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## To What Extent Can the Special Court for Sierra Leone Constitutionally Issue An Exterritorial Subpoena To A Non-Resident Witness To Testify Before The Court

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**CASE WESTERN RESERVE UNIVERSITY  
SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES RESEARCH LAB**

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**MEMORANDUM FOR THE  
OFFICE OF THE PROSECUTOR  
OF THE SPECIAL COURT FOR  
SIERRA LEONE**

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**ISSUE: TO WHAT EXTENT CAN THE SPECIAL COURT FOR SIERRA  
LEONE CONSTITUTIONALLY ISSUE AN EXTERRITORIAL  
SUBPOENA TO A NON-RESIDENT WITNESS TO TESTIFY BEFORE  
THE COURT**

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**PREPARED BY LUKAS M. GRABIEC  
FALL 2004**

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## I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

### A. Issue

This memorandum addresses to what extent the Special Court for Sierra Leone (“SC-SL”)<sup>1</sup> can constitutionally issue an extraterritorial subpoena to a non-resident witness to testify before the Court. For the purposes of this memorandum the words “extraterritorial” and “extrajurisdictional” will be used interchangeably to address subpoenas issued outside the jurisdiction or boundary of the state. The memorandum will be divided into several sections. The first analysis section will address the constitutionality of issuing extraterritorial subpoenas by the SC-SL. The second section will address the lack of jurisprudence in Sierra Leone on this subpoena matter and thus will look at nations with similar constitutions and for guidance on whether the SC-SL may issue an extraterritorial subpoena. The third section will focus on the duty and obligation of states to cooperate with the SC-SL.

### B. Summary of Conclusions

**Examining the Sierra Leone Constitution, the documents that created the SC-SL, as well as comparing the Sierra Leone Constitution to that of other nations a sound legal argument can be made that the SC-SL may issue extraterritorial subpoenas to non-resident witnesses.**

Despite the fact that the Sierra Leone Constitution<sup>2</sup> has had little or no academic or judicial interpretation, a conclusion can be drawn from the language of its text, that the President has the power to enter into treaties and therefore the treaty that created the SC-SL with the United Nations is one which is valid. Understanding the fact that the SC-SL is a

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<sup>1</sup> Special Court for Sierra Leone will be referred to as “SC-SL” throughout this Memorandum.

<sup>2</sup> *The Constitution of Sierra Leone, 1991* (Reproduced in the accompanying notebook I TAB 5).

legally and constitutionally valid body, one may examine the auspices of its rules and formation agreement to look for language involving the issuance of extraterritorial subpoenas. These “Agreements”<sup>3</sup> allow for the SC-SL to enter into treaties with other nations and to issue orders and requests. As is mentioned in the Constitution of Sierra Leone, any body of the government that has the power to make laws, may make them to have extraterritorial operation.<sup>4</sup> Therefore the SC-SL can constitutionally issue extraterritorial subpoenas to non-resident witnesses to testify before the Court.

**The Sierra Leone Government as well as other States have a duty to assist the SC-SL.**

As is instructed in the above-mentioned Agreements,<sup>5</sup> the Sierra Leone Government has created the SC-SL in the hopes of trying those most responsible for the atrocities that occurred in the country. The duty of the Sierra Leone Government is to assist the SC-SL in every way possible to insure its success. Third party states also have a duty to assist the SC-SL under the obligations of the U.N. Charter. While the Court lacks formal Chapter VII authority its very creation is a reflection of the wants and needs of the international community.<sup>6</sup> Under the Geneva Convention of 1949 there is a duty to prosecute and

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<sup>3</sup> see: Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Reproduced in the accompanying notebook I TAB 7); The Statute of the Special Court for Sierra Leone (Reproduced in the accompanying notebook I TAB 8); SC-SL Rules of Procedure and Evidence (Reproduced in the accompanying notebook II TAB 49).

<sup>4</sup> *The Constitution of Sierra Leone, 1991*(Reproduced in the accompanying notebook I TAB 5).

<sup>5</sup> see: Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Reproduced in the accompanying notebook I TAB 7); The Statute of the Special Court for Sierra Leone (Reproduced in the accompanying notebook I TAB 8); SC-SL Rules of Procedure and Evidence (Reproduced in the accompanying notebook II TAB 49).

<sup>6</sup> Chapter VII of the United Nations Charter (Reproduced in the accompanying notebook I TAB 11 ).

investigate *jus cogens* violations.<sup>7</sup> There were clearly violations of the Geneva Conventions that occurred in Sierra Leone and therefore the international community has a duty to assist the SC-SL to investigate these crimes.

## II. FACTUAL BACKGROUND

The review of twenty national constitutions adopted over the past fifteen years shows that the examined constitutions have many common components: a preamble; general principles of state organization; fundamental rights and freedoms; a system of state governance including sections on central and local governments, sections on judicial structures and judicial control of the constitutions, a section on emergency measures; and some miscellaneous or transitional provisions.<sup>8</sup> Some of these common features seem to be more essential than others. For example, few of the constitutions under the review contain preambles or sections on local government and judicial review, but virtually every constitution includes sections on general principles of state organization, fundamental rights, central government, the judiciary, and procedures for amendments.<sup>9</sup> The Constitution of Sierra Leone<sup>10</sup> was created during the time of the one-party government of the APC (All

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<sup>7</sup>The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I). The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked members of the Armed Forces at Sea (Geneva Convention II). The Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) The Geneva Convention Relative to the Protection of Civilian Person in Time of War (Geneva Convention IV). (Reproduced in the accompanying notebook I TAB 4)

<sup>8</sup> 16 B.U. Int'l L.J. 1, 67 (Reproduced in the accompanying notebook I TAB 6).

<sup>9</sup> 16 B.U. Int'l L.J. 1, 67 (Reproduced in the accompanying notebook I TAB 6).

<sup>10</sup> *The Constitution of Sierra Leone, 1991* Chapter VIII Sec. 172 paragraph 3(a) “any power to make laws conferred by this constitution includes the power to make laws having extraterritorial operations. (Reproduced in the accompanying notebook I TAB 5).

People’s Congress).<sup>11</sup> As mentioned above, it has the same characteristics of the surveyed constitutions. As with new forming and growing countries and constitutions, the lifespan of the Constitution was short-lived following the overthrow of the government by the (NPRC) National Provisional Ruling Council.<sup>12</sup>

One of the potential problems with its creation has been the fact that it has been so rarely used. One former Sierra Leone Presidential candidate indicated in his article entitled *Memorandum of Points and Authorities in Support of the Constitution as the Supreme Law of the Land* (“*Memorandum*”, that the Constitution has been unused and unfamiliar, outside legal circles, Parliament and arguably the Executive Branch.<sup>13</sup> Since it has not been used one must look at the Constitution’s roots in order to interpret its contents. In the *Memorandum* the author draws links with the United States Constitution<sup>14</sup> and the contents and spirit of its creation.<sup>15</sup> The author goes on to compare specific sections of the United States Constitution with the Sierra Leone Constitution.<sup>16</sup> It is important to understand that this link with the United States Constitution will play a key role in the interpretation of whether or not the

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<sup>11</sup> Bankole Thompson, *The Constitutional History and Law of Sierra Leone (1961-1995)*, University Press of America (1997) at 183. (Reproduced in the accompanying notebook I TAB 1).

<sup>12</sup> Bankole Thompson, *The Constitutional History and Law of Sierra Leone (1961-1995)*, University Press of America (1997) at 184. (Reproduced in the accompanying notebook I TAB 1).

<sup>13</sup> *Memorandum of Points and Authorities in Support of the Constitution as the Supreme Law of the Land*, Raymond Bamidele Thompson, Sr. <http://www.sierra-leone.org/essay1.html> (Reproduced in the accompanying notebook I TAB 43).

<sup>14</sup> United States Constitution (Reproduced in the accompanying notebook II TAB 47).

<sup>15</sup> *Memorandum of Points and Authorities in Support of the Constitution as the Supreme Law of the Land*, Raymond Bamidele Thompson, Sr. <http://www.sierra-leone.org/essay1.html> (Reproduced in the accompanying notebook I TAB 1).

<sup>16</sup> *Memorandum of Points and Authorities in Support of the Constitution as the Supreme Law of the Land*, Raymond Bamidele Thompson, Sr. <http://www.sierra-leone.org/essay1.html> (Reproduced in the accompanying notebook I TAB 1).

issuance of extraterritorial subpoenas by the SC-SL is legal under the Sierra Leone Constitution.

