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Columbia Journal of Transnational Law
2006

Note

***649 THE WRIT OF HABEAS CORPUS AND THE SPECIAL COURT FOR SIERRA LEONE: ADDRESSING AN UNFORESEEN PROBLEM IN THE ESTABLISHMENT OF A HYBRID COURT**

Dorsey & Whitney Student Writing Prize in Comparative and International Law Outstanding Note Winner

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The hybrid model of international criminal tribunals, which supplements general principles of international criminal law with the domestic legal principles of the host country, has been implemented in myriad nations, including Cambodia, Kosovo, and Sierra Leone. The popularity of this model derives in part from its potential to legitimate international criminal prosecutions in the eyes of the host country and to strengthen the domestic legal system of that nation. However, in creating an obligation to honor principles of both domestic and international law, the hybrid model may create inconsistent legal duties whose resolution could undermine the proper functioning of an international tribunal. This Note highlights such a conflict, which stems from a tension between the temporal jurisdiction of the Special Court for Sierra Leone and protections accorded by the Sierra Leonean Constitution. Specifically, this Note argues that Special Court prisoners who are imprisoned by the state in Sierra Leone could be legally entitled to release by writ of habeas corpus. The Note considers several solutions to the problem, and argues for three approaches that are grounded upon respect for the legal traditions of Sierra Leone and which thus preserve the legitimating and capacity-building functions of the hybrid model.

***650** Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns--the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.

Donald Rumsfeld [FN1]

Introduction

The Special Court for Sierra Leone (The Special Court) [FN2] has been enthusiastically embraced as a successful instantiation of the “hybrid” model of international tribunals. [FN3] Under this model, a court is bound to apply “general principles of international criminal law to crimes against the peace and security of mankind, and principles of national criminal law to crimes under domestic law.” [FN4] Such mixed-law courts have developed in response to the challenge to create a model tribunal that enjoys international legitimacy but “respects a *651 nation's vision of justice, its choice of means of bringing it about, and its ownership, at least in part, of the judicial process.” [FN5] Enthusiasm for hybrid courts stems in part from their political advantages vis-à-vis international tribunals. However, despite the benefits that derive from the hybrid model's synthesis of domestic and international law, the model may create inconsistent legal duties between the court and the host country. In extraordinary cases, these conflicts of law may undermine the proper functioning of the tribunal.

This Note argues that Special Court prisoners who are imprisoned by the state in Sierra Leone could be legally entitled to release by writ of habeas corpus in spite of their commission of unconscionable atrocities. This entitlement stems from a conflict between the protections in the Sierra Leonean Constitution against imprisonment for pardoned crimes and the temporal jurisdiction of the Special Court, which vests the Court with the authority to prosecute crimes committed prior to a general pardon granted under the Lomé Accord. The Note considers several solutions to the problem, and argues for three approaches that are grounded upon respect for the legal traditions of Sierra Leone. Part I addresses the political and legal framework in Sierra Leone that gives rise to the problem, highlighting the amnesty provisions of the Lomé Accord, the protections that the Sierra Leonean Constitution guarantees to pardoned criminals, the sentencing arrangements under the Special Court Statute, and the writ of habeas corpus in Sierra Leonean law. Part II considers how a prisoner convicted by the Special Court and imprisoned in Sierra Leone according to the terms of the Special Court Statute would be entitled to release upon submitting a habeas petition to domestic courts, and introduces expedient unilateral solutions to this “habeas problem.” [FN6] Part III critiques these solutions *652 by examining the goals of hybrid courts and argues that the international community should adopt measured solutions to the habeas problem that honor the legitimating and capacity-building functions of hybrid tribunals.

I. Background: Legal and Political Issues Affecting the Relationship Between the Special Court and the Government of Sierra Leone

The legal and political contexts in which the Special Court was created give rise to a unique threat to its core mandate. This Part addresses the legal and political tensions between the Special Court and the State of Sierra Leone that give rise to the habeas problem. Section A addresses the amnesty provisions of the Lomé Peace Agreement and the response of the international community in the form of the Special Court. Section B highlights the conflict between the temporal jurisdiction of the Special Court and the protections afforded under the Sierra Leonean Constitution. Section C considers the terms of incarceration for prisoners convicted by the Special Court. Section D demonstrates the existence and articulates the substance of the writ of habeas corpus in Sierra Leonean law.

A. The Lomé Accord Amnesties and the International Reaction

From 1991 to 2002, the civil war in Sierra Leone wrought unfathomable devastation in terms of lives lost and people displaced. [FN7] Three unsuccessful attempts were made to negotiate a *653 peace agreement between the Government's Civil Defence Forces (CDF) and the rebel Revolutionary United Front (RUF) before an effective ceasefire was struck in May 2001. [FN8] The most comprehensive of these failed agreements was signed on July 7, 1999 in the Togolese capital of Lomé [FN9] by Sierra Leone's elected President, Ahmed Tejan Kab-bah, on behalf of the Government. [FN10]

The Lomé Peace Agreement contained a blanket amnesty provision for all who were implicated in the conflict, [FN11] ostensibly in order to “consolidate the peace and promote the cause of national reconciliation.” [FN12] This provision mandates that “the Government of Sierra Leone shall . . . grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the . . . Agreement.” [FN13] Although the rebels refused to comply with their obligation to disarm, [FN14] and fighting continued through the May 2001 ceasefire, [FN15] the Sierra Leonean government has never renounced the *654 amnesty provision. [FN16]

Despite acting as a “moral guarantor” to the agreement, [FN17] the international community never accepted the amnesties, [FN18] and the Special Court was established by a bilateral agreement between the Government of Sierra Leone and the United Nations with temporal jurisdiction over international crimes committed prior to the Lomé Agreement. [FN19] Each of the active Special Court indictments charges *655 defendants with the commission of crimes committed prior to July 7, 1999. [FN20] Thus, if the amnesty provision of the Lomé Accord is valid, it applies to every individual that has been indicted by the Special Court.

While the Special Court has held that the Lomé Accord is not a valid legal instrument under international law, the validity of the Accord under domestic law has not been impeached. The Special Court considered the legality of the amnesty provisions in disposing of a preliminary motion by two defendants, Morris Kallon and Brima Bazzy Kamara, and determined that the Lomé Agreement was not valid under international law. [FN21] In so doing, however, the Court stressed that

[w]hat rightly falls for consideration is not whether the undertaking in the Lomé Agreement made by the *656 Government of Sierra Leone to grant amnesty is binding on the Government of Sierra Leone, but whether such undertaking could be effective in depriving [the Special] Court of the jurisdiction conferred on it by the treaty establishing it [FN22]

The amnesty provision's claim to legality under domestic law was not impeached, and the validity of the amnesty provision as a matter of Sierra Leonean law thus requires examination of the Sierra Leonean Constitution.

B. The Temporal Jurisdiction of the Court and the Sierra Leonean Constitution: A Conflict of Laws

By endowing the Court with a temporal jurisdiction over crimes committed prior to the Lomé amnesties, the Special Court Statute established an institution whose legal framework is incompatible with the constitutional obligations of the Sierra Leonean government. The National Constitution of Sierra Leone, which was signed in 1991, holds that “the laws of Sierra Leone shall comprise: (a) this Constitution; (b) laws made by or under the authority of Parliament as established by this Constitution” and “(c) any orders, rules, regulations and other statutory instruments made by any person or authority pursuant to a power conferred in that behalf by this Constitution or any other law.” [FN23] Under this article, the Special Court Statute, which was incorporated into Sierra Leonean Law pursuant to the Special Court Ratification Act, [FN24] operates as binding domestic law. So too, however, does the Lomé Agreement, which was signed by the President pursuant to his authority under Chapter 5 of the Constitution. [FN25]

While the Special Court Statute and the Lomé Agreement are both binding, the Constitution delineates further obligations that compel the Government to honor the amnesty provisions of the Lomé Peace Agreement at the expense of inconsistent provisions within the Special Court Statute. The Constitution establishes itself as a *657 document that is legally superior to both domestic law and treaty, and requires that any law that is inconsistent with one of its provisions be voided. [FN26] The Constitution further mandates that “no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence” [FN27] Therefore, since the Government has granted “pardon and reprieve to all combatants and collaborators” under the Lomé Accord, [FN28] the Constitution stipulates that these individuals cannot legally be tried for “anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.” [FN29] So long as the pardons remain in force, provisions of the Special Court Statute are void under Sierra Leonean law to the extent that they are inconsistent with the amnesty provisions of the Lomé Peace Accord. Thus, the trials of the Special Court prisoners are not legally legitimate under the domestic law of Sierra Leone.

Some claim that the Special Court could reconcile this tension by adopting a “dual approach” to its jurisdiction. [FN30] Under this approach, the Lomé amnesties would bar prosecution for common crimes committed before 1999 but permit prosecution for common crimes committed after 1999 or any international crimes. The Special Court has arguably adopted such an approach. [FN31] Article 10 of the Special Court Statute provides that “[a]n amnesty granted to any person falling within the jurisdiction of the Special Court in *658 respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.” [FN32] This provision omits Article 5 of the Statute, which incorporates provisions of Sierra Leonean law. Consequently, amnesties granted for domestic crimes may provide a bar to prosecution. [FN33]

However, no arguments have been offered that the dual approach resolves the constitutional dilemma, and there is little support for such a claim. Based on its text, the Sierra Leonean Constitution does not explicitly distinguish between the Government's obligation with respect to amnesties for international crimes and amnesties for common crimes. There does not seem to be any legislative history that would favor a reading outside the scope of the text that would bar amnesties for international crimes. The Constitution thus seems to prohib-

it the trial of any pardoned prisoner, regardless of the nature of his or her crime.

It may be argued that the conflict of laws between the Sierra Leonean Constitution and the Special Court Statute is illusory under a broad interpretation of the Constitution. This interpretation would hold that while the Government cannot try pardoned individuals, non-State entities may do so. Written in the passive voice, the amnesty provision of the Constitution stipulates that individuals shall not be tried for pardoned offenses, without specifying who is prohibited from trying them. [FN34] Read narrowly, the provision indicates that any trial of a pardoned individual--by any court-- would be legally void in the eyes of the Sierra Leonean government. However, an alternative interpretation suggests that pardoned individuals may not be tried by courts established under the Constitution, but that other courts-- including the Special Court--could have the legal imprimatur to convict and sentence them.

A defense of this broad construction may invoke canons of statutory interpretation under English law, the system on which Sierra Leone's jurisprudence is grounded. [FN35] At common law, there is a presumption that the legislature intends to conform to general principles of public international law as well as specific treaty obligations: [FN36] "Every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of *659 nations or with established principles of international law." [FN37] This principle thus lends weight to the broad construction of the pardon provision in the Sierra Leone Constitution so that the domestic law conforms to the State's international commitment to honor the temporal jurisdiction of the Special Court.

