

**THE SPECIAL COURT FOR SIERRA LEONE:
THE FIRST EIGHTEEN MONTHS¹***March 2004***I. INTRODUCTION**

The civil war in Sierra Leone, which began in early 1991, claimed the lives of an estimated 75,000 individuals and displaced a third of the population.² In July 1999, the government and the rebel group Revolutionary United Front (RUF) negotiated a comprehensive peace agreement at Lomé, Togo, but hostilities briefly re-erupted in 2000. The United Nations strengthened its presence and became the largest UN peacekeeping mission at the time, with approximately 17,000 soldiers. These forces, with the assistance of British troops, helped to end the fighting. Since then, Sierra Leone has stabilized significantly, including undergoing a process of disarmament, demobilization, and reintegration and holding a peaceful election in May 2002.

The Lomé Peace Agreement invited senior RUF leaders into government, agreed on the establishment of a Truth and Reconciliation Commission (TRC), and granted a blanket amnesty to ex-combatants. But in June 2000, after the resurgence of hostilities, President Ahmad Tejan Kabbah asked the UN to help Sierra Leone establish a “special court” to try those who had committed atrocities during the war. In response, on August 14, 2000, the UN Security Council requested that Secretary-General Kofi Annan negotiate an agreement with the Government of Sierra Leone toward this end. In January 2002, the war was officially declared over, and the Government of Sierra Leone and the UN signed an agreement establishing the Special Court for Sierra Leone. (This agreement was later implemented into Sierra Leonean law by the Special Court Agreement (Ratification) Act, 2002.)

The Special Court for Sierra Leone is a tribunal established to try “those bearing the greatest responsibility” for serious violations of international humanitarian law and certain provisions of Sierra Leonean domestic law since November 30, 1996.³ Its jurisdiction and procedures are governed by the Statute, which was appended to the Agreement, and by its Rules of Procedure and Evidence, which the judges drafted.⁴ The Special Court is often referred to as a “hybrid tribunal” because of its mixed jurisdiction and composition. Structurally, it is independent and completely distinct from Sierra

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² The population of Sierra Leone is currently estimated to be 5.6 million.

³ This limitation on the temporal jurisdiction of the war, based on the date of the failed Abidjan Accord, was intended to keep the budget down in comparison to the other international criminal tribunals.

⁴ The Rules of Procedure and Evidence are an altered and abbreviated version of the Rules of the International Criminal Tribunal for Rwanda. They were amended on August 1, 2003.

Leone's legal system, and enjoys primacy vis-à-vis domestic courts.⁵ UN administrations in Kosovo and East Timor have established other hybrid tribunals, but the Court is the first example of this particular model, and has the potential to be an important precedent.

The Special Court has a mixture of domestic and international judges, and Geoffrey Robertson, an Australian national, serves as President.⁶ The Office of the Prosecutor is headed by an American, David Crane, who was previously a lawyer at the U.S. Department of Defense.⁷ The Registry—which provides support to the judges, the Office of the Prosecutor, and the Defence Office—is led by Robin Vincent, a senior court administrator from the UK.⁸ The Court is funded by voluntary contributions from a group of interested states,⁹ and a Management Committee comprising a small number of states oversees all nonjudicial activities.¹⁰ Matters of cooperation with the Government of Sierra Leone are regulated by the Special Court Agreement (Ratification) Act, 2002. The Special Court will have a short life span, perhaps as little as three years.

This report describes what the Court has accomplished in the first 18 months of its mandate and draws out some early lessons on how it fits into the global development of international justice.

II. PROGRESS TO DATE

A. Establishment of the Court

In April 2002, three months after the Government of Sierra Leone and the UN signed the agreement establishing the Special Court, UN Secretary-General Kofi Annan appointed the Registrar and the Chief Prosecutor. They arrived in Freetown in late July and early August 2002, respectively.

They began operations in difficult conditions. An advance planning mission in January 2002 had determined that no ready-made and convenient offices for the Court existed and that a new facility would have to be built. Moreover, unlike the International Criminal Tribunal for Rwanda (ICTR), the Court lacked a formal relationship with the UN. For various reasons, cooperation from the UN Assistance Mission in Sierra Leone (UNAMSIL) proved to be minimal politically and complex financially, although support from UNAMSIL military personnel was easier to obtain. Assistance from the Government of Sierra Leone was also forthcoming. The Special Court built its own site—staff offices, courtrooms, and prison facilities—on an 11.5-acre plot of land, donated by the Government, in central Freetown. But, until January 2003, the Registry had to work in provisional offices owned by the Bank of Sierra Leone, while the Office of the Prosecutor, located in a private residence a few kilometers away, was not transferred to the permanent site until August 2003.

⁵ This is particularly significant in respect of challenges that have been made to the jurisdiction of the Special Court under domestic law, such as the law implementing the Lomé Amnesty.

⁶ In fact, both the President and the Deputy Prosecutor, Desmond da Silva from the UK, are internationals appointed by Sierra Leone, thereby skewing the composition, which was already tilted toward internationals (the Statute provides for three judges to be appointed by Sierra Leone and five by the UN Secretary-General).

⁷ The Office of the Prosecutor has about 40 staff members, including investigators and trial and appeals counsel.

⁸ The Registry performs the following functions: management of detention; witness protection; court management; legal support to the Chambers; filing of court records and exhibits; public information and outreach; security; financial and procurement matters; support to the Defence Office; and witness support and protection.

⁹ This model of funding was opted for in the wake of the ICTY and ICTR, each of which costs the international community in excess of \$100 million in assessed contributions yearly.