### **III. LEGAL ANALYSIS**

#### **Part 1. Constitutionality of issuing extraterritorial subpoenas to non-resident witnesses to testify before the SC-SL.**

Under Chapter XIII entitled Miscellaneous, the Constitution of Sierra Leone is declared to be the supreme law of the land and any law that is inconsistent with any of the provisions shall be found to be void or of no effect.<sup>17</sup> With this in mind the Constitution provides that any body of the government that has the power to make laws, may make them to have extraterritorial operation.<sup>18</sup> Under the Authority of the President (who has the power to enter into treaties) and his power according to section 40(4) of the Constitution<sup>19</sup>, the Government of Sierra Leone entered into a treaty with the United Nations thus creating the SC-SL<sup>20</sup>. The Defense Counsel in *Prosecutor v. Morris Kallon* contended that the SC-SL had

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<sup>17</sup> *The Constitution of Sierra Leone, 1991* is composed of 14 chapters and 1 amendment. Chapter I-Discuss the formation of the Republic of Sierra Leone and what are its extrinsic symbols such as flag, national anthem, and seal; Chapter II-Focuses on the Fundamental Principles of State Policy; Chapter III-Addresses the Recognition and Protection of Fundamental Human Rights and Freedoms of the Individual; Chapter IV-Shows how the People will be Represented; Chapter V-Discusses the Executive Branch of the Government; Chapter VI-Discusses the Legislative Branch; Chapter VII-Discusses the Judiciary; VIII-Describes the opening of an office of Ombudsman; Chapter IX-Commissions of Inquiry; Chapter X- The Public Service such as the Police and other public works; Chapter XI-Discusses the Armed Forces; Chapter XII-Discusses the Laws of Sierra Leone; Chapter XIII-Miscellaneous section which includes definitions of words used in the Constitution as well as short analysis of any ambiguities in the language used in the Constitution; Chapter XIV-Focuses on the Transitional Provisions necessary to make this Constitution effective; and one Amendment. (Reproduced in the accompanying notebook I TAB 5)

<sup>18</sup> *The Constitution of Sierra Leone, 1991* Chapter VIII Sec. 172 paragraph 3(a). (Reproduced in the accompanying notebook I TAB 5).

<sup>19</sup> *The Constitution of Sierra Leone, 1991* Chapter V (Reproduced in the accompanying notebook I TAB 5).

<sup>20</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone. (Reproduced in the accompanying notebook I TAB 7).

no legal and Constitutional standing in Sierra Leone.<sup>21</sup> The Appeals Chamber of the SC-SL determined under Rule 72(E)<sup>22</sup> that it has the competence to determine whether or not the SC-SL has the jurisdiction to decide on the law fullness and validity of its creation.<sup>23</sup> In addition, as referenced in the Statute of the Special Court, the SC-SL is mandated to interpret the provisions that created its institution.<sup>24</sup> The Judges in *Prosecutor v. Morris Kallon* responded to Defense Counsel directly with four main reasons why the SC-SL does abide by the Constitution: 1) The SC-SL was not part of the Judiciary of Sierra Leone and therefore free from relying on the Chief Justice of the Sierra Leone Supreme Court 2) Unlike the Judiciary of Sierra Leone the SC-SL and the ability to enter into agreements with States that may be necessary thus giving the SC-SL treaty making power 3) The SC-SL being a treaty-based organization is not “anchored in any existing system<sup>25</sup> 4) The SC-SL is established outside of the national court system.<sup>26</sup> Therefore the SC-SL is created in accordance with section

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<sup>21</sup> *Prosecutor v. Morris Kallon et. al* (“Decision on Constitutionality and Lack of Jurisdiction”) SCSL-2004-14-AR72(E) see para. 47: “Counsel for the Accused Hinga Norman... contends that the creation of the Special Court by the Government “in agreement with the United Nations by virtue of the Special Court Agreement 2000 (Ratification) Act 2000 in effect amends fundamental aspects of the Constitution of Sierra Leone for which no referendum was held.” Counsel for the Accused Hinga Norman goes on to argue that the establishment of the Special Court clearly amends the judicial framework and Court structure in Sierra Leone and cites section 120(1) of the Constitution. See *The Constitution of Sierra Leone* which states that the “Judicial power of Sierra Leone shall be vested in the Judiciary of which the Chief Justice shall be the head.” (Reproduced in the accompanying notebook I TAB 2)

<sup>22</sup> SC-SL Rules of Procedure and Evidence (Reproduced in the accompanying notebook II TAB 49).

<sup>23</sup> *Prosecutor v. Morris Kallon et. al* (“Decision on Constitutionality and Lack of Jurisdiction”) SCSL-2004-14-AR72(E) see para. 34 (Reproduced in the accompanying notebook I TAB 2).

<sup>24</sup> The Statute of the Special Court for Sierra Leone. see preamble (Reproduced in the accompanying notebook I TAB 8).

<sup>25</sup> i.e. United Nations administrative law or the national law of the State of the seat

<sup>26</sup> *Prosecutor v. Morris Kallon et. al* (“Decision on Constitutionality and Lack of Jurisdiction”) SCSL-2004-14-AR72(E) see para. 49, 50, 51, 52. (Reproduced in the accompanying notebook I TAB 2).

40(4). Furthermore, it appears that the Rules<sup>27</sup> must be guided by the jurisprudences of the ICTY<sup>28</sup>, ICTR<sup>29</sup> and Sierra Leone courts. This would appear to follow not only from the origin of the Rules and the fact that the Sierra Leone jurisprudence is minimal at the present moment, but also from Article 20(3) of the Statute.<sup>30</sup>

### **Definition and use of “subpoenas” in International Tribunal Context**

The definition of the word “subpoena” has been described in great detail in the *Blaskic* decision before ICTY.<sup>31</sup> Here the Appeals Chamber stated that the term subpoena<sup>32</sup> should be construed “as referring only and exclusively to binding orders addressed by the International

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<sup>27</sup> SC-SL Rules of Procedure and Evidence (Reproduced in the accompanying notebook II TAB 49).

<sup>28</sup> The International Criminal Tribunal for the Former Yugoslavia will be referred to as (“ICTY”) for the remainder of this Memorandum.

<sup>29</sup> The International Criminal Tribunal for Rwanda will be referred to as (“ICTR”) for the remainder of this Memorandum.

<sup>30</sup> The Statute of the Special Court for Sierra Leone. See Article 20(3) which reads: “The Judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone”. (Reproduced in the accompanying notebook I TAB 8).

<sup>31</sup> The term “subpoena” in the English text should not be construed as always meaning a compulsory order not capable of being enforced by a penalty; rather, in light of the principle of effectiveness (*ut res magis valeat quam pereat*), that word should be given a narrow interpretation: it should only refer to compulsory orders, implying the possible imposition of a penalty, issued to individuals acting in their private capacity. *Blaskic*, Case No. IT-95-14-AR108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, reg. Pg. nos. 1908-1851 (29 Oct. 1997) (*Appeals Chamber Subpoena Decision*) at para. 21. (Reproduced in the accompanying notebook II TAB 23).

<sup>32</sup> The Dictionary of Law under the Oxford University Press defines subpoena duces tecum in the modern language as being a witness summons.<sup>32</sup> It is “an order to a person to appear in a court on a certain day to give evidence. Before the introduction of the Civil Procedure Rules in 1999, this order was known as a subpoena. The party calling the witness must pay his reasonable expenses. A witness who fails to comply with the order is in contempt of court. The order is made under penalty of fine or imprisonment for default. There are two kinds of witness summons: a summons requiring a person to give evidence (formerly called a *subpoena ad testificandum*); and a summons requiring him to produce particular documents that are required as evidence (formerly called a *subpoena duces tecum*).”<sup>32</sup> <http://www.oxforddictionary.com/law>.

Tribunal, under threat of penalty, to individuals acting in their private capacity.”<sup>33</sup> This definition has not been officially adopted by the SC-SL, however the Judges of the Appeals Chamber of the Special Court are instructed in Article 20(3) of the Statute<sup>34</sup> that they should look in the ICTY and ICTR jurisprudence for guidance in their decision making process.

Further, the ICTY elaborated on the consequences of breaching a *jus cogens* norm in the Furundzija case concerning the crime of torture.<sup>35</sup> In terms of the criminal liability, the Tribunal found that one of the consequences upon the prohibition of torture is that “every State is entitled to investigate, prosecute, and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.”<sup>36</sup> This seems to suggest that that the ICTY has not only a right to prosecute and to investigate these *jus cogens*<sup>37</sup> crimes, but it also implies that the ICTY has a mandatory obligation. Therefore the power to subpoena witnesses under the duty to investigate, would allow the court to seek out in all nations witnesses who would be able to provide the necessary information to assist in the prosecution or acquittal of potential criminals.

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<sup>33</sup> *Blaskic*, at para. 21. (Reproduced in the accompanying notebook II TAB 23).

<sup>34</sup> The Statute of the Special Court for Sierra Leone. See Article 20(3) (Reproduced in the accompanying notebook I TAB 8).

<sup>35</sup> *Prosecutor v. Anto Furundzija*, Judgment, IT-95-17/1-T, 10 December 1998 (Reproduced in the accompanying notebook II TAB 46).

<sup>36</sup> *Prosecutor v. Anto Furundzija*, Judgment, IT-95-17/1-T, 10 December 1998 paras. 153-157 (Reproduced in the accompanying notebook II TAB 46).