However, other core principles of statutory interpretation weigh against this construction in favor of an interpretation that better secures the rights of the pardoned individual. An equi-pollent canon of statutory construction at English common law holds that "the legislature does not intend to limit vested rights further than clearly appears from the enactment." [FN38] The protection that the Sierra Leonean Constitution accords to those who receive amnesties is clearly a right that is vested in particular individuals. In cases where such a right is vested and there is external evidence that the legislature intended a narrower interpretation than can be understood from the text, "who is to have the benefit of those doubts, Parliament, or the holder of the right? The orthodox answer is 'the holder of the right'" [FN39] On this view, it would be plainly inappropriate to impute a rights-restricting interpretation to a text that, on its face, seems to afford broad freedom from trial for those who have received a pardon.

Even under the rights-restricting construction of the constitutional provision, however, the Government of Sierra Leone is prohibited from involving itself with the imprisonment of pardoned individuals who are convicted in an alternative court. The Constitution mandates that "no person shall be deprived of his personal liberty except as may be authorized by law" under a discrete set of circumstances, including "in the execution of a sentence or order of a Court whether in Sierra Leone or elsewhere in respect of a criminal offence of which he has been convicted." [FN40] In order for this provision to be read as a coherent, rights-conferring constitutional guarantee, the conviction that serves as the basis for the sentence must satisfy a threshold of legitimacy. In the case of those individuals pardoned under the Lomé Accord, the trial that serves as the basis for their sentence would fail to satisfy a basic constitutional requirement that "no person shall be tried for a criminal offence if he shows that he has been

pardoned for that offence” [FN41] If this *660 threshold did not need to be satisfied, the Government could circumvent its basic constitutional obligations toward its prisoners by delegating its judicial authority to another body, thus stripping the provision of any protective force and rendering it pointless. A fundamental canon of statutory construction at common law establishes the presumption that, in creating a statute, the legislature does not intend a result that is “futile or pointless.” [FN42] A constitutional reading that would allow the Government of Sierra Leone to imprison individuals on the basis of trials that would be fundamentally illegitimate if they were carried out by Sierra Leonean courts is therefore implausible. Thus, even under a rights-restricting interpretation of the Sierra Leone Constitution, the Government may not play a role in depriving an amnestied individual of his or her liberty.

C. Incarceration of Prisoners Convicted by the Special Court

Despite the constitutional problems highlighted above, the Special Court Statute entrusts prisoners convicted by the Court to the domestic law of Sierra Leone and vests the host government with primary custody over them, barring exceptional circumstances, and thus entitles them to the protections of the Sierra Leonean Constitution. Since no individuals have been convicted by the Special Court as of September 2005, [FN43] the determination of who bears responsibility for incarcerating convicted prisoners is necessarily an exercise in statutory interpretation. [FN44] Article 22(1) of the Special Court Statute holds that “imprisonment shall be served in Sierra Leone.” [FN45] The clause goes on to allow that

If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the *661 International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. . . . The Special Court may conclude similar agreements for the enforcement of sentences with other States. [FN46]

On their face, these two clauses of the section are contradictory. The first clause, employing the term “shall,” seems to mandate that sentences be served within the territory of Sierra Leone. The second allows that sentences “may” be served in alternative States. Clarification of this apparent inconsistency requires recourse to the drafting history. [FN47]

Based on this history, the reading that renders these two clauses most consistent is one wherein Sierra Leone occupies a position of supremacy over other States in terms of its right and obligation to hold Special Court prisoners. The official United Nations (UN) document concerning the establishment of the Court, the “Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone,” stipulates that “imprisonment shall normally be served in Sierra Leone,” but then considers conditions under which such an arrangement would be undesirable. [FN48] In this account of the textually inconsistent clauses, Sierra Leone is the statutorily preferred location for prisoners, barring exigent circumstances.

The two circumstances that the international community seemed to contemplate in establishing the alternative location provision were security and the rights of the prisoners. Security concerns seem to be the principal reason for establishing the clause. After

stressing that imprisonment shall normally be served in Sierra Leone, the Secretary-General cautions that “particular circumstances, such as the security risk entailed in the continued imprisonment of some of the convicted persons on Sierra Leonean territory, may require their relocation to a third state.” [FN49] Such a concern was well-*662 founded, as the occupants of the central prison in Freetown, the Pademba Road prison, had been freed during two previous coups. [FN50]

The second, rights-based concern stems from the condition of Sierra Leonean prisons. International instruments establish minimum international prison standards. [FN51] Concerns have been expressed that none of the prisons in Sierra Leone currently meet these minimum standards. [FN52] This concern was apparent at the time of the Statute's implementation, when a UN team concluded that the Sierra Leonean prisons “were found to be inadequate in their current state.” [FN53]

However, if the security and integrity of the domestic prisons improve, the Special Court is under a statutory mandate to incarcerate its convicts in Sierra Leone, and the prisoners will benefit from the protections of the Sierra Leonean Constitution. The Special Court Statute states that “[c]onditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court.” [FN54] In other words, the Special Court Statute seems to *663 incorporate domestic law with respect to the confinement of prisoners. Consequently, courts would be bound to apply Sierra Leonean law--including its constitutional protections against imprisonment for a pardoned crime--in disposing of cases brought by prisoners convicted by the Special Court.

In addition to incorporating domestic law with respect to the incarceration of convicts, the Special Court Statute seems to vest the host government with actual control over the prisoners. The Special Court Ratification Act implies that the Sierra Leone Director of Prisons is entrusted with substantial authority over Special Court prisoners: The Act indicates that the Director of Prisons must allow the Special Court to supervise the incarceration of prisoners, requiring that the Director allow communication between the Court and the prisoner, provide information to the Court upon request, and ensure access to the prisoner by Court judges. [FN55] Thus, the Government of Sierra Leone, through the service of the Director of Prisons, would play a significant role in the incarceration of Special Court prisoners.

D. The Writ of Habeas Corpus in Sierra Leonean **Law**

1. The Existence of the Writ under Sierra Leonean **Law**

A substantive analysis of the writ of habeas corpus in Sierra Leone is a complicated and formalistic endeavor. Unlike in most common **law** regimes, the existence and substance of the writ in Sierra Leone cannot be clarified **by** recourse to case **law**. Publication of Sierra Leone court decisions ceased in the 1970s, [FN56] and the unpublished cases were largely destroyed **by** fire in the attacks on Freetown. [FN57] The country's unwritten **law** has thus remained in stasis and, in many respects, “Sierra Leone's legal **development** appears rather placid, if not somnolent.” [FN58]

However, while the legal status of the writ seems unclear at first blush, it becomes apparent upon careful analysis of the Sierra Leonean Constitution and common law. Section 125 of the Constitution stipulates that “[t]he Supreme Court . . . shall have power to issue such directions, orders or writs including writs of habeas corpus . . . as it may consider appropriate for the purposes of *664 enforcing or securing the enforcement of its supervisory powers.” [FN59] The Constitution goes on to maintain that

[t]he High Court of Justice . . . in the exercise of its supervisory jurisdiction shall have power to issue such directions, writs and orders, including writs of habeas corpus . . . as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers. [FN60] The common law of Sierra Leone makes clear that the power of judges to issue the writ confers an absolute right to the writ for those being deprived of liberty in Sierra Leone.

The common law of Sierra Leone prior to the nation's independence mirrors English common law. The Sierra Leone Courts Act of 1965 explicitly incorporated English law, with the date of reception fixed at January 1, 1890. [FN61] The Constitution of Sierra Leone recognizes the validity of this common law, [FN62] and the current common law of Sierra Leone is thought to closely parallel that of English common law prior to 1960. [FN63] Since Sierra Leone has made no effort to alter the writ of habeas corpus by statute, [FN64] non-published and now undocumented cases presumably cannot serve as *665 precedential authority in a common-law system. [FN65] Therefore, it may be presumed both that the writ exists under contemporary Sierra Leonean common law and that English habeas corpus law prior to 1960 may provide a reasonably accurate proxy for current Sierra Leonean law on the subject. [FN66]

Since Sierra Leone has adopted basic elements of English common law, the discretion that the Constitution confers upon judges to grant the writ evinces the existence of a right to the writ. At common law, “[i]f evidence discloses a prima facie case that [a] detention is unlawful, a court is under a duty to issue the writ,” [FN67] and “[t]he [Habeas] Act of 1679 imposes the severest penalties on all persons (including judges) who fail to do their duty in the process.” [FN68] Thus, so long as a judge has the power to issue a writ of habeas corpus, the judge has a duty to do so if a prisoner whose containment is unlawful brings a petition before him. [FN69] It follows that a constitutional provision according Sierra Leonean judges the power to issue writs of habeas corpus necessarily endows them with a duty to issue the writ.

2. The Substance of the Writ in Sierra Leonean Law

The principle underlying the issue of the writ of habeas corpus in English common law--and thus in Sierra Leonean law--“cannot be better expressed than in the words of Blackstone: ‘The King . . . is at all times entitled to have an account, why the liberty of *666 his subjects is restrained.’” [FN70] The remedy is available as of right, [FN71] provided that probable cause is demonstrated before a court. [FN72] Once the writ is issued, it “will be served upon the person having custody of the person detained,” [FN73] who may be bound to release the prisoner. The custodian on whom the court serves the writ is compelled to “appear before the Court or judge to show legal cause for the detention: if he cannot do this the person detained will at once be freed.” [FN74] “Since every detention is prima facie unlawful the burden of proof is on the detainer to justify it.” [FN75]

The respondent's duties under the writ have led commentators to conclude that the individual must be “a person having the capacity to exert control over the subject of the precept.” [FN76] The writ, according to Blackstone, “commands the jailer to bring the applicant before the court on the day and at the time specified ‘together with the day and cause of his being taken and detained. . . .’” [FN77] Because the respondent must both bring the prisoner before the court and be able to physically effect the prisoner's release, it follows that the writ must be brought against the acting custodian of the detainee.

In Sierra Leone, the Government's Director of Prisons satisfies the role of acting custodian over state prisoners, and would thus be a proper respondent to a habeas petition. The Director of Prisons serves as the head of prison administration for the country, [FN78] thus conferring on him sufficient authority to exert control over the prisoner bringing the writ. The propriety of bringing petitions against the Director of Prisons is supported by the Special Court petition brought by Alex Tamba Brima, [FN79] wherein he cited the Sierra Leone Director of Prisons as a respondent in a petition that was intended to conform to Sierra Leonean domestic law on the writ of habeas corpus. [FN80] The right to habeas corpus, thus concretized into *667 Sierra Leonean law, would provide Special Court prisoners who are incarcerated in Sierra Leone with recourse to contest the lawfulness of their detentions, thereby creating the pressing problem described in Part II.

II. The “Habeas Problem” and Unilateral Solutions

The unique contingencies of the Sierra Leonean legal system are such that a clash of its jurisdictional laws with those of the Special Court could devastate the Court's core purpose. Specifically, due to the habeas corpus right accorded to prisoners by the Sierra Leonean Constitution, the conflict between the temporal jurisdiction of the Special Court and the amnesty provision of the Lomé Accord could mandate the release of prisoners detained in Sierra Leone. [FN81] This problem could be solved by unilateral measures that circumscribe the power of the domestic courts of Sierra Leone to secure the protections granted under the Constitution.