¹⁰ The management committee comprises representatives from Canada (chair), the United States, the United Kingdom, the Netherlands, Lesotho, Nigeria, the UN Office of Legal Affairs, and the Government of Sierra Leone.

B. The Registry (the Chambers and the Defence Office)

A year after the Court began to operate, the Registry was still in formation. By April 2003, the Special Court had hired only 55 percent of its expected total personnel of 256. This was the Registrar's conscious choice: because of budgetary constraints, the top priority was getting the Office of the Prosecutor up and running.

By the time the Court had to deal with its first detainees, with the first wave of indictments and arrests on March 10, 2003 (known by the Office of the Prosecutor as "Operation Justice"), it had made much progress, but still had no permanent prison facilities, courtroom, or functional defense office. It relied on quickly rehabilitated buildings on Bonthe Island to house the detainees for the first months. Forty minutes from Freetown by helicopter, the island's remote nature and rustic character—chosen mainly for security reasons—presented some accessibility challenges for relatives, lawyers, and local journalists. On August 10, 2003, the accused were transferred to the permanent detention facility in Freetown.

Observers noted that when the accused first appeared in court in mid-March 2003, there appeared to be some confusion on matters of legal procedure, and the Court was later criticized for holding the initial appearance of Hinga Norman in closed session, which was done for security reasons. However, other initial appearances held a few weeks later were conducted more smoothly.

With the first arrests, the organization and support of defense counsel was an urgent priority. In February 2003, the Management Committee approved an innovative new structure, suggested by the Registrar, for organizing the defense. This system tries to strike a balance between two competing concerns, which have posed a difficult challenge for other international criminal tribunals: strictly controlling the costs of legal aid,¹¹ a primary concern of donor states, and bringing in highly qualified lawyers, a key element of fair trials. Largely inspired by British practice, the Special Court has established the Defence Office, which is essentially a public defender's office. The Defence Office is intended to be led by an international senior lawyer and assisted by up to four additional attorneys, all of whom are on the Court's payroll. This Office will provide services in legal research, whereas the defense teams hire investigators separately. Each accused is assigned an experienced lawyer, using a lump-sum payment system in order to avoid inflation of fees. This system is an experiment in international justice and seems promising. However, it has been difficult to hire someone into the top post of Public Defender, because there is no representational role envisaged for this person in court, and it is difficult to entice experienced criminal practitioners to abandon their practices and relocate to Sierra Leone.

Hiring professional lawyers with international criminal justice experience will be crucial in providing adequate legal support to the judges, but this process did not start before the end of the first fiscal year in July 2003. At any given time, there will be only a few legal officers supporting Chambers, unlike at the other international criminal tribunals.

Providing public information is another important function of the Registry. Information on the Court, including documents, was not readily available in the first year, but the website is now vastly improved (although ideally all public documents, including motions, would be posted there).¹²

The Special Court is preparing to begin trials in May 2004. The Court building itself is due to be completed in March 2004. In the interim, there has been some judicial activity on issues of detention

¹¹ Most of the accused before the Special Court will be unable to pay for their defense. Initially, Hinga Norman hired his own lawyer. This case indicated that there could be a fruitful working relationship between a privately hired defense attorney and the Defence Office, the former relying on the latter's free research services. However, Hinga Norman requested legal aid in a letter to the Registrar in late June 2003, and the Court has paid for his defense since that time.

¹² See <http://www.sc-sl.org/>.

and witness protection, as well as a series of appellate hearings on crucial issues such as a challenge to the jurisdiction of the Court based on the Lomé amnesty, head of state immunity, and issues relating to the charges in the indictments of recruitment of child soldiers.¹³ Motions on “joinder of trials” were heard before the Trial Chamber in the first week of December 2003, requesting that the accused be joined into two large trials, one dealing with the RUF and Armed Forces Revolutionary Council (AFRC)¹⁴ and another with the Civil Defense Forces (CDF).¹⁵ In January 2004, the Court ruled that, instead, there will be three trials: one for the three RUF indictees, one for the three AFRC indictees, and one for the three CDF indictees. It is possible that this decision could extend the life of the Court beyond its planned three years, and the Office of the Prosecutor has appealed.

To sum, achievements in the Registry’s start-up phase include its rapid establishment of infrastructure, recruitment, provision of effective security, and creation of an innovative structure for the defense, whereas challenges have included diplomatic relations with neighboring states¹⁶ and relations with local media, particularly on issues pertaining to Hinga Norman.

C. The Office of the Prosecutor

The Office of the Prosecutor developed with remarkable speed. The Prosecutor arrived in Freetown in early August 2002, and by November the Office was reputedly working at full capacity. The Prosecutor recruited from four principal sources: his own personal connections, former staff members of the ICTR and International Criminal Tribunal for the former Yugoslavia (ICTY), Sierra Leone-based expatriates, and Sierra Leoneans.

Seven months after the Prosecutor’s arrival, eight indictments were presented to a judge for confirmation. By the end of June 2003, another four indictments were completed. To date, the indictments provide indication of a focused prosecutorial strategy, concentrating on a few individuals from every faction.¹⁷

1. A Restricted Prosecutorial Strategy

From its outset, the jurisdiction of the Special Court was restricted to “those who bear the greatest responsibility.” Clearly, this was intended to prevent the Special Court from expanding in size and expense as a result of an unwieldy prosecutorial policy, as some diplomats had characterized the ICTY and ICTR. Although formal figures were never given, it was clear from the outset that the general expectation of the international community, including the UN, was that the Special Court would not go beyond 20 to 30 individual indictments. The Prosecutor has shown that he intends to comply with this expectation.