<sup>37</sup> *Prosecutor v. Anto Furundzija*, Judgment, IT-95-17/1-T, 10 December 1998 para. 156. referring to *Demjanuk v. Petrovsky*, 776 F.2d 571 (6<sup>th</sup> Cir. 1985) (Reproduced in the accompanying notebook II TAB 46).



## **Hybrid nature of the court provides a unique approach to constitutionality**

The Special Court for Sierra Leone is a hybrid court of an international and a domestic nature.<sup>38</sup> It is not exclusively one or the other. It was created by a treaty between the sovereign nation of Sierra Leone<sup>39</sup> and the United Nations, a treaty organization with nearly every nation state participating as a party. The jurisdiction of the tribunal is both domestic and international in nature.<sup>40</sup> The judges and officers sitting on the Special Court are made up of both natives of Sierra Leone and members of the international legal community.<sup>41</sup> The Court is located within Sierra Leone but funded by foreign state contributions.<sup>42</sup> The hybrid nature of the Court means that it is at once national and international without division or separation.<sup>43</sup>

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<sup>38</sup> Schocken, at 436-37. (Reproduced in the accompanying notebook I TAB 22).

<sup>39</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone at Preamble. (Reproduced in the accompanying notebook I TAB 7).

<sup>40</sup> The SCSL Statute: Article 2-5. (Article 2 grants jurisdiction to the SCSL for crimes against humanity; Article 3: grants jurisdiction for violations of Article 3 common to the Geneva Conventions and the Additional Protocols II; Article 4: grants jurisdiction over other serious violations of international humanitarian law; Article 5 grants jurisdiction over crimes under Sierra Leone law. (Reproduced in the accompanying notebook I TAB 8).

<sup>41</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone. See Article 2: Composition of the Special Court and Appointment of Judges. Two judges are appointed by the Secretary General upon nominations forwarded by States and three judges are appointed by the government of Sierra Leone. (Reproduced in the accompanying notebook I TAB 7).

<sup>42</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone. Article 6: Expenses of the Court are paid by voluntary contributions by the international community; Article 10: Seat of the Special Court. (Reproduced in the accompanying notebook I TAB 8).

<sup>43</sup> Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council. The letter contained a letter from the President of Sierra Leone requesting assistance in the formation of the SCSL as well as a discussion of the hybrid nature of the court. (Reproduced in the accompanying notebook II TAB 50).

**Hybrid nature of the Court affects the obligations of third-party states to assist in the subpoena of witnesses in their countries.**

The Court's ability to summon witnesses is recognized by the characteristic of duality of the Court's function. However, issues arise in regard to subpoenaing witnesses' extraterritorially because the Court was not granted Chapter VII authority by the Security Council.<sup>44</sup> The SC-SL had requested the Security Council of the United Nations for the expanded mandate because it would legally require all nations to cooperate with the Court however the Security Council felt that there were other items that were of greater importance than to grant the SC-SL Chapter VII power.<sup>45</sup> The Court has primacy over domestic courts within Sierra Leone, but not courts abroad.<sup>46</sup> Those who have been subpoenaed residing abroad, while within the Court's explicit jurisdictional mandate, are outside the reach of its enforcement authority.<sup>47</sup> Despite the fact that this is deemed by the public as an International Court, it does not necessarily preclude the national nature of the Court. The Sierra Leone government came to the United Nations for assistance in the prosecution of the instigators of

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<sup>44</sup> See SCSL Agreement for general information. (Reproduced in the accompanying notebook I TAB 7). Also see Security Council Resolution 1315(2000) at note 15: the resolution authorizing the Secretary-General to negotiate an agreement with Sierra-Leone in which there is no mention of Chapter VII authority given to the court. (Reproduced in the accompanying notebook I TAB 3)

<sup>45</sup> Global Policy Forum "Special Court Requests Expanded Mandate" see Reuters June 11, 2003. <http://www.globalpolicy.org/intljustice/tribunals/sierra/2003/0612moremandate.htm> (Reproduced in the accompanying notebook II TAB 44).

<sup>46</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone. Article 8: Grants concurrent jurisdiction and states that the SCSL will have primacy over domestic courts. (Reproduced in the accompanying notebook I TAB 7).

<sup>47</sup> Chapter VII of the United Nations Charter: Grants organs law making authority when deemed necessary or preferable. Absent this authority the cornerstone of international law remains intact: the sovereignty of the state prevails over all claims over its sovereignty absent an external obligation under international law. (Reproduced in the accompanying notebook I TAB 11).

war crimes within the Sierra Leone territory against Sierra Leoneans.<sup>48</sup> While the world accurately views the SC-SL as an international war crimes tribunal, third party foreign states must recognize the domestic aspect of the Court as an inherent part of its structure.

### **Investigatory powers of the Prosecutor**

Pursuant to article 15(1) of the Statute of the Special Court, the Prosecutor is “responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leone law committed in the territory of Sierra Leone since 30 November 1996.”<sup>49</sup> In carrying out these responsibilities, the Prosecutor is mandated by the Statute to “act independently as a separate organ of the Special Court.”<sup>50</sup> The Prosecutor also is commanded not to “seek or receive instructions from any Government or from any other source.”<sup>51</sup>

To fulfill these responsibilities, article 15(2) of the Statute provides the Office of the Prosecutor with the power “to question suspects, victims and witnesses, to collect evidence

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<sup>48</sup> Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council. The letter contained a letter from the President of Sierra Leone requesting assistance in the formation of the SCSL. (Reproduced in the accompanying notebook II TAB 50).

<sup>49</sup> Agreement between The United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (16 January 2002) <http://www.sierra-leone.org/specialcourtagreement.html> see Art. 15(1) Also found in: No Peace Without Justice. *Lawyer’s Guide to the Special Court for Sierra Leone*, March 2004 (Reproduced in the accompanying notebook I TAB 7 and notebook II TAB 48).

<sup>50</sup> Agreement between The United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (16 January 2002) <http://www.sierra-leone.org/specialcourtagreement.html> see Art. 15(1) Also found in: No Peace Without Justice. *Lawyer’s Guide to the Special Court for Sierra Leone*, March 2004 (Reproduced in the accompanying notebook I TAB 7 and notebook II TAB 48).

<sup>51</sup> Agreement between The United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (16 January 2002) <http://www.sierra-leone.org/specialcourtagreement.html> see Art. 15(1) Also found in: No Peace Without Justice. *Lawyer’s Guide to the Special Court for Sierra Leone*, March 2004 (Reproduced in the accompanying notebook I TAB 7 and notebook II TAB 48).

and to conduct on-site investigations.”<sup>52</sup> It also provides that the Prosecutor shall have the assistance of Sierra Leonean authorities; by article 17(1) of the Agreement, Sierra Leone has already undertaken to “facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.”<sup>53</sup>

The Rules of Procedure and Evidence of the Special Court provide additional information with respect to how the Prosecutor may exercise these investigatory powers. Rule 2 defines an “investigation” as “[a]ll activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after approval of an indictment”.<sup>54</sup> Then, echoing but not specifically referring to the provisions of article 15 of the Statute, Rule 39 provides that “[i]n the conduct of an investigation” the Prosecutor may “[s]ummon and question suspects, interview victims and witnesses and record their statements, collect evidence and conduct on-site investigations”.<sup>55</sup> Rule 39 also provides that the Prosecutor may “[t]ake all measures deemed necessary for the purpose of the

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<sup>52</sup> Agreement between The United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (16 January 2002) <http://www.sierra-leone.org/specialcourtagreement.html> see Art. 15(2) (Reproduced in the accompanying notebook I TAB 7 and notebook II TAB 48)

<sup>53</sup> Agreement between The United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (16 January 2002) <http://www.sierra-leone.org/specialcourtagreement.html> see Art. 17(1) (Reproduced in the accompanying notebook I TAB 7 and notebook II TAB 48).

<sup>54</sup> Rule of Procedure and Evidence for the Special Court for Sierra Leone <http://www.sierra-leone.org/rulesofprocedureandevidence.html>. Rule 2. Also referenced in: No Peace Without Justice. *Lawyer’s Guide to the Special Court for Sierra Leone*, March 2004 (Reproduced in the accompanying notebook I TAB 7 and notebook II TAB 48).

<sup>55</sup> Rule of Procedure and Evidence for the Special Court for Sierra Leone <http://www.sierra-leone.org/rulesofprocedureandevidence.html>. Rule 39. Also referenced in: No Peace Without Justice. *Lawyer’s Guide to the Special Court for Sierra Leone*, March 2004 (Reproduced in the accompanying notebook I TAB 7 and notebook II TAB 48).

investigation, including the taking of any special measures to provide for the safety, the support and the assistance of potential witnesses and sources”.<sup>56</sup> In addition, Rule 39 acknowledges that the Prosecutor may need to see the assistance of State authorities as well as relevant international bodies, including the International Criminal Police Organization (INTERPOL), and invites the Prosecutor to “[r]equest such orders as may be necessary [in the conduct of an investigation] from a Trial Chamber or a Judge.”<sup>57</sup>

Finally, the Rules assign to the Prosecutor the responsibility for the “preservation, storage and security of information and physical evidence obtained in the course of his [sic] investigations.”<sup>58</sup> Rule 41(B) further requires the Prosecutor to produce an inventory of all materials seized from the accused, serve a copy of the inventory on the accused and return without delay to the accused materials that are of no evidentiary value.<sup>59</sup>

All of these provisions suggest that the Prosecutor has the power to utilize outside sources to get information regarding witnesses and therefore the ability to subpoena.