This Part identifies the habeas problem and considers unilateral solutions that the Special Court could adopt to address it. Section A explains how the imprisonment of Special Court prisoners in Sierra Leonean prisons could result in their release. Section B addresses the threshold consideration of whether the habeas problem merits a solution. Section C introduces intuitively attractive solutions to the habeas problem that the Special Court could unilaterally adopt, resulting in the diminished authority of the domestic courts of Sierra Leone.

*668 A. The Habeas Problem

The habeas problem follows simply from the legal tensions addressed in Part I. Consider a case in which the Special Court convicts a defendant who received amnesty under the Lomé Accord and, pursuant to Article 22 of the Special Court Statute, orders him to serve his sentence in Sierra Leone. This prisoner will be subject to Sierra Leonean law. The Special Court Statute maintains that “[c]onditions of imprisonment, whether in Sierra Leone or in a third

State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court.” [FN82] This clause ensures that the prisoner will enjoy those legal protections afforded by domestic law, including the writ of habeas corpus.

The prisoner's captor will likewise be subject to Sierra Leonean law. The Special Court Ratification Act indicates that the Sierra Leone Director of Prisons is charged with primary custody over prisoners. [FN83] The Act indicates that the Director of Prisons must allow the Special Court to supervise the incarceration of the prisoners, requiring that the Director allow communication between the Court and the prisoner, provide information to the Court upon request, and ensure access to the prisoner by Court judges. [FN84] The qualification that this information will only be provided upon request indicates that, while the Special Court may have some formal authority over the prisoner, it would not be responsible for the day-to-day control of the prisoner's custody. Moreover, limitations on the Director of Prison's authority are only sensible if the Director has both a custodial responsibility over the prisoner and sufficient discretion over the prisoner's care that explicit exceptions to his actual authority must be stated. Thus, the Director of Prisons presumably has the power to bring the prisoner before the court and physically affect the prisoner's release, and is thus the proper respondent to a habeas petition under Sierra Leonean law. The prisoner would therefore enjoy a right to petition the domestic courts to issue a writ of habeas corpus against his custodian. [FN85]

Once the court issues a writ, [FN86] the custodian would be unable to demonstrate the legality of the prisoner's detention under Sierra *669 Leonean law. The Government of Sierra Leone is bound by international agreement to honor the authority of the Special Court. [FN87] However, this obligation is qualified by the existence of the Constitution as “the supreme law of the land” requiring that “any other law found to be inconsistent with any provision of th[e] Constitution shall, to the extent of the inconsistency, be void and of no effect.” [FN88] While the Special Court may be under an unmitigated duty to apply the law of the Statute, domestic courts are subject to a separate hierarchy of legal obligations.

Under these obligations, the domestic courts are prohibited from recognizing the validity of the Special Court trial insofar as it serves as the basis of detention by the Sierra Leonean government. The Constitution holds that “no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.” [FN89] The Constitution further stipulates that “no person shall be deprived of his personal liberty except as may be authorised by law” except under a discrete set of circumstances, including “in the execution of a sentence or order of a Court whether in Sierra Leone or elsewhere in respect of a criminal offence of which he has been convicted.” [FN90] Thus, the Special Court trial that served as the basis for the prisoner's incarceration would not be recognized under domestic law. Consequently the Director of Prisons would have no constitutional ground for detaining the prisoner. The domestic courts would be compelled to order the prisoner's release.

Though the release of the prisoner without the consent of the Special Court is prohibited by the Special Court Statute, this consideration is trumped by the domestic courts' constitutional obligations. Under the Special Court Statute, “[t]here shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.” [FN91]

However, the incorporation of the common law writ of habeas corpus into the Sierra Leonean Constitution renders this law void under the hierarchy of law by which domestic judges are bound. [FN92] Since one element of the writ is the obligatory release of an individual held illegally, the court would be forced to release the prisoner in spite of the Government's duties under Article 23 of the Statute.

***670** An objection to this analysis could be offered on the grounds that Special Court prisoners are ultimately incarcerated under the authority of the Court, which would not be bound to respond to a habeas petition. The Special Court Statute indicates that imprisonment, while governed by the law of the State of enforcement, is “subject to the supervision of the Special Court.” [FN93] Since the Court does not view itself as owing its existence to the Constitution of Sierra Leone, and “application of the Constitution was limited to Courts created by that Constitution,” it would not be bound by Sierra Leonean constitutional principles. [FN94]

However, this contention is flawed for two reasons. First, the text of the Special Court Statute does not confer immunity upon the Court from the laws of the host state. The statute maintains that the imprisonment of prisoners “shall be governed by the law of the State of enforcement subject to the supervision of the Special Court.” [FN95] The authority conferred upon the Court by the second clause of this phrase, “subject to the supervision,” suggests that the supervisor must honor the laws of the state of enforcement. While the Court may not be subject to the Sierra Leonean Constitution when acting qua adjudicator, it explicitly incorporates domestic law into its sentencing provisions, and would thus be bound by it qua jailor. Since the Special Court implicates the Government of Sierra Leone in the imprisonment of Court convicts--albeit at a subordinate level--the conditions of the prisoner's detainment would be illegal even if one recognized the legal primacy of the Special Court Statute.

Second, the terms of the Special Court's supervision as contemplated in the Special Court Ratification Agreement are limited. Specifically, the Agreement requires that the Director of Prisons allow communication between the Court and the prisoner, provide information to the Court upon request, and ensure access to the prisoner by Court judges. [FN96] While the Agreement cautions that these limitations should not be read to “prevent the Director of Prisons from complying with any other request of the Special Court in relation to the supervision of sentences,” [FN97] they nonetheless suggest a rather modest supervisory capacity in comparison to the practical authority of the Director of Prisons.

***671** The sentencing mechanisms in the Special Court Statute require cooperation between the Court and the State in achieving shared goals. However, these mechanisms are deeply problematic given the conflict of laws between these entities with regard to amnesty. So long as prisoners are sentenced for crimes that the Sierra Leonean Constitution does not recognize as punishable, the State is obliged to allow their release.

B. Does the Habeas Problem Merit a Solution?

The habeas problem would result in the release of individuals convicted for shocking atrocities, [FN98] and thus compels a speedy remedy. However, there exists a counterintuitive argument that Sierra Leone's responsibility to honor amnesties trumps countervailing considera-

tions. “In the absence of a decisive victory, a formal amnesty is likely to be a necessary first step in the process of consolidating peace, the rule of law, and democracy.” [FN99] In the case of the Lomé Accord, civil society participants in the peace process seemed to regard the amnesties as an unfortunate necessity. [FN100] Since the Government of Sierra Leone has never officially renounced the amnesty provisions, [FN101] any steps to undermine them may give pause.

Critics argue that the prospective costs of violating an amnesty outweigh the benefits of punishing those charged by the Special Court. [FN102] On this view, the violation of the amnesties creates disincentives for future parties to engage in peace brokering. [FN103] If the present amnesties are violated, there would be little reason for future parties to believe that amnesties will be honored. Thus, if amnesties have been accorded, they should be upheld regardless of the international compulsion to prosecute perpetrators.

However, the political realities of the Lomé Accord amnesties grossly undermine the merits of this argument. Instead of being viewed as an instrument for peace, the RUF saw the Lomé Accord *672 “as a step toward entrenching their practices of domination and plunder.” [FN104] Despite some guarded support by the public, [FN105] many within Sierra Leone were outraged at the granting of an amnesty that seemed to reward the rebels. [FN106] Thus, the amnesties did little to ensure peace as the rebels refused to comply with the Accord and continued to commit atrocities. [FN107] Such an ill-conceived amnesty is not one that the international community would be well-served to replicate, so the disincentives that violating the amnesty would create for rebels like the RUF to participate in future peace negotiations are not a pressing concern. The precedent that abandoning the amnesties would create thus fails to offer a compelling reason against resolving the habeas problem.

The argument for amnesties is further outweighed by the international community's legal and political duty to punish those who bear the greatest responsibility for conflict in Sierra Leone. The amnesty provisions of the Lomé Accord arguably frustrate Sierra Leone's duty under international law to punish war criminals. [FN108] Because trials “secure preeminent rights and values,” [FN109] international law imposes a general duty upon States to prosecute for atrocious crimes, and governments cannot extinguish their international obligations “merely to appease disaffected military forces or to promote national reconciliation” by granting amnesties. [FN110] In addition to this general duty to prosecute under international law, the Government of Sierra Leone has assumed international obligations in signing the Special Court Agreement that cannot be invalidated by a conflict with its internal law. [FN111] Thus, while the domestic courts of *673 Sierra Leone face a significant constraint on their ability to address the habeas problem because of their duty to honor the State's constitutional principles at the expense of its international agreements, the international community would be justified in taking unilateral steps to prevent convicted war criminals from being released as the result of an unforeseen conflict of laws.

C. Expedient Unilateral Solutions to the Habeas Problem

Adopting a solution is of paramount importance since the habeas problem could under-

mine the principal goal of establishing an international court in Sierra Leone--fulfilling the obligation to punish serious violations of humanitarian law. [FN112] Two approaches present themselves that would resolve the dilemma by limiting the power of the domestic courts of Sierra Leone. As the Special Court could adopt these approaches unilaterally, both solutions are expedient and thus attractive in light of the institution's core mandate.

1. Removing a Habeas Petition Request from Domestic Courts

The Special Court has two legal avenues for stripping national courts of their jurisdiction to consider prisoners' habeas petitions. A legally tenuous, unilateral approach consists of barring the courts of Sierra Leone from reviewing the legality of the Special Court's operations or decisions. [FN113] Article 17 of the Agreement between the United Nations and the Government of Sierra Leone requires that the government "cooperate with all organs of the Special Court at all stages of the proceedings" [FN114] and "comply without undue delay with any request for assistance by the Special *674 Court or an order issued by the Chambers" [FN115] It may be argued that this language should be read broadly as imposing a duty to cooperate that extends "not only to the 'government' in the narrow sense but more broadly also to other branches of the state of Sierra Leone with functions other than executive ones." [FN116] Read in this fashion, the provision would arguably exclude review of Court decisions by the judicial branch of the Sierra Leonean government, [FN117] and thus preclude the judiciary from entertaining habeas motions. Under the Article, the Special Court could simply demand that the domestic courts relinquish their power to hear habeas petitions, framing the demand as a "request for assistance."