By November 2003, 13 individuals had been indicted, 10 of whom were in the Special Court’s custody: Foday Sankoh, the RUF founder and former leader; Issa Sesay, who replaced Foday Sankoh as leader of the RUF; Morris Kallon and Augustine Gbao, senior RUF commanders; Alex Tamba Brima, Ibrahim “Bazzy” Kamara, and Santigie Kanu, senior members of the AFRC; Sam Hinga Norman, national coordinator of the CDF and Minister of Internal Affairs and National Security at the time of this arrest; Moinina Fofanah, Director of War for the CDF; and Allieu Kondewa, Chief

¹³ These are now delayed, pending a defense application seeking to disqualify Geoffrey Robertson for certain statements made about the RUF in his book, *Crimes Against Humanity: The Struggle for Global Justice*, prior to becoming President of the Special Court.

¹⁴ The AFRC was the military junta responsible for the coup in 1997, and it later joined forces with the RUF.

¹⁵ The CDF is largely composed of traditional hunters, some of whom are known as Kamajors. President Kabbah called on the CDF to assist in fighting the RUF.

¹⁶ See Section II(C)(2) for further description.

¹⁷ Although the first indictments were brought expeditiously, it seems that investigations have continued in order to gather additional evidence. The Prosecutor has stated that he applied an internal standard of “proof beyond reasonable doubt” prior to signing the indictments. In contrast, the Rules do not require a “prima facie” case for confirmation of an indictment by a judge, as has been common before the other tribunals (Rule 47).

Initiator and High Priest of the Kamajors. Three additional accused were at large, dead, or allegedly dead: Sam “Mosquito” Bockarie, former Battlefield commander of the RUF; Johnny Paul Koroma, head of the AFRC; and Charles Taylor, former President of Liberia. Some of these cases are discussed in further detail below.

The indictments employ an innovation known as “notice pleading,” a brief form of pleading that has been upheld and may set a new practice for international criminal proceedings. The indictments also include far fewer charges than is common at the ICTR. Also unique is the emphasis on gender crimes and recruiting child soldiers, which reflects the immense suffering of women and children during the war.

The indictments issued thus far have focused on the leadership of the three main armed groups—RUF, AFRC, and CDF—fighting the civil war since November 1996. However, the Prosecutor has alluded frequently to the financiers pulling the strings behind the conflict, causing speculation that they may be among the remaining indictees.

Another unique element of prosecutorial strategy in Sierra Leone has been the use of public statements on prosecutorial strategy to reassure the public. For example, the Prosecutor put to rest the contentious issue of whether children would be tried (a question debated long and hard in the context of drafting the Statute) by declaring that he did not intend to indict anyone for crimes committed while under the age of 18. He also declared that he would not seek information from the TRC. It is unusual for a Prosecutor to declare his prosecutorial plans or policies in advance, but on both these issues, his announcements have been positively received.

2. Individual Cases

Foday Sankoh (RUF). At his initial appearance on March 15, 2003, Foday Sankoh appeared to be in a poor physical state. Jailed for almost three years in Freetown’s central prison on murder charges relating to events in May 2000, the former RUF leader was brought before a Special Court judge slumped in a wheelchair, his hair and beard unkempt, his right leg trembling, and his head resting on his chest. Sankoh was unable to answer the judge’s questions and thus could not enter a plea; a medical and psychiatric examination was ordered to determine if he was fit to stand trial. The exam revealed that Sankoh was in a catatonic state and incapable of walking, talking, or feeding himself. It was recommended that Sankoh be subject to further assessment of his psychiatric state. A court order was made to that effect, but Sierra Leone lacked the medical facilities to carry out the examination.

Shortly thereafter, Sankoh’s health declined, and he was transferred to the UNAMSIL medical facility in Freetown on March 29, 2003. The Registry asked the Government of Sierra Leone to request that the Security Council Sanctions Committee lift the travel ban against Sankoh so that he could be transferred abroad for better medical treatment. The Sanctions Committee rejected the application, fearing that Sankoh would undertake legal action to avoid proceedings before the Special Court.

Nevertheless, the Registry continued to attempt to negotiate transfer agreements with countries in the region. Three months later, the Court issued a statement saying it was in an “urgent need” of assistance from a country where Sankoh could be properly diagnosed and treated.

However, no such assistance was offered. Sankoh died on July 29, 2003, causing the Deputy Prosecutor to remark that “he died the quiet death that he denied so many others.” A postmortem examination determined that he expired from natural causes, and a report was produced to record the Registry’s efforts to have him transferred for medical care.

Issa Sesay (RUF). Sierra Leonean citizens expressed mixed feelings about Issa Sesay’s arrest. As the interim leader of the RUF following Sankoh’s arrest in May 2000, he played an important role in leading the RUF into the peace process and disarmament. Some are grateful to him for helping to bring the war to an end. In Makeni, where the RUF had its headquarters from 1998 until the end of the

conflict, many youths consider Sesay a “hero,” or at least a man of peace. In Freetown, before the arrest, several intellectuals expressed concern about the fact that leaders like Sesay may be indicted after publicly committing themselves to peace. However, it appears that these concerns did not resurface once the charges were a reality.

During his initial appearance before the Court on March 15, 2003, Sesay seemed eager to talk and was allowed to make a number of substantive remarks. He denied planning to take UN soldiers as hostages in 2000, one of the charges against him and other RUF or AFRC indictees. Instead, he blamed Foday Sankoh. He also stated that he had received orders from Charles Taylor. These statements have given rise to speculation that the Prosecution may seek Sesay’s cooperation and testimony against others.