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<sup>56</sup> Rule of Procedure and Evidence for the Special Court for Sierra Leone <http://www.sierra-leone.org/rulesofprocedureandevidence.html>. Also referenced in: No Peace Without Justice. *Lawyer’s Guide to the Special Court for Sierra Leone*, March 2004 Rule 39 (Reproduced in the accompanying notebook I TAB 7 and notebook II TAB 48)

<sup>57</sup> Rule of Procedure and Evidence for the Special Court for Sierra Leone <http://www.sierra-leone.org/rulesofprocedureandevidence.html>. Rule 39. Also referenced in: No Peace Without Justice. *Lawyer’s Guide to the Special Court for Sierra Leone*, March 2004 (Reproduced in the accompanying notebook I TAB 7 and notebook II TAB 48).

<sup>58</sup> Rule of Procedure and Evidence for the Special Court for Sierra Leone <http://www.sierra-leone.org/rulesofprocedureandevidence.html>. Rule 41(A) (Reproduced in the accompanying notebook I TAB 7 and notebook II TAB 48).

<sup>59</sup> Rule of Procedure and Evidence for the Special Court for Sierra Leone <http://www.sierra-leone.org/rulesofprocedureandevidence.html>. Rule 41(B) Also referenced in: No Peace Without Justice. *Lawyer’s Guide to the Special Court for Sierra Leone*, March 2004. (Reproduced in the accompanying notebook I TAB 7 and notebook II TAB 48).

## Requests by the SC-SL

A request is not expressly defined in the Agreement, the Statute, the Rules or Sierra Leone's Special Court Agreement Ratification Act. Nonetheless, it is acknowledged by Rule 8 to be a form of communication that may be used by any organ of the Court to obtain assistance.<sup>60</sup> According to the Agreement, Statute, Rules and Ratification Act, requests may be made by organs of the Court to obtain assistance from a State with regard to deferral, discontinuance, identification and location of persons, service of documents, arrest or detention of persons and transfer of an indictee to the Court. Rule 8(E) also specifies that the Prosecutor may request a State "to forward to him [sic] all relevant information" regarding "a crime within the jurisdiction of the Special Court [that] is or has been the subject of investigations or criminal proceedings instituted in the courts of any State."<sup>61</sup> These examples, however, are not exhaustive. Article 17 of the Agreement and section 15 of the Ratification Act make clear that by noting these examples, they are not limiting the subjects of potential requests.<sup>62</sup>

As mandated by article 17(2) of the Agreement, and acknowledged in Rule 8, the Government of Sierra Leone, as the legal representative of the Republic of Sierra Leone, must

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<sup>60</sup> Rules of Procedure and Evidence for the Special Court for Sierra Leone <http://www.sierra-leone.org/rulesofprocedureandevidence.html>. see Rule 8. Also referenced in: No Peace Without Justice. *Lawyer's Guide to the Special Court for Sierra Leone*, March 2004 (Reproduced in the accompanying notebook I TAB 49 and notebook II TAB 48).

<sup>61</sup> Rules of Procedure and Evidence for the Special Court for Sierra Leone <http://www.sierra-leone.org/rulesofprocedureandevidence.html>. see Rule 8(E). Also referenced in: No Peace Without Justice. *Lawyer's Guide to the Special Court for Sierra Leone*, March 2004 (Reproduced in the accompanying notebook I TAB 49 and notebook II TAB 48).

<sup>62</sup> Section 15(3) of the Special Court Agreement Ratification Act also acknowledges the possibility of "co-operation of an informal nature." (Reproduced in the accompanying notebook I TAB 7 ).

“comply without undue delay with any request for assistance by the Special Court”. In order to meet the requirements of this obligation, Sierra Leone provided for a procedure for responses to requests in its Special Court Agreement Ratification Act.<sup>63</sup>

Pursuant to section 15(1) of the Ratification Act, “upon receiving from the Special Court a request for assistance”, the Attorney-General of Sierra Leone must consider such request “without any undue delay”.<sup>64</sup> In accordance with section 18(1), the Attorney-General must then, without undue delay, notify the Court “of his response to a request and the outcome of any action that has been taken in relation to it.”<sup>65</sup>

In execution of a request, the Ratification Act mandates strict adherence to the terms of such request. Section 16 states that if a request for assistance specifies that it should be executed in a particular manner that is not prohibited by Sierra Leone law, the Attorney General must ensure that the request is executed in that manner.<sup>66</sup> Moreover, under section 17, adherence to the terms of a request is specified to include maintenance of the confidentiality

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<sup>63</sup> The Special Court Agreement Ratification Act also sets out a procedure for requests for assistance from Sierra Leone to the Special Court. Under section 19(1) of the Ratification Act, the Attorney-General of Sierra Leone may make a request for assistance to the Special Court “for the purposes of any investigation into or trial in respect of any act or omission that may constitute a crime within the jurisdiction of the Special Court.” However, in the absence of an agreement between Sierra Leone and the Special Court regarding such requests, there is no obligation of compliance on the part of the Court. (Reproduced in the accompanying notebook I TAB 7)

<sup>64</sup> The Special Court Agreement, 2002, Ratification Act, 2002 section 15(1). (Reproduced in the accompanying notebook I TAB 7).

<sup>65</sup> The Special Court Agreement, 2002, Ratification Act, 2002 section 18(1). (Reproduced in the accompanying notebook I TAB 7).

<sup>66</sup> The Special Court Agreement, 2002, Ratification Act, 2002 section 16(1). (Reproduced in the accompanying notebook I TAB 7).

of the request where required by the Court, except to the extent that disclosure of the request is necessary for its execution.<sup>67</sup>

The procedure in the Ratification Act also recognizes that there might be an instance in which the Attorney General must refuse or postpone compliance with a request. Section 18 provides that in such instances the Attorney General must notify the Special Court and provide the reasons for such failure to comply.<sup>68</sup> This procedure appears designed to resolve situations in which compliance with a request might violate the existing laws of Sierra Leone or might be impossible without judicial order. For example, in the case of a request that would require disclosure of “material that may be prejudicial to the national security of the Republic of Sierra Leone”, section 18(4) provides that the Attorney General shall “without undue delay, notify the Special Court of that fact together with the reasons therefore.”<sup>69</sup> Once the Court receives this response, a Judge of the Court may order disclosure of the material, which is recognized by the Ratification Act to be authorization for disclosure that otherwise would have been prohibited under Sierra Leone’s national security laws.

Ultimately, the Government of Sierra Leone has undertaken to comply with requests for assistance from the Special Court and Rule 8 acknowledges this obligation. Rule 8(B) provides that, in general, “where a Chamber or a Judge is satisfied that the Government of Sierra Leone has failed to comply with a request made in relation to any proceedings before

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<sup>67</sup> The Special Court Agreement, 2002, Ratification Act, 2002 section 17. (Reproduced in the accompanying notebook I TAB 7).

<sup>68</sup> The Special Court Agreement, 2002, Ratification Act, 2002 section 18. (Reproduced in the accompanying notebook I TAB 7).

<sup>69</sup> The Special Court Agreement Ratification Act also sets out a procedure for requests for assistance from Sierra Leone to the Special Court. Under section 18(4). Also referenced in: No Peace Without Justice. *Lawyer’s Guide to the Special Court for Sierra Leone*, March 2004. (Reproduced in the accompanying notebook I TAB 7 and notebook II TAB 48).



that Chamber or Judge, the Chamber or Judge may refer the matter to the President to take appropriate action.”<sup>70</sup> Before taking such step, however, it is likely that the Chamber or Judge would issue an order, which, as noted above in the case of a request for material that may be prejudicial to national security, is necessary in certain instances to facilitate compliance by Sierra Leone.

States other than Sierra Leone are not obliged to cooperate with the Court’s requests, but are encouraged to do so by the UN Security Council and the Management Committee for the Special Court. Since there is no formal obligation of cooperation on the part of States other than Sierra Leone, there is no established procedure for responding to a request.