In order to avoid this expansive reading of the Agreement whereby any judicial review of Court protocols would be barred, the Special Court may request that the Sierra Leonean courts defer to the competence of the Special Court with respect to a habeas petition. [FN118] The Special Court Statute allows that "[a]t any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence." [FN119] Rule 9 provides that "[w]here it appears that crimes which are the subject of investigations or proceedings instituted in the courts of a State . . . [f]all within Rule 72(B), [t]he Prosecutor may apply for an order or request for deferral." [FN120]

Once a habeas petition is removed from domestic courts through either of these steps, the Special Court could arguably extinguish it without regard for Sierra Leone's constitutional commitments. A habeas petition brought before the Special Court may be deemed to satisfy the common law entitlement to the writ of habeas corpus enshrined in the Constitution. However, unlike domestic courts, for which the Constitution is the supreme law, the Special Court would adjudicate the petition according to the Special Court Statute, under which amnesty is not a bar to prosecution. [FN121] The Special Court could therefore conclude that the protection of pardons in the Sierra Leonean Constitution is void insofar as it conflicts with the temporal jurisdiction specified in Article 1(1) of the *675 Special Court Statute. [FN122]

Even granting its legal validity, however, removing petitions to the Special Court may fail

as a sustainable option for addressing the habeas problem. First, prisoners may simply wait until the Court has disbanded before filing a petition. The Agreement predicating the existence of the Special Court is to “be terminated by agreement of the Parties upon completion of the judicial activities of the Special Court.” [FN123] Once the Court ceases to exist, the prisoner's only recourse for bringing a habeas petition would lie in the domestic courts of Sierra Leone. Thus, a patient prisoner may simply wait out the duration of the Court's existence before protesting the illegality of his confinement.

Second, the Government may simply refuse the Court's request to remove a petition. As a legal matter, any request by the Special Court that a Sierra Leonean court defer to its jurisdiction requires the discretionary cooperation of the Sierra Leonean Government. The Special Court Agreement stipulates that where “pursuant to Article 8 of the Statute of the Special Court, the Attorney-General receives any request for deferral or discontinuance in respect of any proceedings, he shall grant the request, if in his opinion there are sufficient grounds for him to do so.” [FN124] The Attorney-General could make a colorable argument that a Special Court hearing does not satisfy a prisoner's constitutional right to the writ of habeas corpus. Though the current government would presumably be inclined to assist the Court, the Attorney-General of a future government that is hostile to the Court's existence is left with the discretion to refuse a request for deference.

2. Incarcerating Prisoners Outside of Sierra Leone

A quick solution to the habeas problem that lacks the pitfalls associated with removing petitions from the domestic courts consists simply of sentencing Special Court prisoners to confinement outside *676 of Sierra Leone. Such an approach would avoid the legal and temporal complexities associated with removing petitions from domestic courts since, as a legal matter, placing Special Court prisoners beyond the reach of Sierra Leonean law is relatively straightforward. As addressed in Part I.C, the Special Court Statute provides that “[i]mprisonment shall be served in Sierra Leone.” [FN125] However,

[I]f circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States. [FN126]

In spite of the provision's drafting history, [FN127] the nature of the circumstances contemplated in this clause is not specified in any of the materials that have legal effect on the Court's operations. The Special Court would thus have the authority to decide that Sierra Leone's constitutional protections against imprisonment for pardoned crimes constitute a circumstance requiring that imprisonment take place in another State.

However, in view of the putative purposes for the provision, [FN128] placing prisoners outside of Sierra Leone to avoid the country's legal protections would likely be viewed as a troubling abuse of the Special Court's statutory authority. The primary reasons for vesting the Court with the authority to sentence prisoners outside of Sierra Leone seem to stem from the

infrastructural and security deficiencies of the Sierra Leonean prison system, with detention in Sierra Leone being the normal state of affairs. The removal of prisoners from Sierra Leone's geographic jurisdiction for the purpose of avoiding the habeas problem would thus involve manipulating a statute designed to compensate for the weaknesses of the Sierra Leonean criminal system, using it instead to circumvent the country's legal protections of the imprisoned.

*677 III. Upholding the Ideals of Hybrid Tribunals Through Measured Solutions to the Habeas Problem

Notwithstanding any practical difficulties, approaches to the habeas problem that circumscribe the power of the domestic courts of Sierra Leone needlessly sacrifice the ancillary goals of a hybrid tribunal in the service of the primary goal of prosecuting war criminals. Though the habeas problem highlights a disturbing flaw in the institutional design of the Special Court, numerous solutions are available, and selecting among them offers the opportunity for critical reflection on the reasons for the Court's existence. In light of these reasons, the Special Court should be cautious in adopting unilateral solutions to the habeas problem that destroy its unique value as a hybrid institution.

This Part argues that an optimal solution to a conflict of laws between a hybrid court and its host state is one that recognizes both the legitimizing and capacity-building functions of such a court. In the case of Sierra Leone, an optimal solution would thus honor the domestic common law right to the writ of habeas corpus, respect the constitutional obligation of the Sierra Leonean government to honor amnesties, and settle the conflict between the temporal jurisdiction of the Special Court and the amnesty provisions of the Lomé Accord. Section A addresses the ancillary goals of hybrid institutions and considers how the solutions presented in Part II undermine those aims. Section B offers three measured solutions to the habeas problem that respect the legitimating and capacity-building functions of a hybrid tribunal.

A. The Ancillary Goals of Hybrid Tribunals

Hybrid tribunals that “apply general principles of international criminal law to crimes against the peace and security of mankind, and principles of national criminal law to crimes under domestic law” [FN129] have been adopted to address mass atrocities because of their contextual advantages relative to purely international or purely domestic tribunals. [FN130] Specifically, hybrid tribunals have been celebrated for enhancing a court's legitimacy in the eyes of the *678 host nation and fostering post-conflict stability by building the capacity of the host country's legal system. The two expedient and superficially attractive solutions to the habeas problem introduced in Part II undermine these functions of a hybrid tribunal, and should therefore not be adopted if better solutions present themselves.

1. The Legitimizing Function of Hybrid Tribunals

By incorporating domestic law, hybrid tribunals have been celebrated for enhancing the legitimacy of the international community's aims in the eyes of the host nation. [FN131] Hybrid courts often stem from “the need to assuage the nationalistic demands of the local popula-

tion,” which happens “when national authorities regard the administration of justice as an essential attribute of sovereignty.” [FN132] In the case of Sierra Leone, the nation has a rich tradition of jurisprudence stemming from the English common law, despite its legal stagnancy in the last few decades. The incorporation of domestic law into the Special Court Statute may be seen as an international recognition of this tradition. However, if the host country sees the Court as arrogating responsibility to itself in order to flout domestic legal traditions, this spirit of cooperation may vanish.

Beyond being normatively unpalatable, abandoning the legitimating goal of a hybrid tribunal can have dire practical effects for the institution's operations. For example, consider the option of removing petitions from domestic courts as a solution to the habeas problem. By circumventing the fundamental constitutional values of the host nation, such a solution may offend the State of Sierra Leone and thus undermine the cooperation necessary to ensure the effective detention of prisoners. Even if the Court unilaterally barred the Sierra Leonean courts from reviewing its decisions, the courts may simply violate the Agreement and refuse to relinquish their authority, citing their obligation to honor the Constitution of Sierra Leone. Such a refusal could spark a political crisis with respect to the relationship between the United Nations and the Government of Sierra Leone. This in turn would force the international community to decide whether it would enforce the sentences of Special Court *679 prisoners against the wishes of the host government by using force or coercion to ensure that convicted criminals are not released by domestic courts. When it manifested a commitment to apply national law, the United Nations enjoyed the enthusiastic cooperation of the Government of Sierra Leone, as evidenced by the Agreement Establishing the Special Court. [FN133] However, by requiring domestic courts to relinquish their authority to adjudicate the constitutional issues of the host nation, this necessary spirit of cooperation may be lost.

Any approach to the habeas problem that could sacrifice the legitimating function of the Court should thus be avoided if possible. While a unilateral solution may be an alluring remedy against the release of prisoners, its costs are heavy. A sustainable procedural solution to the habeas problem would require the cooperation of the Sierra Leonean government and should rely upon legal doctrine that can be applied **by** the domestic courts.

2. The Capacity-Building Function of Hybrid Tribunals

Solutions to a conflict of **laws** such as the relocation of prisoners undermine a further foundational purpose of mixed courts: the **development** of the host nation's legal capacity. The Special Court, for example, exists in part to help strengthen the legal system in Sierra Leone. [FN134] Pierre Courin, a Justice of the Court, has contended that “[t]he main objective of the court is to reestablish the rule of law in this country and then show to the people of Sierra Leone that justice can be done in this country.” [FN135] Optimism has been expressed that the structure of the Special Court will enable Sierra Leonean legal professionals to use and develop principles pertaining to international human rights law “not only within the hybrid court but perhaps in future cases in domestic Sierra Leonean courts as well.” [FN136] In this respect, the hybrid model of the Court is preferable to a purely international tribunal in that the international humanitarian law norms are more likely to penetrate into Sierra Leonean legal culture than norms applied in a remote tribunal by foreigners.” [FN137]

***680** By adopting sentencing principles that are hostile to the legal traditions of Sierra Leone, the Special Court would abandon this mandate. Regardless of the Court's legal evolution, the domestic courts of Sierra Leone are bound to apply law according to the Constitution, "and shall not be subject to the control or direction of any other person or authority." [FN138] However, the decision to incarcerate prisoners in alternative locations in order to avoid the host nation's constitutional protections undermines, rather than develops, the legal principles articulated in the Sierra Leonean Constitution. Placing prisoners outside of the territorial jurisdiction of Sierra Leone to avoid conflicts of law thus manifests disrespect for the rights protections that are established in domestic law and fails to create precedents regarding how to best reconcile the international obligations and constitutional protections of the nation.

B. Solutions to the Habeas Problem that Honor the Ideals of a Hybrid Court

An effective solution to the habeas problem must be efficient and practicable in order to preserve the core mandate of the Special Court. However, in view of the legitimating and capacity-building function of hybrid tribunals, a measured approach to the habeas problem must also respect the constitutional prerogatives of the host government and settle the conflict between the temporal jurisdiction of the Special Court and the amnesty provision of the Lomé Accord. Three categories of such approaches present themselves.

1. Doctrinal Approaches

The most attractive resolution to the amnesty problem consists in challenging the constitutional validity of the amnesty provision of the Lomé Accord. Extensive attention has been focused on the Secretary-General's reservation to the amnesties, which served as the basis for the temporal jurisdiction of the Special Court. However, it may also be questioned as to whether the President of Sierra Leone possessed the authority to pardon all participants in the conflict prior to their being held accountable for atrocities that they may have committed, and whether the amnesty is still valid after the abrogation of the Lomé Agreement by the RUF. [FN139]

***681** In granting the Lomé amnesties, the President may have stretched beyond his constitutional powers. The blanket amnesty provision maintains that "the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement." [FN140] However, it is unclear whether the President of Sierra Leone is vested with the ability to make this promise. [FN141] The Constitution of Sierra Leone endows the President with the power to "grant any person convicted of any offence against the laws of Sierra Leone a pardon, either free or subject to lawful conditions." [FN142] However, it "does not purport to endow the President with the ability either to grant a pardon before conviction or to guarantee anyone that criminal prosecutions will not be brought before them." [FN143] The amnesty provisions of the Lomé Accord could thus arguably be unconstitutional and therefore invalid.

As an alternative doctrinal approach, the amnesty provisions of the Lomé Accord may be interpreted so that they are consistent with both Sierra Leone's constitutional obligations and

its international commitments under the Special Court Statute. The amnesty provisions stipulate that combatants shall receive “pardon and reprieve . . . in respect of anything done by them in pursuit of their objectives.” [FN144] Atrocities that were committed against civilians could plausibly be declared beyond the scope of a legitimate military objective; if so, the Lomé amnesties would not protect their perpetrators from prosecution. [FN145] While this argument has not been raised by those seeking to break the amnesty agreement, [FN146] it may merit scrutiny.