Sam Hinga Norman (CDF). The indictment and arrest of Sam Hinga Norman, a government minister, caused a shock among the population. Hinga Norman, a retired captain in the Sierra Leone Army, is alleged to have been instrumental in bringing together traditional hunters from the Mende region—the Kamajors—to protect civilians from attacks by both soldiers and rebels. By 1996, the Kamajors had become an important force in support of the transition to civilian government and were widely seen as heroes during the election campaign that brought Ahmad Tejan Kabbah to power. After the AFRC overthrew Kabbah in May 1997, Norman became the national coordinator of the CDF. The CDF became the main force fighting for the government in exile. At the peak of the war, the CDF may have comprised up to 200,000 members. When Kabbah was reinstated as President in March 1998, Norman became his deputy Minister of Defence. At the time of his arrest, on March 10, 2003, he was still a key cabinet minister, in charge of Internal Affairs and National Security.

Many consider Hinga Norman to be a hero, especially in his native region of Bo district and, by extension, throughout the Mende region.¹⁸ In these places, reactions to his arrest ranged from anger to betrayal. Hinga Norman’s support is not limited to his fellow citizens. Former western diplomats who worked in Sierra Leone in the mid- and late 1990s have privately and publicly expressed their support and are likely to testify for his defense. However, victims and representatives of the Amputees’ Association welcomed Hinga Norman’s indictment as a necessary and vital acknowledgement of the atrocities the CDF committed.

Hinga Norman’s powerful position and perceived capacity to mobilize former CDF forces led the Special Court to take exceptional security measures following his arrest: his arraignment and other court appearances were held in closed session; his place of detention was not made public until his own lawyer disclosed it; and initially there were plans to fly him out of the country for his pre-trial detention. (The Registrar had attempted, without success, to negotiate his transfer to the detention unit of either the ICTY in The Hague or the ICTR in Arusha.) There were regular rumors in Freetown about the Kamajors’ plans to attack the prison and free their leader. These alleged threats, regularly assessed by Court officials, have not materialized. Three months after Norman’s arrest, two senior leaders of the CDF were taken into custody and their court appearances took place in public.

Sam Bockarie (RUF) and Johnny Paul Koroma (AFRC). Sam Bockarie, known as “Mosquito,” and Johnny Paul Koroma, former leader of the AFRC and head of the military junta after the 1997 coup, were publicly indicted on March 10, 2003, but could not be arrested. The former was the RUF Battlefield Commander when he left Sierra Leone in December 1999. He then took refuge in Liberia and was widely rumored to be involved in the fighting across Liberia and Ivory Coast at the time of his indictment. On April 30, 2003, the Office of the Prosecutor declared it had information that Bockarie was in Liberia. Liberian authorities immediately denied this, only to announce a week later that Bockarie had been killed while trying to enter Liberia from the Ivory Coast. On June 1, 2003, Bockarie’s body was flown to Freetown and given to the Special Court for final identification (he was positively identified).

¹⁸ Mende people constitute some 30 percent of the population and are the most prominent ethnic group in Sierra Leone, along with the Temne. They are spread over the southern region of the country and part of the eastern districts.

At the same time that the Office of the Prosecutor announced that it believed that Bockarie was in Liberia, it also gave detailed information on Johnny Paul Koroma, also believed to be in Liberia. Koroma had successfully participated in May 2002 elections in Sierra Leone and was elected to the Parliament. On January 17, 2003, he escaped arrest by the Sierra Leone police, which were investigating an alleged coup attempt that had taken place a week earlier. Since then, Koroma has been on the run. On June 15, 2003, the Special Court Chief of Investigations, Alan White, declared he had reliable information that Koroma had also been killed in Liberia two weeks earlier, although the Court has since received contradictory information. His whereabouts remain unclear.

Charles Taylor. Kept sealed for months, the indictment of the President of Liberia was made public on June 4, 2003. Since the Court's creation, many have suspected that Charles Taylor might be included in its prosecutions. The Court's mandate does extend to non-Sierra Leoneans, and Taylor's role in the various subregional conflicts has been widely documented.

The timing of the announcement of the indictment attracted wide controversy: the Prosecutor chose to reveal it while Taylor was attending peace talks in Ghana. Several diplomats declared that this action was detrimental to the peace process in Liberia.¹⁹ Taylor's presence in Ghana was one of the rare occasions in recent years where he left the protection of Liberia (although he also made a fleeting visit to Togo in April 2003).

Some contend that Taylor's indictment hastened his removal from power and expulsion to Nigeria, where he has been offered asylum by President Obasanjo, although this remains a matter of speculation. For now, Charles Taylor appears out of the Special Court's reach. Most recently, INTERPOL has attached a red notice to his indictment, and President Obasanjo has announced that he would hand over Taylor to Liberia if he were asked to do so. At the same time, it is clear that Taylor will continue to challenge his indictment legally and politically, if only from a distance.²⁰

With Sankoh and Bockarie dead, Koroma missing, and Taylor out of reach, the Court may be unable to try its four most prominent suspects. Unlike the other ad hoc tribunals, it has no procedure for hearing evidence in cases where the accused is not in custody.²¹ Norman may now be the most high-profile individual to come before the Special Court, which in itself forms a difficult challenge, as his indictment was already the most controversial.

3. Prosecutorial Independence

Especially during the Court's start-up period, most of the key posts in the Office of the Prosecutor were filled by U.S. nationals, which attracted some criticism. By April 2003, 25 percent of the prosecutorial staff comprised Americans, including the Chiefs of Investigations, Prosecutions, and Operations (although two of these posts have been turned over to non-Americans). The Prosecutor explained that his key motivation in making these hires was to get to work quickly. As a consequence, however, some have perceived the Special Court as under undue American influence.²²

¹⁹ On the public announcement of Taylor's indictment, instead of acting on the Special Court's request for his arrest, Ghanaian authorities swiftly made a plane available so that he could safely fly back to Monrovia.