For this reason, Rule 8 foresees that the Court might enter into agreements or ad hoc arrangements for cooperation that would include a procedure for compliance with a request.<sup>71</sup> Rule 8 also foresees enforcement of such ad hoc arrangements or agreements. In such cases, it provides that if a State “fails to cooperate” with the Court’s requests, the Court’s “President may take appropriate action.”<sup>72</sup>

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<sup>70</sup> Rule 8(B) states that there are four exceptions to this general rule: “cases to which Rule 11, 13, 59 or applies”. Rule 13 sets out specific procedures regarding requests and orders for discontinuance, and also provides for the President to “take appropriate action” if a court fails to cooperate with a request or comply with an order. It is unclear, however, why the other rules are listed as exceptions. Rule 11 deals only with orders – not requests – for deferral. Rule 59 deals with the failure to execute a transfer order or a warrant of arrest, which is also a form of order. Rule 60 does not discuss requests or orders; rather, it deals with trial in the absence of the accused. Also referenced in: *No Peace Without Justice. Lawyer’s Guide to the Special Court for Sierra Leone*, March 2004 (Reproduced in the accompanying notebook I TAB 7)

<sup>71</sup> Rules of Procedure and Evidence for the Special Court for Sierra Leone <http://www.sierra-leone.org/rulesofprocedureandevidence.html>. see Rule 8(E) (Reproduced in the accompanying notebook II TAB 49).

<sup>72</sup> Rules of Procedure and Evidence for the Special Court for Sierra Leone <http://www.sierra-leone.org/rulesofprocedureandevidence.html>. see Rule 8(D) (Reproduced in the accompanying notebook II TAB 49).

Ultimately, it is possible that, if a State refuses to cooperate with a request that is critical to an organ of the Special Court, the Court might appeal to the Management Committee and invite one of its member States to appeal to the UN Security Council for assistance in obtaining cooperation. Prior to undertaking this step, however, it is likely that the Court would exhaust any available alternative, including all diplomatic means of securing cooperation.

### **Orders in the SC-SL**

In accordance with the Agreement, the Statute and the Rules, an order may be issued by a Chamber or by a Judge. Sierra Leone's Special Court Agreement Ratification Act takes an additional step and defines an "order of the Special Court" to mean "any order, summons, subpoena, warrant, transfer order or any other order issued by a judge of the Special Court".<sup>73</sup> These documents also acknowledge that, without limitation, an order may be issued regarding any of the examples of potential requests noted in the previous section. With respect to the form of an order, however, they provide no direction, leaving this matter to the discretion of the Judges of the Court.

In Sierra Leone, the obligation to comply with orders of the Court is absolute. Section 21(2) of the Special Court Agreement Ratification Act establishes that an order of the Special Court is binding on "every natural person, corporation, or other body created by or under Sierra Leone law."<sup>74</sup> Regarding procedures for compliance with an order, section 21(1) of the

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<sup>73</sup> Special Court Agreement Ratification Act, s. 1. This mirrors Rule 54 of the Special Court Rules, based on the ICTR equivalent, which provides for the power of a Judge or Chamber to issue "orders, summonses, subpoenas, warrants and transfer orders". (Reproduced in the accompanying notebook I TAB 7).

<sup>74</sup> In addition, section 38 of the Special Court Agreement Act provides: "Any person who resists or willfully obstructs—(a) an official of the Special Court in the execution of his duty, or any person lawfully acting in aid of such an official; or (b) any person executing an order of the Special Court, commits an offence and shall be

Act provides that “any person executing an order of the Special Court shall comply with any direction specified in that order.”<sup>75</sup> In particular, with respect to the execution of an order for seizure of documents or other tangible objects, section 21(3) requires such items to be delivered “forthwith” into the custody of the Special Court, even if that is not specified in the order. Finally, section 21(4) requires that “[i]f a person to whom an order of the Special Court is directed is unable to execute that order, he [sic] shall report forthwith the inability to the Special Court and give the reasons therefore.”<sup>76</sup> This section of the Ratification Act facilitates compliance with provisions such as Rule 59, which sets out a requirement for the reporting forthwith by Sierra Leone authorities of any inability to execute a warrant of arrest or transfer order that has been transmitted to them.<sup>77</sup>

States other than Sierra Leone are not obliged to comply with the Court’s orders, but are encouraged to do so. Thus, as is the case with requests, since there is no formal obligation on the part of States other than Sierra Leone, there is no established procedure for compliance with an order. Rather, States are encouraged to negotiate such a procedure with the Court. If a State refuses to comply with an order, the Special Court retains the option of appealing to the

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liable on conviction, to a fine not exceeding two million leones or to a term.” Also referenced in: No Peace Without Justice. *Lawyer’s Guide to the Special Court for Sierra Leone*, March 2004.

<sup>75</sup> In addition, section 38 of the Special Court Agreement Act provides:

“Any person who resists or willfully obstructs-

- a) an official of the Special Court in the execution of his duty, or any person lawfully acting in aid of such an official; or
- b) any person executing an order of the Special Court, commits an offence and shall be liable on conviction, to a fine not exceeding two million leones or to a term of imprisonment not exceeding two years or to both such fine and imprisonment”.

<sup>76</sup> The Special Court Agreement Ratification Act, Under section 18(4). (Reproduced in the accompanying notebook I TAB 7).

<sup>77</sup> The Special Court Agreement Ratification Act and Rules of Procedure and Evidence for the Special Court for Sierra Leone <http://www.sierra-leone.org/rulesofprocedureandevidence.html>. Rule 59 (Reproduced in the accompanying notebook I TAB 7).

Management Committee and inviting one of its member States to appeal to the UN Security Council for assistance in obtaining compliance.<sup>78</sup>

## **Part 2. Various Nation Approach**

### **United States Approach**

Historically, the United States has exercised sovereignty in various locations outside of its national borders.<sup>79</sup> United States law on jurisdiction over extraterritorial crimes has been expanding, and with this expansion the rights of witnesses to be compelled to testify before the court has also increased. This expansion is apparent in relation to violations of 1) antitrust laws<sup>80</sup>; 2) securities laws<sup>81</sup> 3) conspiracy to import narcotics.<sup>82</sup> However, the paramount case on whether extraterritorial subpoenas are constitutional is *Blackmer v. United States*.<sup>83</sup> In *Blackmer*<sup>84</sup>, the United States Supreme Court upheld the constitutionality of the Walsh Act<sup>85</sup>,

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<sup>78</sup> Referenced in: No Peace Without Justice. *Lawyer's Guide to the Special Court for Sierra Leone*, March 2004 (Reproduced in the accompanying notebook II TAB 49)

<sup>79</sup> *Dorr v. United States*, 195 U.S. 138 (1904) (Reproduced in the accompanying notebook II TAB 24)

<sup>80</sup> *United States v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945) (Reproduced in the accompanying notebook II TAB 25).

<sup>81</sup> *Shoenbaum v. Firstbook*, 405 F. 2d 200, (2d. Cir) (Reproduced in the accompanying notebook II TAB 26).

<sup>82</sup> *United States v. Conroy*, 589 F. 2d 1258 (5<sup>th</sup> Cir. 1979) (Reproduced in the accompanying notebook II TAB 27); *United States v. Postal*, 589 F.2d 862 (5<sup>th</sup> Cir. 1979) (Reproduced in the accompanying notebook II TAB 28); *United States v. Williams*, 589 F. 2d 210 (5<sup>th</sup> Cir. 1979) (Reproduced in the accompanying notebook II TAB 31); *United States v. Cadena*, 585 F.2d 1252 (5<sup>th</sup> Cir. 1978) (Reproduced in the accompanying notebook II TAB 30).

<sup>83</sup> *Blackmer v. United States*, 284 U.S. 421, 438-41 (1932) (Reproduced in the accompanying notebook II TAB 29).

<sup>84</sup> *Blackmer v. United States*, 284 U.S. 421, 438-41 (1932) (Reproduced in the accompanying notebook II TAB 29).

<sup>85</sup> 28 U.S.C. §§ 1783 & 1784 (1994) are commonly referred to as the Walsh Act. *Blackmer* upheld the validity of 28 U.S.C. §§ 711-718, 284 U.S. at 433-43, which was the basis for the current Walsh. See 28 U.S.C. § 1783 (1994) (reviser's note). (Reproduced in the accompanying notebook II TAB 32 and 33).

which authorizes federal courts to subpoena United States nationals or residents living abroad. Blackmer, a United States citizen residing in France, was served in France with two subpoenas requiring him to appear at different times as a witness in a criminal trial pending in the Supreme Court of the District of Columbia.<sup>86</sup> *Blackmer* failed to honor the subpoenas and, after a hearing, the District of Columbia court held him in contempt and fined him \$ 30,000 in each case.<sup>87</sup> His property was seized to satisfy the judgments.<sup>88</sup> The court of Appeals for the District of Columbia affirmed the decree.

In concluding that the statute did not violate the due process clause of the fifth amendment, a unanimous Supreme Court resorted to a vertical sovereignty theory: in that [Blackmer] continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him. . . . Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it. Despite the potentially enormous universal burdens Blackmer would suffer from being forced to travel from France to the United States twice, the Court upheld the constitutionality of the extraterritorial subpoenas.<sup>89</sup>

According to *Blackmer*, the due process clause contains no absolute mileage limitation on the distance an "innocent" non-party witness may be required to travel to fulfill her civic duty

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<sup>86</sup> *Blackmer v. United States*, 284 U.S. 421, 438041 (1932) (Reproduced in the accompanying notebook II TAB 29).

<sup>87</sup> *Blackmer* (Reproduced in the accompanying notebook II TAB 29)

<sup>88</sup> *Blackmer* (Reproduced in the accompanying notebook II TAB 29).