The principal advantage of these doctrinal approaches is that they resolve a troublesome conflict of laws by developing, rather than stifling, constitutional jurisprudence in Sierra Leone. The clash between the amnesty provisions of the Lomé Accord and the temporal jurisdiction of the Court demonstrates an embarrassing tension between the needs to punish criminals for mass atrocities and to rebuild the Sierra Leonean legal system. A careful and textually-grounded analysis of the constitutional obligations of the State can *682 work to resolve this clash while respecting the legal tradition of Sierra Leone.

This approach may be adopted either by the domestic courts or by the Special Court, if it chooses to remove a habeas petition from the national court system. If the domestic courts of Sierra Leone were to dispose of a habeas petition in this fashion, it would serve to develop the nation's constitutional jurisprudence and align its constitutional commitments with its political needs. If the approach were adopted by the Special Court in removing a habeas petition from the domestic courts, it could counterbalance the affront felt by the host state by manifesting respect for the constitutional obligations that are triggered by the sentencing provisions in Article 22 of the Special Court Statute. The Court need not retract from its position that the force of the Constitution “is only limited to the Courts created by the 1991 Constitution of Sierra Leone.” [FN147] The Court would instead recognize that the Special Court Statute incorporates domestic law with respect to the detainment of prisoners, and that habeas petitions are thus owed a constitutional analysis. Regardless of which court adopts the doctrinal approach, it would serve to resolve a worrisome legal tension and develop Sierra Leone's legal infrastructure.

2. Political Approaches

The international community could also encourage the Government of Sierra Leone to resolve the issue politically through two approaches. [FN148] First, the Government could renounce the amnesty provisions of the Lomé Accord. International law concerning the invalidation of bilateral treaties would allow the Government to renounce the pardons without shame. Because the Lomé Accord was a bilateral agreement between the Government of Sierra Leone and non-state rebels, with the UN signing only as a “moral guarantor,” [FN149] it is sensibly read as creating no international *683 obligations on the part of the Sierra Leonean government. [FN150] However, even if the participation of the United Nations in the Accord was deemed to create a treaty governed by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the Government of Sierra Leone would be entitled to withdraw from the Agreement. Although the Accord required the disarmament of both the RUF and the forces loyal to the Government of Sierra Leone, [FN151] the rebels refused to comply and widespread atrocities continued to oc-

cur. [FN152] The Vienna Convention stipulates that a “material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.” [FN153] Therefore, the Government may simply terminate the treaty and eliminate the amnesty problem.

However, the political solution may prove problematic as the trials for Special Court defendants are already underway. The Constitution holds that “no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.” [FN154] At the time that the trials for the Special Court defendants began, the Government of Sierra Leone had not renounced the amnesty provisions of the Lomé Accord. [FN155] Thus, it may be argued that, since the pardon was in effect while the trial was occurring, the trial is nevertheless void. Consequently, this political approach is not as doctrinally safe as invalidating the amnesties on constitutional *684 grounds.

3. A Procedural Approach

Finally, the prosecutor of the Special Court could drop those charges in the indictments concerning international crimes committed prior to the signing of the Lomé Accord. The indictments currently in force cite the commission of international crimes committed subsequent to July 7, 1999. [FN156] By concentrating the prosecutorial efforts on these charges, the conflict between the Lomé Accord and the temporal jurisdiction of the Court would be rendered moot.

However, this approach may be both politically unrealistic and procedurally undesirable. The date of the Lomé Peace Agreement was deemed politically unacceptable for the commencement of the Court's temporal jurisdiction, particularly to the United Nations in light of its disclaimer upon signing the Lomé Agreement that amnesties would not apply to serious violations of international law. [FN157] Indictments have already been submitted against the defendants in the Special Court. Thus, the prosecutor's time and the resource commitment devoted to addressing the charges cited would provide him with strong disincentives from abandoning his case and renders the approach even more politically unpalatable than before. Furthermore, a constructive limitation on the temporal jurisdiction of the Court by the prosecutor is a politically surreptitious way of handling the conflict of laws between the international community and the host country, and would do little to honor the principles that justify the existence of the hybrid court.

Conclusion

In light of the important legitimating and capacity-building functions of the Special Court, an ideal solution to the habeas problem is one that honors the legal institutions of Sierra Leone and develops the domestic law. While a number of measured solutions to the problem present themselves, doctrinal solutions are the most faithful to the aspirational values that the Court embodies. Through *685 taking jurisprudential steps to clarify the scope of either Lomé amnesties or the Sierra Leonean Executive's constitutional power, the habeas problem can be resolved even while enhancing the legitimacy of Sierra Leone's legal structure.

Beyond the narrow issue that faces Sierra Leone, however, the habeas problem of the Special Court highlights the structural perils that are faced by any hybrid tribunal. When a hybrid institution blends domestic law into its legal structure, the consequences of a legal conflict between the court and the host nation may threaten to undermine its most central functions. Thus, in establishing future hybrid tribunals, [FN158] the international community should be circumspect in adopting terms of creation that are obviously in conflict with domestic legal obligations.

However, unforeseen dilemmas in the **development** of a hybrid court cannot be remedied *ex ante*, [FN159] and measured solutions to such problems require an understanding of the functions and purposes of hybrid institutions. The primary purpose of an international court is of course to ensure that all necessary steps are taken to fulfill the international obligation to punish mass atrocities. However, decision-makers must also be mindful of the advantages of a hybrid court *vis-à-vis* purely international and domestic tribunals, and endeavor to ensure that those advantages are not abandoned by the solution that one adopts. Thus, when a modest and doctrinally-based solution to a conflict of law problem presents itself, it should be favored over a solution that aggrandizes the court's power at the expense of the legal prerogatives of the host nation. This modest approach serves to preserve the legitimacy of the court in the eyes of the nation, as well as develop the legal infrastructure of the host state.

[FN1]. News Briefing, Donald Rumsfeld, U.S. Secretary of Defense (Feb. 12, 2002), available at http://www.defenselink.mil/transcripts/2002/t02122002_t212sdv2.html.

[FN2]. The Special Court was officially established by a bilateral agreement between the Government of Sierra Leone and the United Nations that was signed in the Sierra Leonean capital, Freetown, on January 16, 2002. Act No. 9, Special Court Agreement, 2002 (Ratification Act), reprinted in Supplement to the Sierra Leone Gazette Vol. CXXXIII, No. 22, at 2 (Apr. 25, 2002) [hereinafter Special Court Ratification Act]. For the full text of the agreement, see Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone [hereinafter Special Court Agreement], sched. to Special Court Ratification Act. The agreement was motivated by a Security Council Resolution requesting that the Secretary-General negotiate an agreement with the Government of Sierra Leone to create an independent special court. S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000). Its mandate consists of prosecuting “persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law” in connection to the conflict in Sierra Leone. Special Court Agreement, *supra*, pmbl. For further information on the Court's establishment, see generally Celina Schocken, Note, [The Special Court for Sierra Leone: Overview and Recommendations](#), 20 *Berkeley J. Int'l L.* 436 (2002); Nancy Kaymar Stafford, [A Model War Crimes Court: Sierra Leone](#), 10 *Ilsa J. Int'l & Comp. L.* 117 (2003); Nsongurua J. Udombana, [Globalization of Justice and the Special Court for Sierra Leone's War Crimes](#), 17 *Emory Int'l L. Rev.* 55 (2003).

[FN3]. See generally Daphna Shraga, [Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdiction](#), in *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo*,

and Cambodia 15, 16 (Cesare P.R. Romano, André Nollkaemper & Jann K. Kleffner eds., 2004) (noting that the mixed tribunals for Sierra Leone and Cambodia have inspired the creation of mixed jurisdictions in East Timor, Kosovo, and Bosnia and Herzegovina); Stafford, *supra* note 2, at 142 (arguing that “[t]he hybrid model of the Special Court should be the standard for future war crimes tribunals”); Laura K. Dickinson, *The Promise of Hybrid Courts*, 97 *Am. J. Int'l L.* 295 (2003) (arguing that hybrid courts are an important complement to international and local justice, using the Special Court of Sierra Leone as an example).

[FN4]. Bert Swart, *Internationalized Courts and Substantive Criminal Law*, in *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* 291, 305 (Cesare P.R. Romano et al. eds., 2004).

[FN5]. See Shraga, *supra* note 3, at 15.

[FN6]. In identifying the habeas problem, this Note highlights a novel issue. While the writ of habeas corpus in Sierra Leonean law and the potential problems that arise from it point to a serious flaw in the institutional design of the Special Court, no practitioners or scholars seem to have addressed this problem in published work. Since no defendants have yet been convicted by the Special Court, none of them have had the occasion to bring a habeas petition before the Government of Sierra Leone challenging the legality of their imprisonment. Nor have any individuals challenged the legality of their pre-conviction detainment in domestic courts as of January 11, 2005. See John R.W.D. Jones et al., *The Special Court for Sierra Leone: A Defence Perspective*, 2 *J. Int'l Crim. Just.* 211, 219 (2004) (“[T]he question arises as to whether a person detained by the Special Court could apply for habeas corpus before the national courts of Sierra Leone. So far, this has not been done.”); E-mail Interview with Peter Andersen, Spokesman for the Special Court of Sierra Leone (Jan. 4, 2005) (confirming that no prisoners have applied for a writ before the national courts as of January 4, 2005) (on file with author). One defendant, Alexander Tamba Brima, petitioned the Special Court for the writ of habeas corpus. See *Prosecutor v. Tamba*, Case No. SCSL-2003-06-PT-05, *Ruling on the Application for the Issue of a Writ of Habeas Corpus Filed by the Applicant* (2003) (Trial Ct. of the Special Ct. of Sierra Leone) [hereinafter *Brima*, *Trial Court Habeas Petition*]. However, Brima challenged the legality of his detention on different grounds than those addressed by this Note, contending that his detention was illegal because his identity was mistaken with that of the person listed in the indictment, because no valid authority served a warrant to him on the day of his arrest, and because his indictment is defective under Article 47 of the Court's Rules of Procedure and Evidence. *Brima*, *Trial Court Habeas Petition*, *supra*, at 3. Therefore, this petition is of limited relevance to the central thesis of this Note. For further discussion of the *Brima* Habeas Petition, see Jones et al., *supra*, at 219; Jann K. Kleffner & André Nollkaemper, *The Relationship Between Internationalized Courts and National Courts*, in *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* 359, 370 (Cesare P.R. Romano et al. eds., 2004). While any attempt to explain why this issue has not heretofore been addressed is purely speculative, two factors that may contribute to its lack of treatment include the absence of domestic case law in Sierra Leone and the fact that no defendants have been prosecuted by the Special Court as of yet. As the habeas issue has not been sufficiently addressed in prior scholarship, portions of this Note rely heavily on primary sources.

