the Rome Statute on 17 July 1998 and it was ratified on 22 September 2004. It is unclear whether Liberia accepted ICC jurisdiction backdated to the entry into force of the Rome Statute (July 2002) or whether it only accepted jurisdiction forward from the point of ratification (September 2004).

93 The time of alleged commission of a particular international crime would be crucial to the determination of the kinds of charges that could be laid by an ICC Prosecutor, or another international prosecutor for that matter, in the context of the Liberian conflict.

94 See Michael P Scharf, The ICC's jurisdiction over the nationals of non-party states: A critique of the US position", 64 *Law & Contemp Probs*, 2001, p 67.

95 See, for example, The UN High Commissioner for Human Rights, press release, 24 March 2003.

96 In UNSC Resolution 1509 the Security Council "deplored the violations of human rights, particularly atrocities against civilian populations, including widespread sexual violence against women and children …". It also noted that it was "mindful of the need for accountability for violations of international humanitarian law" committed in Liberia.

97 See also Antonio Cassese, The role of internationalized courts and tribunals in the fight against impunity, in C Romano, A Nollkaemper and Jann K Kleffner (eds), *Internationalized criminal courts: Sierra Leone, East Timor, Kosovo, and Cambodia,* Oxford University Press, Oxford, 2004, pp 1–13 (concluding that "we should rule out the establishment of future ad hoc tribunals similar to those for the former Yugoslavia, or for Rwanda"), p 12.

98 On the other hand, the UN did resuscitate and put on life support the judicial and legal systems in East Timor and Kosovo to enable some war crimes trials that have been criticised for non-compliance with international human rights standards. Given the resources and time required for such a task, we do not think the UN will undertake this in the Liberia case, despite the UN's ongoing law reform efforts in Liberia.

99 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002, < http://www.sc-sl.org/scsl-agreement.html> (18 March 2005).

100 Statute of the Special Court, annexed to the Agreement (16 January 2002), <www.sc-sl.org/scsl-statute.html> (18 March 2005).

101 The link between the Liberian and Sierra Leonean conflicts is well documented. See, for example, Report of the panel of experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone, UN Doc/S/2000/1195 (2000); Ian Smillie, Lansana Gberie and Ralph Hazelton, *The heart of the matter: Sierra Leone, diamonds, and human security (complete report)*, Partnership Africa Canada, Ottowa, 2000, <www.partnershipafricacanada.org> (18 March 2005).

102 Report on the Establishment of the Special Court, supra note 3, paragraphs 40-46.

103 Two other indictees are at large while two more are dead.

104 Existing concerns regarding serious delays due to lack of funding and personnel in the Chambers of the Special Court would first have to be addressed. See HRW, *Bringing justice: The Special Court for Sierra Leone – accomplishments, shortcomings, and needed support,* 16(8(A)), September 2004, <http://hrw.org/reports/2004/sierraleone0904> (18 March 2005).

105 For an analysis of the Taylor decision, see C Jalloh, Immunity from prosecution for international crimes: The case of Charles Taylor at the Special Court for Sierra Leone, *ASIL Insights,* October 2004, <www.asil.org/insights/insigh145.htm> (18 March 2005).

106 See Festus Aboagye and Alhaji M S Bah, Liberia at a crossroads: A preliminary look at the United Nations Mission in Liberia (UNMIL) and the protection of civilians, *ISS Occasional Paper 95*, November 2004, <www.iss.co.za/pubs/papers/95/Paper95.pdf> (18 March 2005), p 13.

107 Mary Robinson, United Nations High Commissioner for Human Rights, Address: Human rights and the International Criminal Court, Caracas, Venezuela, 30 November 2000.

108 With apologies to Martin Luther King Jr, who said that "Injustice anywhere is a threat to justice everywhere".