<sup>89</sup> *Blackmer* (Reproduced in the accompanying notebook II TAB 29).

to testify.<sup>90</sup> Two factors, however, limit the applicability of *Blackmer's* holding to assertions of extraterritorial subpoena power by the states. First, *Blackmer's* vertical sovereignty rationale would support only assertions of subpoena power over persons within the territory of the government that created the court, or over citizens of the forum state.<sup>91</sup> It would not support subpoena power over persons who simply have "minimum contacts" with the jurisdiction, or others over whom assertions of extraterritorial subpoena power might be reasonable.

Second, courts should question the continued viability of any theory predicated solely on the "power of the sovereign." The Supreme Court in *Ireland*<sup>92</sup> rejected the proposition that a state's power to compel nonresident defendants to defend actions brought against them in the state must be *limited* out of concern for the sovereignty of other states. Furthermore, the Court in *Shaffer v. Heitner*<sup>93</sup> rejected the proposition that a state court necessarily has jurisdiction over all property within the territory of the state. If analyzed together *Ireland* and *Shaffer* render suspect the proposition that a state necessarily has unrestrained power over all persons served while physically present within its territory, and even over all domiciliaries, regardless of the amount of ongoing contact they have with the state.

Despite these limitations, *Blackmer* and the Walsh Act remain are the most relevant to the issue of extraterritorial state court subpoena power. Without reference to the power of the

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<sup>90</sup> *Blackmer* (Reproduced in the accompanying notebook II TAB 29).

<sup>91</sup> *Blackmer* (Reproduced in the accompanying notebook II TAB 29).

<sup>92</sup> *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (Reproduced in the accompanying notebook II TAB 42).

<sup>93</sup> *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (Reproduced in the accompanying notebook II TAB 42).

sovereign, courts could uphold the constitutionality of the Walsh Act on the theory that citizens of the United States are presumed to have sufficient contact with the country to support assertions of subpoena power over them by the United States. Even more generally, a court could hold that it is neither unreasonable nor unfair to require United States citizens residing abroad to testify in United States courts when they will be compensated for their time and travel expenses. Essentially *Blackmer* would support the proposition that a state may assert extraterritorial subpoena power over nonresidents as long as asserting such subpoena power would not offend "traditional notions of fair play and substantial justice."<sup>94</sup>

The root of the power to issue extraterritorial subpoenas rests in statutes of the United States. 28 USCS § 1783<sup>95</sup> is a rarely invoked provision that empowers federal courts to issue subpoenas on United States residents or nationals who are in a foreign country. The subpoena can require persons to produce documents or other things or to appear before the court or another designated place for testimony. As mentioned in *Blackmer*, the Supreme Court sanctioned Congress's sovereign authority to recall its citizens and residents to complete certain civic duties, such as assisting the administration of justice.<sup>96</sup> The statute is applicable only to U.S. citizens and residents, and subpoenas served on a non-resident alien abroad are void.<sup>97</sup> This power is somewhat analogous to an exercise of a "long-arm jurisdiction" in that citizenship and residency may constitute "minimum contacts" with the United States, and thus it is not unfair to ask citizens and residents to return to this country to testify. Section 1783

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<sup>94</sup> *Milliken v. Meyer*, 311 U.S. 457, 461 (1940). (Reproduced in the accompanying notebook II TAB 35).

<sup>96</sup> *Blackmer* (Reproduced in the accompanying notebook II TAB 29).

<sup>97</sup> *United States v. Farfan-Carreon*, 935 F.2d 678 (5th Cir. Tex. 1991). (Reproduced in the accompanying notebook II TAB 36).

establishes separate criteria for obtaining a subpoena in criminal and civil cases. A Section 1783 subpoena is available in all criminal proceedings, including grand jury proceedings, provided the testimony or other evidence is necessary "in the interest of justice." Failure to appear or produce as ordered under § 1783 is punishable as contempt pursuant to the procedures set forth in 28 USCS § 1784.

As mentioned in this section, the United States has constitutionally recognized the ability to issue extraterritorial subpoenas. However, The Supreme Court has held that, for U.S. legislation to have extraterritorial application, Congress must state so explicitly.<sup>98</sup> The method by which it employs these subpoenas appears to be focused on the relevant importance of obtaining the evidence and testimony of the witness. As the Court held in *United States v. Bowman*, criminal statutes that are enacted because of the government's right to defend itself must apply abroad; otherwise "to limit their locus to the strictly territorial jurisdiction would...greatly curtail the scope and usefulness of the statute."<sup>99</sup> Under the Hague Evidence Convention, diplomatic officers, consular agents and commissioners may not use compulsion to take the evidence of any witness, including their own nationals,<sup>100</sup> unless application is made to the local authorities for the use of compulsion and the application is granted.<sup>101</sup> This clearly eliminates the use of the Walsh Act subpoena in a Convention country when the American court has designated a consul or commissioner to serve the

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<sup>98</sup> *EEOC v. Arab Am. Oil Co.*, 499 U.S. 244, 248 (1991). (Reproduced in the accompanying notebook I TAB 18).

<sup>99</sup> *United States v. Bowman*, 260 U.S. 94, at 98 (1922) (Reproduced in the accompanying notebook II TAB 50).

<sup>100</sup> The Hague Evidence Convention the declarations and reservations of the contracting countries may be found in FED. CIV. P.(i); 28 U.S.C.A. at 54 arts. 15, 16, 17. (Reproduced in the accompanying notebook II TAB 37).

<sup>101</sup> The Hague Evidence Convention the declarations and reservations of the contracting countries may be found in FED. CIV. P.(i); 28 U.S.C.A. at 54 art. 18. (Reproduced in the accompanying notebook II TAB 37).



subpoena. Such action may constitute a breach of treaty obligations and would violate international law. But the Hague Service Convention provides that American consular officers are free to serve subpoenas upon United States nationals in Conventions countries requiring them to return to the United States to give testimony.<sup>102</sup> Thus the U.S. Supreme Court upheld the issuance of extraterritorial subpoenas but limits their uses. The Walsh Act as well as other Congressional instruments applies to equally to parties and nonparties, but the Walsh Act considers the issuance of a extraterritorial subpoena a “last resort” method to obtaining evidence needed in a given trial.<sup>103</sup>

### **Australian Approach**

The Australian Courts have dealt with the constitutionality of extraterritorial subpoenas rarely in their jurisprudence. However, this matter is dealt with comprehensively in the unreported judgment of Rogers CJ Commercial Division of the Supreme Court of NSW in *Arhill Pty. Limited v. General Terminal Company Pty. Limited & Ors* (1990) 23 NSWLR 545.<sup>104</sup> In that case His Honour noted that Part 37 Rule 2 Supreme Court Rules (NSW)<sup>105</sup> give the court the power to issue subpoenas in completely general terms.<sup>106</sup> His Honour then

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<sup>102</sup> The Hague Evidence Convention the declarations and reservations of the contracting countries may be found in FED. CIV. P.(i); 28 U.S.C.A. at 54 art. 8 (West Supp. 2000). See *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1313. (Reproduced in the accompanying notebook II TAB 42) The Hague Convention applies to “judicial and extrajudicial documents.” The United States Department of Justice Monograph, *International Judicial Assistance* at 5 (1976). (Reproduced in the accompanying notebook II TAB 37).

<sup>103</sup> Walsh Act (Reproduced in the accompanying notebook II TAB 32-33).

<sup>104</sup> As cited in PLNBank Note pg. 3 located at <http://www.pln.com.au> (Reproduced in the accompanying notebook II TAB 39); and *Aetna Pacific Securities Ltd. v. HongKong Bank of Australia Ltd.*, 1993 NSW LEXIS 7466 at 10 (Reproduced in the accompanying notebook II TAB 40); and *Williams v. Lips-Heerlen BV*, 1991 NSW LEXIS 9077 at 23 (Reproduced in the accompanying notebook II TAB 41).

<sup>106</sup> As cited in PLNBank Note pg. 3 located at <http://www.pln.com.au> (Reproduced in the accompanying notebook II TAB 39); and *Aetna Pacific Securities Ltd. v. HongKong Bank of Australia Ltd.*, 1993 NSW LEXIS

referred to Part 10 of the Supreme Court Rules dealing with service outside the State (referring to both within Australia and also outside of Australia.<sup>107</sup> His Honour took the view that Part 10 Rule 3 was authority for the Court to give leave to serve a subpoena outside Australia. His Honour stated that:

“The fact that an order made pursuant to it could, in some instances, involve an infringement of the sovereignty of another country does not mean that it is a reason for holding the rule to be invalid. Nonetheless the rule should be construed consistently with the established criteria of international law with regard to comity.”<sup>108</sup>

The Australian approach thus understands the political ramifications of the issuance of extraterritorial subpoenas but refuses to find them to be unconstitutional on their face.