[FN7]. See generally Daniel Bergner, *In the Land of Magic Soldiers: A Story of White and Black in West Africa* (2003) (offering a narrative account of the conflict in Sierra Leone); Elizabeth M. Evenson, [Truth and Justice in Sierra Leone: Coordination between Commission and Court](#), 104 *Colum. L. Rev.* 730, 733-37 (2004) (providing a concise account of the conflict); Daniel J. Macaluso, [Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lomé Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone](#), 27 *Brook. J. Int'l L.* 347, 349-52 (2001-2002) (providing a background account of the conflict as related to the Lomé Accord); Babafemi Akinrinade, [International Humanitarian Law and the Conflict in Sierra Leone](#), 15 *Notre Dame J.L. Ethics & Pub. Pol'y* 391, 426-34 (2001) (providing a graphic account of soldiers' abuses against civilians in Sierra Leone and addressing their culpability under international law).

[FN8]. See Macaluso, *supra* note 7, at 348; Physicians for Human Rights, *War Related Sexual Violence in Sierra Leone* 21 (2002), available at http://www.phrusa.org/research/sierra_leone/report.html [hereinafter Physicians for Human Rights Report] (providing a background account of the Lomé Peace Accord).

[FN9]. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999, Annex to Letter dated July 12, 1999 from the Charge D'Affaires Ad Interim of the Permanent Mission of Togo to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1999/777 (1999) [hereinafter Lomé Peace Accord]; see Macaluso, *supra* note 7, at 348 (“Both sides signed the third, and most comprehensive, peace agreement, on July 7, 1999, in the Togolese capital of Lomé.”).

[FN10]. See Evenson, *supra* note 7, at 735, 737.

[FN11]. *Id.* at 737; Karen Gallagher, Note, [No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone](#), 23 *T. Jefferson L. Rev.* 149, 149-71 (2000) (providing a detailed account of the terms of the amnesty provisions of the Lomé Accord, as well as the political background and response).

[FN12]. Lomé Peace Accord, *supra* note 9, art. IX, § 3.

[FN13]. *Id.* art. IX, § 2. Article IX, § 1 of the Lomé Peace Accord further secures an absolute pardon and reprieve specifically for RUF leader Foday Sankoh, arguably the “worst war criminal in the world.” Bergner, *supra* note 7, at 38 (noting the views of the human rights community about Sankoh).

[FN14]. Macaluso, *supra* note 7, at 350-51.

[FN15]. Physicians for Human Rights Report, *supra* note 8, at 21 (noting isolated acts of violence against civilians by both sides through July 2001).

[FN16]. See Jones et. al, *supra* note 6, at 222 (“Whatever the United Nation's position in 1999 or later, the Government of Sierra Leone has never renounced the Lomé amnesty. Nor indeed has the government sought to prosecute any persons for acts within the amnesty's time frame in its national courts.”). Cf. William A. Schabas, [Amnesty, the Sierra Leone Truth and Recon-](#)

ciliation Commission and the Special Court for Sierra Leone, 11 U.C. Davis J. Int'l L. & Pol'y 145, 153 (2004) (arguing that, in requesting the establishment of the Special Court, "the Government of Sierra Leone 'reassessed' its position with respect to amnesty" (quoting Solomon Berewa, Addressing Impunity Using Divergent Approaches: The Truth and Reconciliation Commission and the Special Court, in Truth and Reconciliation in Sierra Leone 56 (2001))). In support of his proposition, Schabas cites an address by Solomon Berewa, the Vice-President of Sierra Leone. See Berewa Solomon, Addressing Impunity Using Divergent Approaches: The Truth and Reconciliation Commission and the Special Court, available at <http://www.sierra-leone.org/trcbook-solomonberewa.html>. However, in this address, Vice-President Berewa states only that the Government of Sierra Leone "reassessed [its] position" that "with peace at hand, the wounds of the war would be healed through reconciliation. Id. In other words ... that truth was as good as, or at least, an adequate substitute for justice." Id. The Vice-President did not indicate that the Government of Sierra Leone "reassessed" the validity of the Lomé Amnesties, and his address is clearly consistent with the view that individuals should be punished for those actions committed subsequent to the signing of the Lomé Peace Accord. In fact, Vice-President Berewa explicitly notes that "[a]nother aspect of the Lomé Peace Agreement is that the amnesty granted by that Agreement was only in respect of violations of Sierra Leone domestic law before the 7th July 1999, and not after that date." Id.

[FN17]. The United Nations signed the Lomé Peace Accord not as a party, but as a "moral guarantor." See Schocken, *supra* note 2, at 441.

[FN18]. In signing the Lomé Peace Accord, the Special Representative of the U.N. Secretary-General appended to his signature a handwritten disclaimer that amnesty provisions of the agreement "shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international law." The Secretary-General, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, delivered to the Security Council, P 23, U.N. Doc. 2/2000/915 (Oct. 4, 2000) [hereinafter SG Report]. The reservation was later endorsed by the Security Council in its Resolution 1315 (2000). S.C. Res. 1315, U.N. Doc. S/RES/1314 (Mar. 15, 2002). See Shraga, *supra* note 3, at 31. This reservation was critical to the establishment of a Special Court with temporal jurisdiction over pardoned crimes, and Article 10 of the Statute of the Special Court explicitly invalidated any amnesties for international crimes falling within the Court's jurisdiction. Statute of the Special Court for Sierra Leone, art. 10 (Aug. 14, 2000) [hereinafter Special Court Statute]; see also sched. to Special Court Ratification Act, *supra* note 2 ("An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."); Nicole Fritz & Alison Smith, [Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone](#), 25 *Fordham Int'l L.J.* 391, 424 (2001) ("Indeed, the Special Court is premised on [the] idea, namely that people are suspected of having committed crimes under international law must be held accountable for their actions, amnesty or no amnesty.").

[FN19]. Special Court Statute, *supra* note 18, art. 1, § 1 ("The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders

who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”). By setting this start date for the conflict, the Court deliberately affirmed its rejection of the amnesty provisions of the Lomé Accord. See Alison Smith, *Sierra Leone: The Intersection of Law, Policy, and Practice*, in *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* 125, 130 (Cesare P.R. Romano et al. eds., 2004) (arguing that March 1991, the start of the conflict, and July 7, 1999 served as two more obvious dates for commencement, and starting the temporal jurisdiction on the date of the failed Abidjan Agreement was an unfortunate political compromise).

[FN20]. See *Prosecutor v. Samuel Hinga Norman, Moiunina Fofana, Allieu Kondewa*, Case No. SCSL-04-14-T (June 15, 2005); *Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao*, Case No. SCSL-2004-15-PT (Feb. 5, 2004); *Prosecutor v. Alex Tamba Brima et al.*, SCSL-2004-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Kanu (May 6, 2004); *Prosecutor v. Charles Taylor*, SCSL-2003-01-I, Decision on Immunity from Jurisdiction (May 31, 2004).

[FN21]. *Prosecutor v. Kallon*, Case No. SCSL-2003-07-PT, Preliminary Motion based on lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (June 16, 2003); *Prosecutor v. Kamara*, Case No. SCLS-2003-10-PT, Application by Brima Bazzy Kamara in respect to Jurisdiction and Defects in Indictment (June 16, 2003). The Special Court declined to treat the Lomé Agreement as an international instrument on the grounds that:

(1) The role of the U.N. as a mediator of peace, the presence of a peace-keeping force which generally is by consent of the State and the mediation efforts of the Secretary-General cannot add up to a source of obligation to the international community to perform an agreement to which the U.N. is not a party ... (2) the U.N. assumed no legal obligations through its role as a moral guarantor to the agreement, and (3) the RUF was a non-state party with no legal personality under international law, and therefore (4) the agreement created neither rights nor obligations that are capable of being regulated under international law.

Prosecutor v. Kallon, Case No. SCSL-2004-15-AR, Decision to Challenge Jurisdiction: Lomé Accord Amnesty, PP 36-42 (Mar. 13, 2004). In articulating this holding, the Special Court offered no framework for evaluating the substantive legitimacy of the pardons under international law, provided that they are agreed upon in valid international instrument, or under domestic law.

[FN22]. *Prosecutor v. Kallon*, P 65.

[FN23]. Sierra Leone Const. ch. 12, §1.

[FN24]. Special Court Ratification Act, *supra* note 2, at “Memorandum and Reasons.”

[FN25]. Sierra Leone Const. ch. 5, § 40, cl. 4(b) (“[T]he President shall ... be responsible ... for ... the execution of treaties, agreements or conventions in the name of Sierra Leone.”). Sierra Leone's commitment to incorporate the Lomé Accord into law is further evinced by the portion of the Accord that calls upon the government to ensure that the Constitution is consistent with the Accord and, if necessary, amend the former document to reconcile it with the lat-

ter. Lomé Peace Accord, *supra* note 9, art. 10 (“Review of the Present Constitution”).

[FN26]. Sierra Leone Const. ch. 13, § 171, cl. 15 (“This Constitution shall be the supreme law of Sierra Leone and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void and of no effect.”).

[FN27]. *Id.* ch. 3, § 23, cl. 9. It should be noted that the provision affords an exception allowing for the trial of individuals previously tried under military “service law” that applies to a prior sentence in the provision protecting against double jeopardy. *Id.* It also states:

Provided that nothing in any law shall be held to be inconsistent with or in contravention of this subsection by reason only that it authorises any court to try a member of a defence force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under service law; but any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under service law.

Id. The qualification is not relevant to the matters that this Note addresses.

[FN28]. Lomé Peace Accord, *supra* 9, art. 9, § 2.

[FN29]. *Id.* art. 9(2).

[FN30]. Shraga, *supra* note 3, at 31-32 (arguing that the Court adopted a “dual approach ... to the question of amnesty and its validity depending on the nature of the crimes, the time of their commission, and the jurisdiction before which they would be prosecutable. Accordingly, amnesty would bar the prosecution of all crimes, whether national or international, before the national courts of Sierra Leone; it would also bar the prosecution before the Special Court of common crimes committed before 1999. Amnesty, however, would not bar prosecution before the Special Court of international crimes committed at any time within its temporal jurisdiction, and of common crimes committed after 1999”).

[FN31]. See Fritz & Smith, *supra* note 18, at 391, 412 (contending that “the Statute acknowledges that amnesties will be valid in respect of the included provisions of Sierra Leone Law”); Macaluso, *supra* note 7, at 368.

[FN32]. Special Court Statute, *supra* note 18, art. 10.

[FN33]. See Fritz & Smith, *supra* note 18, at 412 n.102.

[FN34]. Sierra Leone Const. ch. 3, § 23, cl. 9 (“no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence”).

[FN35]. For detailed support of this claim, see *infra* Part II.C.

[FN36]. See **Francis** Bennion, *Statutory Interpretation: A Code* 942 (Butterworths 4th ed. 2002); Jim Evans, *Statutory Interpretation: Problems of Communication* 303 (Oxford University Press 1988).

[FN37]. Bennion, *supra* note 36, at 942 (quoting Sir James Hannen P's dicta in *Bloxam v.*

Favre (1883) 8 P.D. 101, 104 (U.K.)).