²⁰ A few weeks before his departure to Nigeria, counsel for Taylor filed an application before the International Court of Justice on behalf of Liberia, alleging that Sierra Leone had been in breach of international law by allowing the indictment of Taylor, a sitting head of state. However, Sierra Leone is not subject to the compulsory jurisdiction of the International Court of Justice. Taylor has also filed a motion on head of state immunity before the Appeals Chamber of the Special Court.

²¹ Early in its mandate, the ICTY made use of a procedure (Rule 61) that allowed it to hear evidence in public in confirmation of an indictment.

²² In fact, some have argued that the United States is deliberately promoting the Special Court as an alternative to the International Criminal Court.

The Prosecutor has been criticized for public statements on the origins and nature of the civil war in Sierra Leone, including references to the role of Libyan leader Mu'Ammar Al-Qadhafi, and the presence of al-Qaeda in the West Africa subregion. Some worried that the Prosecutor would place an emphasis and invest resources on issues not central to his mandate. This has not been borne out to date. The Prosecutor's actions regarding Charles Taylor appeared contrary to the policy of the U.S. State Department, which was supporting the peace talks in Ghana and has shown only tepid support for efforts to encourage Nigeria to transfer Taylor to the Special Court.

Because the Special Court is the result of an agreement between the Government of Sierra Leone and the UN, there could be legitimate concern about the Government's influence over the proceedings. There is no sign of this to date. President Kabbah and his government have kept a very low profile on Court-related issues. The most sensitive moment may have been the arrest of Hinga Norman, but the Minister of Justice, and later the President himself, stated that the Government position was to respect the Court's independence. Some of Norman's supporters personally blamed Kabbah for not protecting his minister from prosecution.

III. COMPARING THE SPECIAL COURT TO THE AD HOC TRIBUNALS

The design of the Special Court for Sierra Leone represents an attempt to draw lessons from the experiences of the ICTY and ICTR, which were established in 1993 and 1994, respectively. Both tribunals have been criticized for their slow pace, prosecution strategies, high operational costs, and lack of connection to the societies where crimes were committed. This report mainly uses the ICTR as the reference point against which the Court is assessed.

A. An On-Site Court

The first major difference between the Special Court and the ICTR is geography. The ICTR is located 600 miles from where the crimes were committed.²³ This has contributed to one of the major criticisms against the two ad hoc tribunals: their lack of connection to the people in the countries that suffered the violence.

Ten years after it began to function and seven years after it started trials, the ICTR is criticized as having very little impact on Rwanda's citizens and judiciary. According to some accounts, Rwandans have no sense of ownership of the ICTR and do not necessarily perceive the tribunal to be for them. This is exacerbated by the fact that many ICTR staff members have not even visited Rwanda, with the exception of those who have worked for the Office of the Prosecutor on investigations.

Against this background, there was strong pressure for the Special Court for Sierra Leone to be set up in Freetown, instead of in a neighboring country. In addition, having the Court on site allows for greater analysis of its impact on the Sierra Leonean people and judiciary.

From early on, the Court has demonstrated considerable concern about how it is perceived and understood in Sierra Leone. Between September 2002 and February 2003, the Chief Prosecutor and the Registrar held a series of "town hall meetings" in all 12 districts to explain the Court's work to the population in the provinces and receive feedback. The ad hoc tribunals did not do similar outreach at the outset (although each eventually established such a program).

By April 2003, the Registry had put into place an Outreach Unit that would eventually comprise 17 people, with small offices spread throughout the country in a District Grassroots Network. Through the Network, the Outreach Unit has built the capacity to get information to and from every district in the country within a 36-hour period, despite lack of phone coverage and poor road infrastructure. By September 2003, the Outreach Unit had conducted a number of activities—including targeted outreach

²³ Originally, the Rwandan government had wanted the ICTR to be established in Kigali, but because of security concerns and concerns about the independence of the tribunal, this was not deemed possible.

among the military and a booklet explaining the Court to schoolchildren—and had developed detailed plans for the future, including the creation of a forum to interface between civil society and the Court (Special Court Interactive Forum). The Special Court has prioritized an outreach policy as part of its regular budget. Some commentators have criticized the Court for not taking more consolidated action from the outset, but it appears that the Court takes quite seriously its responsibilities to inform the public.

Security is the main hazard of housing the Court inside Sierra Leone; the Special Court has faced challenges that the ICTR and ICTY have been spared. Hinga Norman's case is the most significant demonstration. As noted above, several unprecedented measures were taken following Norman's arrest, such as holding his initial appearance in closed session and seeking to negotiate his detention outside of the country.²⁴ A balance will have to be struck between security measures and the public nature of the trial (and the Court's ability to have an impact on public debate).