### **Part 3. Duty of the Government of Sierra Leone and the Obligation of States**

State cooperation with the SC-SL depends on the terms of the relationship between an individual and the Court. While these terms differ, all relationships with the Court find themselves on the basis of the Court’s basic documents: the Agreement<sup>109</sup>, the Statute<sup>110</sup>, and

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7466 at 10 (Reproduced in the accompanying notebook II TAB 40); and *Williams v. Lips-Heerlen BV*, 1991 NSW LEXIS 9077 at 23 (Reproduced in the accompanying notebook II TAB 41).

<sup>107</sup> This particular quote was furnished from a phone conversation with an Australian Law Student at Melbourne University who so kindly read the preceding text from the unpublished case.

<sup>108</sup> This particular quote was furnished from a phone conversation with an Australian Law Student at Melbourne University who so kindly read the preceding text from the unpublished case.

<sup>109</sup> Agreement between The United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (16 January 2002) <http://www.sierra-leone.org/specialcourtagreement.html> (Reproduced in the accompanying notebook I TAB 7).

the Rules of Procedure and Evidence<sup>111</sup>. These are the documents that help to establish a structure for the Court's relationships.

The two modes of communication that are recognized by the Court are requests and orders. A request may be issued by any of the organs of the Court.<sup>112</sup> An order only may be issued by the Chambers.<sup>113</sup>

The various "basic documents" in addition to the Sierra Leone Special Court Agreement Ratification Act establish obligations to cooperate with all organs of the Court and comply with all orders of the Court. However, this obligation to cooperate is non-existent for third-party states. Rather, States are encouraged to cooperate with the Court and if possible enter into agreements of cooperation with the Court.

### **1. Obligation of Sierra Leone**

The Government of Sierra Leone is obliged to cooperate with the Special Court's requests and comply with its orders.<sup>114</sup> Pursuant to article 17(1) of the Agreement, and as acknowledged in Rule 8, the Government of Sierra Leone is obliged to cooperate with "all

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<sup>110</sup> The Special Court Agreement, 2002, Ratification Act, 2002. (Reproduced in the accompanying notebook I TAB 7).

<sup>111</sup> Rule of Procedure and Evidence for the Special Court for Sierra Leone <http://www.sierra-leone.org/rulesofprocedureandevidence.html>. (Reproduced in the accompanying notebook II TAB 49).

<sup>112</sup> Rules of Procedure and Evidence for the Special Court for Sierra Leone <http://www.sierra-leone.org/rulesofprocedureandevidence.html>. see Rule 8 (Reproduced in the accompanying notebook II TAB 49).

<sup>113</sup> Agreement between The United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (16 January 2002) <http://www.sierra-leone.org/specialcourtagreement.html> see Art. 17(2) (Reproduced in the accompanying notebook I TAB 7).

<sup>114</sup> Agreement between The United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (16 January 2002) <http://www.sierra-leone.org/specialcourtagreement.html> see Art. 17 (Reproduced in the accompanying notebook I TAB 7).

organs of the Special Court at all stages of the proceedings”.<sup>115</sup> In particular, the Government is obliged to “facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation”.<sup>116</sup> Furthermore, under article 17(2) of the Agreement, the Government of Sierra Leone must “comply without undue delay with any request for assistance by the Special Court”.<sup>117</sup> The Government also must “comply without undue delay with ... an order issued by the Chambers”.<sup>118</sup>

With the enactment of the Special Court Agreement, 2002 (Ratification) Act, 2002, Sierra Leone incorporated these obligations into its national laws.<sup>119</sup> Sections 14 through 18 of the Ratification Act establish a framework for cooperation with requests from the organs of the Court.<sup>120</sup> Section 20 of the Act provides that an order issued by the Chambers of the Special Court is binding in Sierra Leone and states that it has “the same force or effect as if it had been issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone court.”<sup>121</sup>

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<sup>115</sup> Agreement between The United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (16 January 2002) <http://www.sierra-leone.org/specialcourt-agreement.html> see Art. 17. (Reproduced in the accompanying notebook I TAB 7).

<sup>116</sup> Agreement between The United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (16 January 2002) <http://www.sierra-leone.org/specialcourt-agreement.html> see Art. 17(1) (Reproduced in the accompanying notebook I TAB 7).

<sup>117</sup> Agreement between The United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (16 January 2002) <http://www.sierra-leone.org/specialcourt-agreement.html> see Art. 17 (2) (Reproduced in the accompanying notebook I TAB 7).

<sup>118</sup> Agreement between The United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (16 January 2002) <http://www.sierra-leone.org/specialcourt-agreement.html> see Art. 17(2) (Reproduced in the accompanying notebook I TAB 7).

<sup>119</sup> The Special Court Agreement, 2002, Ratification Act, 2002. (Reproduced in the accompanying notebook I TAB 7).

<sup>120</sup> The Special Court Agreement, 2002, Ratification Act, 2002. (Reproduced in the accompanying notebook I TAB 7).

<sup>121</sup> The Special Court Agreement, 2002, Ratification Act, 2002. (Reproduced in the accompanying notebook I TAB 7). Rule 8(A) of the Rules of Procedure and Evidence for the Special Court for Sierra Leone mirrors this language. (Reproduced in the accompanying notebook II TAB 49).

Moreover, section 21 of the Act mandates that “any person” who executes the order must comply with “any direction specified in that order” and that “every natural person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court.”<sup>122</sup>

## **2.Obligation of third-party States**

States other than Sierra Leone are not obliged to cooperate with the Court’s requests or comply with its orders. The Agreement, the Statute, the Rules and Sierra Leone’s Ratification Act only establish obligations to cooperate and comply on the part of Sierra Leone, not other States. States other than Sierra Leone are instead encouraged to cooperate with the Special Court. For example, UN Security Council Resolution 1470 “urges all States to cooperate fully with the Court”.<sup>123</sup> The Management Committee for the Special Court also has, as one of its functions, the responsibility to “[e]ncourage all States to cooperate with the Special Court”.<sup>124</sup> In its Rules, the Special Court has anticipated that such encouragement might result in cooperation and compliance by other States. For example, Rule 8(C) foresees that the Court may invite other States to provide assistance to the Court “on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.”<sup>125</sup>

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<sup>122</sup> The Special Court Agreement, 2002, Ratification Act, 2002 (Reproduced in the accompanying notebook I TAB 7).

<sup>123</sup> S.C.Res. 1470, 4729<sup>th</sup> meeting, 28 March 2003, UN Doc. S/RES/1470 (2003). (Reproduced in the accompanying notebook I TAB 21).

<sup>124</sup> Terms of reference for the Management Committee for the Special Court for Sierra Leone, para. 3(e), attached as Appendix III to the *Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone*, annexed to the Letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2002/246. (Reproduced in the accompanying notebook I TAB 15).

<sup>125</sup> The language of Rule 8(C) is similar to article 87(5)(a) of the ICC Statute, which states: “The Court may invite any State not party to this Statute to provide assistance ... on the basis of an ad hoc arrangement, an

### 3. Duty to Prosecute for Breaches of the Geneva Conventions of 1949.

The four Geneva Conventions were negotiated in 1949 and two protocols were adopted later in 1977<sup>126</sup>, which were intended to solidify and codify international law with respect to the protection of civilians in occupied territories and prisoners of war.<sup>127</sup> Regarding conventional warfare, the language is broad and creates actual duties with definite obligations to enforce the law. Persons who violate the treaties are designated as “war criminals” and are held to be personally liable for their criminal actions.<sup>128</sup> In addition, State parties have a duty to search for, prosecute, and punish perpetrators of grave breaches of the Geneva Conventions.<sup>129</sup> These duties, however, are limited by specific factors that have narrowed its application quite severely in modern times. The duty to prosecute grave breaches under the Geneva Conventions is limited to the context of international armed conflict.<sup>130</sup> The armed conflict aspect of the requirement meets the high threshold of violence that constitutes a genuine armed conflict—it needs to be more than low levels of disturbances such as riots or

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agreement with such State or any other appropriate basis.” (Reproduced in the accompanying notebook II TAB 49).

<sup>126</sup> The four Geneva Conventions were adopted on 12 August 1949. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I). The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked members of the Armed Forces at Sea (Geneva Convention II). The Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) The Geneva Convention Relative to the Protection of Civilian Person in Time of War (Geneva Convention IV). (Reproduced in the accompanying notebook I TAB 4).

<sup>127</sup> Michael Schmitt, *Rethinking the Geneva Convention: Introduction*, 1 January 30, 2003. <http://www.crimesofwar.org/expert/genevaConventions/gc-schmitt.html> (Reproduced in the accompanying notebook II TAB 38).

<sup>128</sup> See The Geneva Conventions in general. (Reproduced in the accompanying notebook I TAB 4).

<sup>129</sup> See The Geneva Convention I-IV: Articles 51, 52, 135, 148 respectively (Reproduced in the accompanying notebook I TAB 4).

<sup>130</sup> Article 2 of the Geneva Conventions. (Reproduced in the accompanying notebook I TAB 4).

isolated and sporadic fighting.<sup>131</sup> The war in Sierra Leone may be viewed as an international armed conflict because of the nature of the persons involved.