[FN38]. Sir Rupert Cross, *Statutory Interpretation* 177 (Butterworths 3rd ed. John Bell & Sir George Engle, 1995).

[FN39]. Cross, *supra* note 38, at 178.

[FN40]. Sierra Leone Const. ch. 3, § 17, cl. 1.

[FN41]. *Id.* ch. 3, § 22, cl. 9.

[FN42]. Bennion, *supra* note 36, at 831.

[FN43]. The trials for indicted individuals are still in process. See The Special Court for Sierra Leone, <http://www.sc-sl.org>.

[FN44]. Article 31 of the Vienna Convention provides the framework for this interpretation. The Special Court was officially established by a bilateral agreement between the Government of Sierra Leone and the United Nations. Special Court Agreement, *supra* note 2. This agreement constitutes a treaty under Article 2, § 1(a)(i) of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (Mar. 21, 1986). Official Records of the U.N. Conference on the Law of Treaties between States and International Organizations or Between International Organizations, vol. II, U.N. Sales No. E.94.V.5 [hereinafter Vienna Convention]. Article 31 of the Convention maintains that “[a] treaty shall be interpreted in good faith ... in the light of its object and purpose.” *Id.* art. 31.

[FN45]. Special Court Statute, *supra* note 18, art. 22, § 1 (emphasis added).

[FN46]. *Id.*

[FN47]. In determining the meaning of ambiguous terms in view of a treaty's object and purpose, it is appropriate under the Vienna Convention to take recourse to documents produced by one of the parties and recognized by the other through the course of the drafting history: “The context for the purpose of the interpretation of a treaty shall, comprise, in addition to its text ... any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument of that treaty.” Vienna Convention, *supra* note 44, art. 31, § 2(b).

[FN48]. SG Report, *supra* note 18, para. 49.

[FN49]. *Id.*

[FN50]. Sierra Leone Coup Leaders Seal Country's Borders, *The Guardian* (London), May 30, 1997, at 16 (“Major Koromah, aged 33, was among those freed from Pademba Road prison in Freetown early on Sunday, as the coup started.”); More Light Shed on Sierra Leone's New Leader, the Xinhua News Agency, May 26, 1997 (“koroma [sic] was freed from the pademba road prison [sic] in freetown [sic] on early sunday [sic] by the coupists, together with hun-

dreds of inmates in the prison.”); Sierra Leone: Ecomog Commander Deplores End of US Aid for his Force, BBC Monitoring Africa (citing Sierra Leone News Website in English (Jan. 13, 1999)), Jan. 15, 1999 (“The warning followed reports that prisoners, including soldiers loyal to the former junta, who were freed from Pademba Road Prison, had been trying to leave Freetown by boat.”).

[FN51]. The United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/6/1, annex I, A (1956), approved July 31, 1957, E.S.C. Res. 663(c), 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended May 13, 1977, E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977); the United Nations Standard Minimum Rules for Non-Custodial Measures, G.A. Res. 45/110, U.N. Doc. A/RES/45/110 (Dec. 14, 1990); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988); G.A. Res. 40/146, U.N. Doc. A/RES/40/146 (Dec. 13, 1985); G.A. Res. 40/32, U.N. Doc. A/RES/40/32 (Nov. 29, 1985); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990); the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Jan. 3, 1976); the International Labour Organization (I.L.O.) Fundamental Conventions on Forced Labor, comprised of the Convention Concerning Forced or Compulsory Labor, I.L.O. Conv. No. 29, 39 U.N.T.S. 55 (adopted on June 28, 1930, entered into force May 1, 1932); Forced Labour (Indirect Compulsion) Recommendation, 1930 (No. 35); and Convention Concerning Abolition of Forced Labour, I.L.O. Conv. No. 105, 320 U.N.T.S. 291 (entered into force Jan. 17, 1959); the [Vienna Convention on Consular Relations](#), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; and the Council of Europe Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, 35 U.S.T. 2867, 22 I.L.M. 530.

[FN52]. E-mail Interview with Peter Andersen, *supra* note 6.

[FN53]. SG Report, *supra* note 18, para. 62.

[FN54]. Special Court Statute, *supra* note 18, art. 22, § 2.

[FN55]. Special Court Ratification Act, *supra* note 2, art. 34, § 2 (emphasis added).

[FN56]. Smith, *supra* note 19, at 135.

[FN57]. *Id.* at 135 n.33.

[FN58]. Foreign Law Database on Sierra Leone, Introductory Abstract, <http://www.foreignlawguide.com> (last visited Feb. 15, 2006).

[FN59]. Sierra Leone Const. ch. 7, § 125.

[FN60]. *Id.* ch. 7, § 134.

[FN61]. Foreign Law Database on Sierra Leone, *supra* note 58.

[FN62]. Sierra Leone Const. ch. 12, § 170, cl. 1. (“The law of Sierra Leone shall comprise ... the common law.”). The Constitution defines this common law as “the rules of law generally known as the common law, the rules of law generally known as the doctrines of equity, and the rules of customary law including those determined by the Superior Court of Judicature.” Id. ch. 12, § 170, cl. 2. Further ensuring the validity of the English common law system at least until 1890, the Constitution stipulates that “the existing law shall, save as otherwise provided in subsection (1), comprise the written and unwritten laws of Sierra Leone as they existed immediately before the date of the coming into force of this Constitution.” Id. ch. 12, § 170, cl. 4.

[FN63]. Foreign Law Database on Sierra Leone, *supra* note 58.

[FN64]. The Constitution mandates that any statutes that the legislature implements must be published in order to achieve force of law. Indeed, it states:

Every statutory instrument shall be published in the Gazette not later than twenty-eight days after it is made or, in the case of a statutory instrument which will not have the force of law unless it is approved by some person or authority other than the person or authority by which it is made, not later than twenty-eight days after it is approved, and if it is not so published it shall be void from the date on which it was made.

Sierra Leone Const. ch. 12, § 170, cl. 6.

There are no published provisions in acts reasonably relating to substantive and procedural criminal law that would alter the common law right to the writ of habeas corpus; i.e., there are no modifications to the common law writ of habeas corpus in the following pieces of legislation: The Human Rights Commission of Sierra Leone Act (2004); The Special Court Agreement, (Ratification) Act (2002); The National Security and Central Intelligence Act (2002); The Truth and Reconciliation Act (2000); The Criminal Procedures Act (1965); Prevention of Cruelty to Children (1926).

[FN65]. This Note assumes that no radical changes in habeas corpus jurisprudence occurred in Sierra Leone between the years of 1960 and 1970, during which time cases may have been published, but are not available.

[FN66]. Whether Sierra Leonean law on the writ reflects the English common law as of 1890, the point at which the law of England is incorporated by statute, or English common law as of 1960, the year of independence, is of little import. The last limited change to the writ in England occurred upon the enactment of the Administration of Justice Act of 1960. Badshah K. Mian, *English Habeas Corpus: Law, History, Politics* 129 (1984). Sierra Leone had already adopted English common law at this point. However, notwithstanding this change, habeas corpus is a writ that has “been little altered since ancient times.” Phillip S. James, *Introduction to English Law* 174 (Butterworths 4th ed. 1959) (The fourth edition is selected for being closest to the time at which Sierra Leone incorporated English law; the same claim is also made in later editions).

[FN67]. Terrence Ingman, *The English Legal Process* 168 (Oxford University Press 9th ed. 2002).

[FN68]. Edwards Jenks, *The Book of English Law* 139 (John Murray (Publishers) Ltd. 5th ed. 1953) (emphasis added). The author of this Note selected this edition for being the one published closest to the date at which the English common law was adopted by Sierra Leone.

[FN69]. As further support for this claim of right under common law, consider that the writ of habeas corpus is the only writ addressed under the chapter entitled "Rights of the Subject," in Edwards Jenk's book. See *id.* at 138.

[FN70]. James, *supra* note 66, at 173 (quoting Blackstone).

[FN71]. Ingman, *supra* note 67, at 168.

[FN72]. Mian, *supra* note 66, at 78.

[FN73]. James, *supra* note 66, at 173.

[FN74]. *Id.* at 173-74.

[FN75]. Ingman, *supra* note 67, at 168.

[FN76]. William F. Duker, *A Constitutional History of Habeas Corpus* 13 (1980).

[FN77]. Lord Justice Simon Brown, Administrative Law Bar Association, Annual Lecture: Habeas Corpus--A New Chapter (Nov. 23, 1999) available at <http://www.adminlaw.org.uk/publications/habeas-corpus.htm> (quoting William Blackstone, Commentaries).

[FN78]. Commonwealth Human Rights Initiative website, <http://www.humanrightsinitiative.org/programs/aj/prisons/statistics/contacts.htm> (last visited Nov. 4, 2005) (listing the heads of prisons for numerous states, including Sierra Leone).

[FN79]. Brima, Trial Court Habeas Petition, *supra* note 6, at 1.

[FN80]. Brima argued that his habeas right existed by virtue of the Special Court for Sierra Leone forming part of the Sierra Leonean court system, and thus falling under the supervisory jurisdiction of the Supreme Court of the Republic of Sierra Leone. *Id.* at 5. The defendant reasoned that he would consequently be entitled to bring habeas petitions under Section 125 of the Sierra Leonean Constitution. *Id.* Thus, Brima presumably crafted his petition to conform to the common law of Sierra Leone.

[FN81]. This Note describes a problem arising subsequent to conviction. Whether a habeas problem is posed by the detention of Court defendants prior to conviction depends on whether one adopts a narrow or broad construction of the Sierra Leonean Constitution. Prior to conviction, detainees are "delivered forthwith into the custody of the Special Court" upon arrest. Special Court Ratification Act, *supra* note 2, art. 25. These defendants are then kept within a detention center in the Court's complex. E-mail Interview with Peter Andersen, *supra* note 6. Therefore, unlike convicted prisoners, these individuals are not being deprived of liberty by the Government of Sierra Leone. Under a narrow reading of the Sierra Leonean Constitution,

the trials for which these individuals are being detained are void. These detainees would be lawfully entitled to release if they brought a petition to domestic courts, as the writ of habeas corpus may be directed against non-State actors. See James, *supra* note 66, at 174. Under a broad reading, however, their trial is valid and their detention is permissible, so long as it is not undertaken by the Government of Sierra Leone. A resolution of this issue is beyond the scope of this Note.

[FN82]. Special Court Statute, *supra* note 18, art. 22, § 2.

[FN83]. See *supra* Part III.D.2.

[FN84]. Special Court Ratification Act, *supra* note 2, art. 34, § 2 (emphasis added).

[FN85]. See Ingman, *supra* note 67, at 168 (stating that the habeas corpus remedy is available as a matter of right, provided that the prisoner presents a *prima facie* case that his detention is illegal).

[FN86]. Assuming that the prisoner makes a *prima facie* case for the illegality of his detention.

[FN87]. Special Court Ratification Act, *supra* note 2.

[FN88]. Sierra Leone Const. ch. 13, § 171, cl. 15.

[FN89]. *Id.* ch. 3, § 23, cl. 9.