B. A Hybrid Court

A key difference between the Special Court and the ICTR is that the Special Court has both national and international staff members in all organs of the Court, including the Chambers. By April 2003, 23 percent of the Court's professional staff members were Sierra Leoneans, and 56 percent of all employees were nationals. Even though internationals hold most key decision-making positions, the influence of Sierra Leonean staff within the structure is significant. There is a wide consensus that the presence and expertise of Sierra Leoneans has made the process more relevant and efficient. Although being on location necessarily exposes the staff of the Special Court to Sierra Leonean society, the Office of the Prosecutor has also recruited some of its staff from expatriates who have been working in Sierra Leone or on issues related to the region, and these individuals have played a critical role in bridge-building between the Court's international and domestic aspects. This was also the case at the ICTR, where several initial recruits worked in various UN agencies in Rwanda prior to the establishment of the tribunal.²⁵

Incorporating nationals helps the Court to carry out its work in an efficient manner that is sensitive to the country's conditions and to maintain its focus and sense of mandate. Furthermore, a major risk in tipping the balance of a hybrid composition in favor of internationals is that the institution will be seen as detached and will have less legitimacy among Sierra Leoneans. However, Sierra Leonean views on this inevitably vary, and while Freetown residents have often urged more inclusion of Sierra Leoneans at senior levels, many of those outside Freetown distrust the Freetown "elites" and prefer to have internationals in key positions.

Whether most Sierra Leoneans perceive the Special Court as mainly international or domestic is still open to debate. More generally, it is essential that the Court's presence has a legacy and impact on the rule of law in Sierra Leone beyond its own mandate. A study conducted by the UN Development Programme (UNDP) and the ICTJ on the Court's potential for legacy found that the Court's staff members are committed to the concept of legacy and wish to make a contribution but, because of limited resources, they must give priority to the tasks specified in the Court's mandate.²⁶ Moreover, long-term legal reform is a large-scale ambition that Sierra Leoneans ultimately need to drive. The UNDP/ICTJ study identified a number of small projects, which will be funded by UNDP and housed outside of the Court, to promote positive benefits for the domestic legal system. Some of these will be carried out by a new organization, the Legal Reform Initiative, which aims to (1) stimulate legal reform in key areas of criminal law and human rights and (2) launch a professional development

²⁴ Immediately after his arrest, authorities explored the option of flying Hinga Norman to The Hague (or Arusha), where he would be detained until the start of his trial, but it proved difficult to obtain the requisite permission from the various domestic authorities and ICTY/ICTR.

²⁵ Interestingly, the Special Court mainly recruited among NGO activists, rather than UN staff.

²⁶ See "Report on ICTJ/UNDP Project on the Legacy of the Special Court for Sierra Leone," available at www.ictj.org/africa/sierra.asp.

program where international and Sierra Leonean legal professionals mix and exchange experiences. Another crucial aspect of legacy is outreach, which aims to enhance the understanding of people outside of Freetown, where exposure to formal justice systems remains minimal.

Another feature of the hybrid nature of the Special Court is its subject-matter jurisdiction, which encompasses a combination of international and domestic legal provisions. Article 5 of the Statute includes Sierra Leonean domestic legal provisions on the abuse of girls and wanton destruction of property. However, to date none of the indictments encompasses charges of domestic crimes. The status of the Lomé agreement and its amnesty clause, which was incorporated into Sierra Leonean domestic law, has also been questioned. Several accused argued in their preliminary motions that the amnesty should prevent the Special Court from exercising jurisdiction over crimes committed before the Lomé agreement. This is a matter of much international interest and a number of international experts have filed *amicus curiae* on this question. A decision is expected in early 2004.

C. A Lower Budget and Voluntary Contributions

Another critical difference between the ad hoc tribunals and the Special Court lies in the latter's financial structure and management. The Special Court is funded from voluntary contributions, rather than the regular budget of the UN. More than 30 countries have contributed to the Special Court, although four of them (Canada, the Netherlands, the United Kingdom, and the United States) provided two-thirds of the Court's first-year budget. This has two consequences: the budget is tight overall, and these few states theoretically have great influence, although the Registrar has said that he has not experienced any interference.

The Special Court's \$19 million first-year budget was about one-fifth of the size of the ICTR's current annual budget of more than \$100 million. The Court has sought about \$33 million for the second year, and by the third its total budget (for three years) is estimated to be around \$75 million.

The Special Court is directly overseen by the Management Committee, which comprises representatives from the UN and main donor countries and the Government of Sierra Leone. It remains to be seen whether this system of voluntary contributions and a Management Committee is successful. To date, there has been no reverting to assessed contributions (although the Secretary-General has mentioned this as a possibility). The Special Court might offer a different perspective on what an international tribunal can accomplish with less funding. If the Court succeeds in trying around 15 people in 3 years within these general budgetary provisions, it may be seen as a more efficient model.

Some of the assumptions behind the budget, particularly in trying to keep costs down in its first year, resulted in unexpected challenges. For example, when the Office of the Prosecutor came out with indictments in March 2003, the Registry had not filled key posts that were necessary to process the detainees, such as the Court Management section and a Chief of Detention, because they were budgeted to be hired only in the next fiscal year, which started in July 2003.

Because of the voluntary nature of contributions, the Court is often in a precarious financial state. In its second year, the Court has struggled to secure adequate pledges from governments. Allowing the Court to be entirely reliant on donations from a small number of states makes it vulnerable and has potentially negative implications for its independence (a matter that defense counsel has already raised). It has also made it difficult for Registry to plan ahead. Information on contributions has not been readily available for public scrutiny. All of this may yield lessons for future situations in which voluntary contributions are contemplated.

D. State Cooperation

International tribunals depend on state cooperation in matters of enforcement, such as arrest and transfer of suspects, detention, witness protection, and so forth. The ICTY and ICTR have a Chapter VII mandate by virtue of being created pursuant to a UN Security Council Resolution under that

Chapter, which makes it mandatory for all UN member states to cooperate. The Special Court for Sierra Leone was not created under a Chapter VII resolution but by an Agreement between Sierra Leone and the UN, and to date it has been at a disadvantage. Before it was faced with Taylor's case, the Office of the Prosecutor claimed that it had not suffered from a lack of cooperation. In particular, the Court had been able to secure such cooperation when it needed special measures for a handful of its most sensitive witnesses.²⁷

As to the arrest of suspects, when the arrests were first announced, the only accused not in Sierra Leone were thought to be in Liberia, a country then at war whose own head of state was indicted by the Special Court. It is worth noting, however, that once the Court failed to attain Taylor's arrest in Ghana, the President wrote to the Secretary-General on June 10, 2003, requesting Chapter VII powers for the Court, but with no result.