## **5. Obligations to Subpoena Under the U.N. Charter**

Neighbor states of Sierra Leone as member of the United Nations have accepted certain obligations set forth in Article 2 of the U.N. Charter.<sup>132</sup> This article lists the principles that each member state must act in accordance with in order to comply with the Purposes of the Charter.<sup>133</sup> Article 2(2) states: “All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”<sup>134</sup>

Additionally, Article 2(5) states: “All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or

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<sup>131</sup> Discussion found in Scharf, Michael P. *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?* 31 TEX. INT’L L.J. 1, 19n.131(1996). The Genocide Convention is not applicable to Sierra Leone because the crime of genocide includes an element of specific intent to destroy a specified class of persons. The killings were not focused on a specific group, rather there was wide spread killing in Sierra Leone. The articles also mentions other human rights conventions that create a duty to prosecute that are not applicable to Sierra Leone. (Reproduced in the accompanying notebook I TAB 17).

<sup>132</sup> U.N. Charter Article 2: (Reproduced in the accompanying notebook I TAB 13).

<sup>133</sup> U.N. Charter: Article 1: “The purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; 3. To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and 4. To be a center for harmonizing the actions of nations in the attainment of these common ends. (Reproduced in the accompanying notebook I TAB 13).

<sup>134</sup> The U.N. Charter Article 2(2). (Reproduced in the accompanying notebook I TAB 13).

enforcement action.”<sup>135</sup> Neighbor countries who are members of the United Nations have a clear and explicit obligation to act in accordance with U.N. action and not contrary to the Purposes of the U.N. organization. These countries further have obligations under Chapter V “The Security Council” where each member agreed in Article 24(1) “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”<sup>136</sup> And then in Article 25: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in Accordance with the present Charter.”<sup>137</sup>

The Security Council acted in response to the threat to international peace and security in Sierra Leone during its decade-long civil war. The Security Council passed a series of resolutions during the past ten years ranging from deploying peace keeping troops to setting up a Truth and Reconciliation Committee in the country.<sup>138</sup> It is important to note that these resolutions, including the resolution granting the Secretary-General the authority to negotiate an agreement for an international tribunal, were not passed with Chapter VII authority. This means that the SC-SL does not have primacy over third party sovereigns to demand compliance with its rulings. Thus, on the surface, a third party sovereign has no duty to answer to or comply with the SC-SL’s orders or rulings. The Court’s lack of direct authority

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<sup>135</sup> The U.N. Charter Article 2(5). (Reproduced in the accompanying notebook I TAB 13).

<sup>136</sup> The United Nations Charter Article 24(1) (Reproduced in the accompanying notebook I TAB 12).

<sup>137</sup> The United Nations Charter Article 25. (Reproduced in the accompanying notebook I TAB 12).

<sup>138</sup> Security Council Resolutions included: 1289 (2000), 1299 (2000), 1306(2000), 1313 (2000), 1315 (2000), 1317 (2000), 1321 (2000), 1334 (2000), 1370 (2001), 1385 (2001), 1389 (2002), 1400 (2002) (Reproduced in the accompanying notebook I TAB 3).



over third party sovereign's does not, however, allow these third party sovereigns to derogate from Security Council Resolutions. Each member has a treaty obligation under international law to fully comply with these resolutions.

The Security Council passed Resolution 1315 (2000), which was adopted on August 14, 2000, and it authorized the Secretary-General to negotiate with Sierra Leone in setting up a Special Court to prosecute the individuals with the greatest responsibility for the atrocities within Sierra Leone. The preamble of this resolution explicitly noted the "pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone." The resolution also reaffirmed in the preamble "the importance of compliance with the international humanitarian law, and reaffirming further 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 standard of justice, fairness, and due process of law." The Security Council clearly emphasized the importance of international cooperation, namely the obligations of Members to cooperate with the Special Court, to end impunity for war crimes and bring about peace, security, and stability in the region.<sup>139</sup> The Security Council then acknowledged and "welcomed" the final agreement between the Special Court and the U.N. in Resolution 1400 (2002) while in Resolution 1436 (2002), the Security Council "welcome[d] the launch of the Special Court for Sierra Leon emphasizing the importance in taking effective action on impunity and accountability and in promoting reconciliation" in the preamble. In clause 10 of the resolution the Security Council "reiterate[d] its strong support for the Special Court for Sierra Leone, welcome[d] the start of

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<sup>139</sup> Security Council Resolution 1315 (2000). (Reproduced in the accompanying notebook I TAB 3).

the Court's operations, encourage[d] donors to contribute generously to the Trust Fund for the Special Court and to disburse existing pledges rapidly.”

Members of the U.N. have an obligation to act in accordance with these resolutions.<sup>140</sup> The Security Council created the Special Court for Sierra Leone with the express intent to end impunity for the atrocities committed in the country.<sup>141</sup> The resolutions clearly require Members, at a very minimum, not to frustrate the process of bringing war criminals to justice in the Special Court. Under Article 2(5) of the Charter, Member states have an affirmative duty to act in accordance with and give every assistance to the U.N.<sup>142</sup> While the Court is not an organ of the U.N.; it was created by the hands and at the will of the law making body of the U.N. Member states agreed in Article 24 to “confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.” The Security Council determined that the unprecedented atrocities occurring in the region were a threat to international peace and security.<sup>143</sup> They created a Court to deal with the crisis. Members are obligated under Article 25 of the Charter to accept and carry out the decisions of the Council.

One country in particular that has not been of assistance to the prosecutorial process is Nigeria which is currently sheltering one of a handful of indictees of the Special Court for Sierra Leone through an express agreement with this individual who has been accused of the

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<sup>140</sup> The United Nations Charter Article 2(2). (Reproduced in the accompanying notebook I TAB 13).

<sup>141</sup> Security Council Resolution 1315(2000). (Reproduced in the accompanying notebook I TAB 3).

<sup>142</sup> The United Nations Charter Article 2(5). (Reproduced in the accompanying notebook I TAB 13).

<sup>143</sup> S.C.Res. 1400 (Reproduced in the accompanying notebook I TAB 3).

most egregious crimes against humanity.<sup>144</sup> The Security Council decided to limit the Court's jurisdiction to those with the "greatest responsibility."<sup>145</sup> The Council made the determination that prosecution of this small class of criminals was the best way to promote peace and security in the region. Nigeria granted one of these individuals, Charles Taylor, political asylum in its borders after this individual's indictment was released. Nigeria may be skirting its obligations under the U.N. Charter to give assistance to the SC-SL. Not only is it failing to render assistance, it is actually undermining the efforts of the Court by creating a major obstacle in the court's pursuit of justice. Nigeria may be in violation of the U.N. Charter and thus should be instructed to assist in the subpoenaing of witnesses in its country.

#### **IV. CONCLUSION**

The recognition of the horrors that occurred in Sierra Leone by the international community is well documented. With this recognition, comes the duty to assist in the prosecution of those most responsible for the atrocities. The SC-SL has the ability constitutionally to issue extraterritorial subpoenas to non-resident witness as evidenced in this memorandum. With this ability to issue subpoenas the Court is only stopped by the lack of cooperation of neighbor states. With the lack of formal bilateral treaties existing between Sierra Leone and nations where likely witnesses of crimes that occurred in Sierra Leone are located (i.e. Liberia, Nigeria and other neighboring African nations) feel there is no duty to abide by requests or demands for summons to the courts of Sierra Leone.

The question of state sovereignty is something that may be explored further in the context

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<sup>144</sup> SC-SL-2003-CI-I-018, 67. Brief by Defendant in Motion to Quash the Indictment against Charles Taylor. (Reproduced in the accompanying notebook II TAB 20).

<sup>145</sup> Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council (Reproduced in the accompanying notebook II TAB 51).

of this particular issue. States are reluctant to relinquish their sovereignty and therefore will not cooperate with the SC-SL. As has been noted earlier, the Security Council has not granted Chapter VII power to the SC-SL however, the SC-SL still has the power, as any member of the United Nations, to approach the Security Council to ask them to assist in the enforcement of such orders as subpoenas.<sup>146</sup> This leaves the proverbial “door open” for the SC-SL to attempt to enforce its various order. Even under Chapter VII power the ICTY, and ICTR must request the Security Council to enforce their orders since they do not have any direct enforcement arm in their respective Courts.<sup>147</sup> It appears that the next step for the SC-SL is to begin to use its treaty making ability to further buttress its quest for justice by entering into various agreements with States where most of the witnesses that fled the violence in Sierra Leone now live.<sup>148</sup>

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<sup>146</sup> Chapter VII of the United Nations Charter (Reproduced in the accompanying notebook I TAB 11).

<sup>147</sup> Chapter VII of the United Nations Charter (Reproduced in the accompanying notebook I TAB 11).

<sup>148</sup> *Prosecutor v. Morris Kallon et. al* (“Decision on Constitutionality and Lack of Jurisdiction”) SCSL-2004-14-AR72(E) see para. 49, 50, 51, 52. (Reproduced in the accompanying notebook I TAB 2).