[FN90]. *Id.* ch. 3, § 17, cl. 1(b).

[FN91]. Special Court Statute, *supra* note 18, art. 23.

[FN92]. See Sierra Leone Const. ch. 13, § 171, cl. 15.

[FN93]. Special Court Statute, *supra* note 18, art. 22, § 2.

[FN94]. Kleffner & Nollkaemper, *supra* note 6, at 16 (citing the Court's view of the source of its legal authority as expressed in the Trial Court opinion of the habeas ruling in Brima, Trial Court Habeas Petition, *supra* note 6).

[FN95]. Special Court Statute, *supra* note 18, art. 22, § 2.

[FN96]. Special Court Ratification Act, *supra* note 2, art. 34, § 2.

[FN97]. *Id.* art. 34, § 3.

[FN98]. For a disturbing account of some of the atrocities committed during the conflict in Sierra Leone, see Bergner, *supra* note 7. For an empirical account of the breadth of the atrocities, see Physicians for Human Rights Report, *supra* note 8.

[FN99]. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in*

Strategies of International Justice, 28 Int'l Security 5, 18 (2003).

[FN100]. Gallagher, *supra* note 11, at 190.

[FN101]. See Jones et al., *supra* note 6, at 222.

[FN102]. See Schocken, *supra* note 2, at 451-52 (arguing that “amnesties should be made deliberately, after weighing the wishes of the victims against the possibilities of creating a lasting peace, and amnesty decisions, once made, should be final”).

[FN103]. See *id.* at 451-52.

[FN104]. Snyder & Vinjamuri, *supra* note 99, at 35.

[FN105]. See Gallagher, *supra* note 11, at 190.

[FN106]. Akinrinade, *supra* note 7, at 438-39.

[FN107]. Macaluso, *supra* note 7, at 350-51.

[FN108]. While a comprehensive analysis of this point is beyond the scope of this Note, see Akinrinade, *supra* note 7, at 438-39 (citing the view of some human rights groups towards the amnesty provisions of the Lomé Accords). For a detailed case for the general duty under customary international law to prosecute crimes of war, see Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2539 (1991) (arguing that international law imposes a duty prosecute for human rights abuses including torture, extra-legal killings, and forced disappearances, and that amnesties cannot cover atrocious crimes). But see Gallagher, *supra* note 11, at 174-86 (arguing that the Lomé amnesties do not violate any duty under international law to prosecute atrocities).

[FN109]. See Orentlicher, *supra* note 108, at 2549.

[FN110]. See *id.* at 2595-96.

[FN111]. The Special Court was established according to a bilateral agreement governed by the Vienna Convention. Under the Vienna Convention, “[a] State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty,” *supra* note 44, art. 27(1), and “[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.” *Id.* art. 46(1). A violation is only manifest “if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, international organizations and in good faith.” *Id.* art. 46(3). As the habeas problem has not heretofore been described, it was clearly not objectively evident to every party at the time that the Agreement was established. Therefore, the Government of Sierra Leone, while bound by its own Constitution to release amnestied prisoners in its custody, has outstanding international obligations that are inconsistent with this duty.

[FN112]. See S.C. Res. 1315, pmb., U.N. Doc. S/RES/1315 (Aug. 4, 2000) (recognizing that the Court was established to reaffirm “that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law ...”).

[FN113]. See Kleffner & Nollkaemper, *supra* note 6, at 372.

[FN114]. Special Court Agreement, *supra* note 2, art. 17, § 1.

[FN115]. *Id.* art. 17, § 2.

[FN116]. Kleffner & Nollkaemper, *supra* note 6, at 372.

[FN117]. *Id.* at 372.

[FN118]. *Id.* at 367.

[FN119]. Special Court Statute, *supra* note 18, art. 8, § 2.

[FN120]. Rules of Procedure and Evidence 9. Rule 72(B) encompasses “objections based on abuse of process,” which would presumably include a petition for the writ of habeas corpus. Kleffner & Nollkaemper, *supra* note 6, at 367.

[FN121]. Sierra Leone Const. ch. 13, § 171, cl. 15.

[FN122]. In dismissing the habeas petition brought before the Special Court by Alex Tamba Brima, the Trial Court judge declared that “the Special Court of Sierra Leone holds it [sic] existence, not to the Constitution or to the Parliament of the Republic of Sierra Leone, but solely to the Security Council Resolution No: 1315 2000 ... and the International Agreement between the United Nations and the Government of Sierra Leone which set it up.” Brima, Trial Court Habeas Petition, *supra* note 6, at 10. Thus, the Sierra Leonean Constitution “is only limited to the Courts created by the 1991 Constitution of Sierra Leone and not to a post 1991 international creation that owes it [sic] existence to an international instrument of the security council and an equally International Agreement between the United Nations and the Government of Sierra Leone.” *Id.* at 11.

[FN123]. Special Court Agreement, *supra* note 2, art. 23.

[FN124]. Special Court Ramification Act, *supra* note 2, art. 14 (emphasis added).

[FN125]. Special Court Statute, *supra* note 18, art. 22. § 1.

[FN126]. *Id.* art. 22, § 1.

[FN127]. See *supra* Part I.C.

[FN128]. See *id.*

[FN129]. See Swart, *supra* note 4, at 305.

[FN130]. See generally Stafford, *supra* note 2; Antonio Cassese, *The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality Law*, in *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia 3* (Cesare P.R. Romano et al. eds., 2004); Dickinson, *supra* note 3.

[FN131]. See Cassese, *supra* note 130, at 5 (arguing that internationalized, or hybrid, courts are viable when “there is the need to assuage the nationalistic demands of the local population”); Dickinson, *supra* note 3, at 301-08 (addressing the legitimizing function of hybrid courts); Snyder & Vinjamuri, *supra* note 99, at 17 (noting the view that domestic trials may have a greater impact on attitudes in the country where abuses have taken place in comparison to international tribunals, and claiming that hybrid tribunals aim to accomplish the goal of dispensing justice locally while maintaining international standards).

[FN132]. See Cassese, *supra* note 130, at 5.

[FN133]. See Shraga, *supra* note 3, at 19.

[FN134]. See Stafford, *supra* note 2, at 133; Cassese, *supra* note 130, at 6; Snyder & Vinjamuri, *supra* note 99, at 18 (“Mixed tribunals are intended to help build the institutional capacity of local judiciaries and thereby strengthen the rule of law.”); Dickinson, *supra* note 3, at 301-08 (addressing the capacity-building function of hybrid courts).

[FN135]. See Stafford, *supra* note 2, at 133.

[FN136]. See Dickinson, *supra* note 3, at 307.

[FN137]. *Id.*

[FN138]. Sierra Leone Const. ch. 7, § 120, cl. 3.

[FN139]. This concern is briefly introduced by Smith, *supra* note 19, at 134.

[FN140]. Lomé Peace Accord, *supra* note 9, art. 9, § 2.

[FN141]. See Smith, *supra* note 19, at 134.

[FN142]. Sierra Leone Const. ch. 5, § 63, cl. 1(a) (emphasis added).

[FN143]. Smith, *supra* note 19, at 134.

[FN144]. Lomé Peace Accord, *supra* note 9, art. 9, § 2.

[FN145]. See Gallagher, *supra* note 11, at 163 (introducing the argument that atrocities against civilians may be beyond the scope of the Lomé amnesties).

[FN146]. See Schocken, *supra* note 2, at 441.

[FN147]. Brima, Trial Court Habeas Petition, *supra* note 6, at 11.

[FN148]. The prospect of solving the habeas problem through a third political approach--alteration of the Constitution--is appealing at first blush. However, Section 108 of the Sierra Leone Constitution makes the alteration of provisions under Chapter III of the Constitution (where the protections against pardons are accorded) difficult. Alteration of such provisions requires the publication of the proposed amendment in at least two issues of the Gazette (the State's annual list of laws), a two-thirds majority vote in Parliament, and approval in a referendum. See Sierra Leone Const. ch. 6, § 108. A Constitutional Amendment would therefore be a relatively slow and therefore unfeasible solution to the habeas problem.

[FN149]. See Schocken, *supra* note 2, at 441. The author of this Note is not aware of any academic literature on whether the U.N.'s participation in the Lomé Peace Accord as a “moral guarantor” establishes the agreement as a treaty under international law. An extensive analysis of this point is beyond the scope of this Note.

[FN150]. For the Special Court's analysis of the invalidity of the Lomé Accord as an international instrument in *Prosecutor v. Kallon*, Case No. SCSL-2004-15-AR72(E) (Mar. 13, 2004) and *Prosecutor v. Karma*, Case No. SCSL-2004-16-AR72(E) (Mar. 13, 2004); *Prosecutor v. Kamara*, Case No. SCLS 2003-10-PT; and *Application by Brima Bazzy Kamara in respect to Jurisdiction and Defects in Indictment* (June 16, 2003), see *supra* note 21. Positing that the U.N. is not a party to the agreement by virtue of its role as a “moral guarantor,” the Court's argument is largely grounded upon the RUF's lack of legal personality, and its consequent absence of power to make treaties under international law. Legal personality under international law is a necessary, but not sufficient, condition for the power to be a party to a treaty. See Ian Brownlie, *Principles of Public International Law* 651 (6th ed. 2003). Apart from States, legal personality under international law is conferred only to international organizations that exist as “a permanent association of states, with lawful objects, equipped with organs” *Id.* at 649 (describing the criteria of legal personality in international organizations). The RUF plainly does not meet this criterion. Therefore, a bilateral agreement between the Government of Sierra Leone and the RUF would not serve as a treaty under international law.

[FN151]. Lomé Peace Accord, *supra* note 9, art. 16.

[FN152]. Macaluso, *supra* note 7, at 350-51.

[FN153]. Vienna Convention on the Law of Treaties art. 60, § 1, opened for signature May 23, 1969, 1155 U.N.T.S. 331, available at <http://www.un.org/law/ilc/texts/treaties.htm>.

[FN154]. Sierra Leone Const. ch. 3, § 23(a) (emphasis added).

[FN155]. Jones et al., *supra* note 6, at 222.

[FN156]. *Prosecutor v. Brima, Kamara, & Kanu*, Case No. SCSL-2004-16-PT, Further Amendment Consolidated Indictment (Feb. 18 2005); *Prosecutor v. Sesay, Kallon, & Gbao*, Case No. SCSL-2004-15-PT, Amended Consolidated Indictment (May 13, 2004); *Prosecutor v. Norman, Fofana, & Kondewa*, Case No. SCSL-2003-14-I, Indictment (Feb. 5, 2004); Pro-

secutor v. Koroma, Case No. SCSL-2003-03-I, Indictment (Mar. 7, 2003); Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Indictment (Mar. 7, 2003).

[FN157]. See Smith, *supra* note 19, at 130.

[FN158]. Hybrid tribunals have been proposed for Iraq, Cambodia, and the Democratic Republic of Congo. See William W. Burke-White, [International Legal Pluralism](#), 25 *Mich J. Int'l L.* 963, 976 (2004).

[FN159]. See Rumsfeld, *supra* note 1, at 14-17.

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