The Registrar has noted that because the Special Court is not a UN body it has suffered some weaknesses. For example, Foday Sankoh might have been able to benefit from medical treatment abroad if there had been legal obligations on states to cooperate with the Court's pleas to host him. The other ad hoc tribunals also may have been more inclined to keep Hinga Norman in detention if the Special Court had a similar mandate and powers.

A duty to cooperate would also assist in concluding agreements with states on the enforcement of sentences, if these are to be enforced outside of Sierra Leone. On the other hand, certain states have taken steps to assist the Court without such a legal obligation. For example, Switzerland froze millions of dollars of Charles Taylor's assets at the request of the Prosecutor, but this stands in contrast to Nigeria and its provision of asylum. The Court will have to work hard to cultivate this political will over the coming months and years as it moves to complete its mandate.

IV. RELATIONSHIP WITH THE TRUTH AND RECONCILIATION COMMISSION

The Special Court has had to adapt to the general transitional justice landscape, including functioning simultaneously with the Truth and Reconciliation Commission (TRC), which was established under the Lomé agreement. The TRC Act 2000 mandated the TRC to compile an impartial historical record of violations of human rights and international humanitarian law related to the armed conflict, address impunity, respond to the needs of victims, promote healing and reconciliation, and prevent a repetition of abuses.²⁸ To this end, the TRC has engaged in statement taking, public hearings, and research and investigations, with the goal of completing a final report with recommendations to the government on institutional reforms intended to address these objectives.

The TRC and the Special Court were established independently. The Special Court was created after the TRC Act was already in place, but neither the agreement between the UN and the Government nor the legislation establishing the Court addresses the issue of the relationship between the Court and the Commission. This is not the first time that a criminal court or tribunal has functioned in conjunction with a truth commission,²⁹ but the Sierra Leonean case has been unique in demonstrating the different and independent roles of these institutions, as well as the potential complications in their relationship.

Early discussions of how the two should relate centered around the issue of whether the Special Court would seek access to information the TRC gathered, and whether this would deter ex-combatants from

²⁷ The ICTY has worked under more favorable conditions, having signed agreements for relocation of witnesses with states such as the United Kingdom.

²⁸ TRC Act 2000, s. 6(1).

²⁹ For instance, a Commission for Reception, Truth and Reconciliation (CAVR), now in process in Timor-Leste, functions simultaneously with a Serious Crimes Unit (SCU) mandated to prosecute perpetrators of the violence of the pre-independence referendum in 1999. Both were established under UN Regulations, which outline some aspects of the working relationship between the two bodies, such as which perpetrators may appear in reconciliation ceremonies before the CAVR and which are liable for prosecution by the SCU.

giving statements to, or otherwise cooperating with, the Commission. Extensive work was done in this regard—including work by an Expert Group convened by the UN, an opinion poll of ex-combatants by an organization called PRIDE,³⁰ and work by local civil society—even before the TRC became operational in October 2002. (The ICTJ co-sponsored the PRIDE study and took part in many early discussions on this issue.) However, the Prosecutor decided early on that he would not seek information from the TRC, and stated his decision in town hall meetings in September 2002. This announcement was followed by a joint public appearance by the Prosecutor and Bishop Humper, chair of the TRC, on December 2, 2002, at Victoria Park, where each expressed support for the role of the other institution. This put the matter largely, although not entirely, to rest.

Discussions about the relationship died down as each concentrated on its respective establishment and commencement of operations. Nonetheless, confusion still exists among the general public regarding the differences between the two institutions. This has been exacerbated by the absence of readily available public information materials that describe these distinctions in clear and plain terms.³¹

Until recently, the two institutions have co-existed without any major disputes. However, in May 2003 the TRC sought access to Hinga Norman and other Court detainees for the purpose of taking testimony for the historical record. Some of these individuals had been in communication with the TRC before they were indicted. The Commission argued that this record would be incomplete without the testimony of these individuals, many of whom were key players in the conflict. Although the detainees originally declined, in late August 2003 the TRC renewed its application on behalf of Hinga Norman with his consent.

The Court first tried to resolve the situation by promulgating a Practice Direction intended to govern any form of access to detainees.³² However, the TRC deemed that the terms of the Practice Direction did not enable it to guarantee confidentiality under Section 7 (3) of its Act.³³ The TRC then sent an application to the presiding judge of the Trial Chamber to request (jointly with Hinga Norman) permission for a public hearing of Hinga Norman. The Prosecutor argued against such a hearing, arguing that it might give rise to concerns of national security (if Hinga Norman used the opportunity to stir up the CDF) and that it could jeopardize the integrity of the proceedings and the security of witnesses.

Judge Bankole-Thompson denied the request for a public hearing, finding that it was not in the interests of justice to grant it. He determined that the TRC had classified Hinga Norman as a perpetrator, and that the Court, in agreeing to the hearing, might be seen as acquiescing to that classification, thereby violating the presumption of innocence and the fair trial rights of the accused.³⁴

Hinga Norman and the TRC appealed to President Robertson, Presiding Judge of the Appeals Chamber. He denied the request for a public hearing of Hinga Norman and held that the preferable method would be a written affidavit, with a follow-up interview if necessary. Robertson took the view that the accused would use the opportunity of a public hearing as a political platform, affecting the public perception of the integrity of the proceedings, and that the TRC could just as well satisfy its

³⁰ The Post-conflict Reintegration Initiative for Development and Empowerment. See “Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone,” available at www.ictj.org/africa/sierra.asp.

³¹ Such information remains scarce, apart from “The TRC and Special Court: A Citizen’s Handbook,” written by Sheku Lahai and Paul James-Allen at National Forum for Human Rights and Jamie O’Connell from Fourah Bay College Human Rights Clinic, which seeks to explain both institutions and the main difference between them in plain terms.

³² Other organizations, such as the FBI, had also sought access.

³³ Section 7 (3) of the TRC Act 2002 states: “At the discretion of the Commission, any person shall be permitted to provide information to the Commission on a confidential basis and the Commission shall not be compelled to disclose any information given to it in confidence.”

³⁴ See www.sc-sl.org: Case # SCSL-03-08-PT-101 (Norman). Decision on the Request by the TRC of Sierra Leone to Conduct a Public Hearing with the Accused, Oct. 29, 2003.

need for information through obtaining a written affidavit, with a follow-up interview if necessary.³⁵ The TRC indicated that it would not pursue the matter further, stating among its reasons that by the time a fresh application was made, it would not have time to collect and integrate the information in its final report. The Registry replied in a letter dated December 4, 2003, that the procedure laid out in the decision could be put into place quickly, but the TRC maintained its position that there was not enough time to apply afresh and that the proposed interview would not meet the Commission's requirements of confidentiality.

In the final analysis, the issue of access to Special Court detainees, which was little anticipated in the debates early on, therefore proved to be most divisive issue in the relationship between the institutions. Further ways in which the presence of the Special Court may have impacted on the TRC are still open for future study.

V. CONCLUSION

After 18 months of operations, the Special Court for Sierra Leone has shown a clear understanding of its mandate, and its management seems relatively efficient. Recruitment was rapid, and the Court has hired some very competent staff. To date, the Court has avoided the huge and incremental growth of the ad hoc tribunals, and its time and budget constraints have kept it under healthy pressure. Moreover, the Special Court has benefited from a courteous relationship between senior officials of the Court and their stated desire to maintain a common front. Also, there is much awareness of the benefit of building on the experience of the previous tribunals—not just to avoid mistakes, but also to build on their achievements. Former staff members from the other tribunals have brought crucial experience and knowledge to the Special Court (as has the blend of former UN and non-UN professionals).

While concerns regarding general prosecution strategy and court management have somewhat dissipated, the Special Court for Sierra Leone still has tremendous challenges ahead. In particular, it still has to show its capacity to hold quality trials. For example, the judges—who will obviously play a crucial role in ensuring that the proceedings are fair and expeditious—have not yet been required to sit regularly. The Office of the Prosecutor now faces the challenge of an increasing shift from investigations to trial work. As for the Defence Office, it is hoped that the new structure will enable a more robust and cost-effective defense than is often the case in such trials.

The Special Court has recently taken steps to make information on its proceedings and trial documents more readily accessible to the international community. As few international experts will be able to attend the trials in Freetown on a regular basis, accessible information is crucial to the Court's transparency. Regular and quality monitoring by domestic and international NGOs will also be essential.

Whether the Court will remain on schedule also remains to be seen. Currently, the trials are due to begin in late April or early May 2004. Trials in the first instance might be concluded by the end of the year, leaving another six months for appeals, the Court suggests, but this pace would far exceed that of other trials. The question is whether such efficiencies can be achieved without prejudice to the accused. The Rules of the Court have been simplified considerably from the Rules of the ICTR on which they were based, and this has already attracted a submission from Amnesty International that Rule 72, which fast-tracks certain matters for appeal, is not in compliance with international standards.³⁶ Moreover, the Special Court will have to break new ground in implementing a "completion strategy" ahead of the other tribunals and in the midst of trials.

³⁵ See www.sc-sl.org; Case # SCSL-03-08-PT-122 (Norman). Decision on Appeal by TRC and Accused Against the Decision of His Lordship Justice Bankole-Thomson to Deny the TRC Request to Hold a Public Hearing with Chief Hinga Norman, Nov. 28, 2003.

³⁶ See Amnesty International, "Sierra Leone Special Court: Denial of right to appeal and prohibition of amnesties for crimes under international law," Nov. 1, 2003.

The Special Court will also face the continued challenge of having a lasting impact on peace and security in Sierra Leone. Of course, it is only one of many factors that determine the total political landscape. Some are afraid that combatants previously active in the war in Liberia will return to Sierra Leone to sow unrest. UNAMSIL will start to downsize over 2004. The economic situation in Sierra Leone has not improved significantly since the end of the conflict, with a continued lack of trust in public institutions, high corruption, inflation, and discontent among ex-combatants and youth about the lack of economic opportunity. Many of these factors led to the cycle of violent overthrow of government that has gripped the country in recent years.

Although these factors are largely beyond what the Special Court can reasonably be expected to influence, the Court is potentially significant as a symbol of accountability for those who were once powerful. But for this to be significant, the message must resonate and the Court be made relevant and comprehensible to the majority of Sierra Leoneans.

In early 2003, before it had accomplished anything tangible, the Special Court was already being promoted as a new model of international tribunal to be applied elsewhere in the world. However, it may be false to speak of a "model," because the Special Court for Sierra Leone may primarily serve to demonstrate the need to carefully adapt such tribunals to a particular society in its political and regional context.