

**PROSECUTIONS
CASE STUDIES
SERIES**

The Special Court for Sierra Leone Under Scrutiny

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About the ICTJ

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

In order to promote justice, peace, and reconciliation, government officials and nongovernmental advocates are likely to consider a variety of transitional justice approaches including both judicial and nonjudicial responses to human rights crimes. The ICTJ assists in the development of integrated, comprehensive, and localized approaches to transitional justice comprising five key elements: prosecuting perpetrators, documenting and acknowledging violations through non-judicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes.

The Center is committed to building local capacity and generally strengthening the emerging field of transitional justice, and works closely with organizations and experts around the world to do so. By working in the field through local languages, the ICTJ provides comparative information, legal and policy analysis, documentation, and strategic research to justice and truth-seeking institutions, nongovernmental organizations, governments and others.

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HYBRID COURTS CASE STUDY

THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY¹

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The Special Court for Sierra Leone was established by an agreement between the Government of Sierra Leone and the United Nations in January 2002. This case study seeks to provide basic information and policy analysis on the Court. It is part of a series that aims to provide information and analysis on policy and practical issues facing hybrid tribunals, including:

- A brief history of the conflict and the nature of the atrocities in Sierra Leone
- Background to the establishment of the Special Court
- The Court's legal framework and jurisprudence
- A description of the Chambers, Office of the Prosecutor, and Registry
- The Defence and issues of fairness
- Prosecutorial discretion
- Issues of efficiency and funding
- State cooperation
- Outreach and public perceptions of the Court
- The potential for legacy
- The Special Court and the Truth and Reconciliation Commission

The purpose of this case study is to provide basic information, some of which is still not widely available, to help guide policymakers and stakeholders in the establishment and implementation of similar mechanisms. Similar case studies have been developed on Kosovo and Timor-Leste.

Summary of Conclusions

While the Special Court was established in response to the government's request, the Court soon became a model for an alternative to the ad hoc tribunals created by the UN.² The Special Court was seen as an improvement in terms of implementing a narrow focus on "those bearing the greatest responsibility", which in turn would allow for a more limited and efficient approach. When evaluated on these terms, the Special Court is succeeding in rendering a measure of justice for some of the worst atrocities in Sierra Leone, as a number of prominent former faction leaders are facing trial.

However, questions of cost and efficiency dominate at the UN and within the Special Court's own oversight mechanism, the Management Committee, whereas other important criteria are often neglected. For instance, the fact that the Special Court has been able to conduct in-country

¹ This case study was written by Tom Perriello and Marieke Wierda, Senior Associate at the International Center for Transitional Justice (ICTJ). Tom Perriello worked at the Special Court from its establishment until August 2003, and Marieke Wierda has followed developments regarding the Court for ICTJ closely since December 2001 and is the author of various other reports on the Special Court. The views represented are those of the authors and not the ICTJ. We are grateful for the assistance of Caitlin Reiger, Ayumi Kusafuka, Annie Bird and others at ICTJ and the Special Court in updating this report.

² These include the International Criminal Tribunals for the former Yugoslavia and Rwanda (respectively, ICTY and ICTR).

trials has many advantages, including the ability to implement more extensive outreach targeted at the local population. The Court has also involved a large number of Sierra Leoneans, albeit that most of them are in non-professional positions, and has potential to have a permanent impact on implementation of the rule of law within Sierra Leone.

Nonetheless, the following challenges remain:

- *Impact.* Domestic and international perceptions on the impact of the Court vary and are, to some extent, in tension. Although the Court enjoys support in Sierra Leone, there is a domestic perception that its mandate is too narrow, partly because only eleven persons were indicted, and because four of the most high-profile accused were long unavailable for trial (two have died, whereas two more, including Charles Taylor, remained at large). The Special Court has been able to counter these perceptions by running an effective outreach program, but these concerns remain. Internationally, the Court's credibility hinges on its ability to complete its core mission in a focused and efficient manner. Its narrow mandate is widely hailed as a new model and has been followed by the International Criminal Court, but a significant challenge to its overall credibility was the continued absence of former President of Liberia Charles Taylor, until his arrest on 29 March 2006 (see epilogue).
- *Legitimacy.* The legitimacy of the Special Court at the local level is partly affected by the perception that it is an international court, a perception the Court has cultivated through its jurisprudence and presentation. There are almost no Sierra Leoneans in the most senior positions at the Court. To a significant extent, this has been the choice of the government, which has appointed internationals in posts that locals should have held. All of this leads to the danger of creating a "spaceship phenomenon"; i.e., a Court that is perceived as a curiosity and an anomaly with little impact on citizens' everyday lives. Also, opportunities for legacy have been limited by the fact that the local legal profession keeps its distance from the Court. All these factors have implications for longer-term restoration of the rule of law and establishment of trust in judicial mechanisms in Sierra Leone. But the "demonstration effect" of the Court may still have an indirect impact on public awareness and demands for accountability. The international legitimacy of the Special Court has been affected by the fact that it does not apply the geographic distribution of the UN and that is dominated by common law jurisdictions. There were also early allegations of U.S. dominance in the Office of the Prosecutor, but these have dissipated with time.
- *Fairness.* Defence counsel before the Special Court have enjoyed a higher level of institutional support than at any other tribunal (including the ICTY and ICTR). Nonetheless, some issues continue to provoke discussion, including the level of resources that should be made available to the Defence and how to ensure quality defence counsel and adequate capacity. Despite such discussions, trials are generally considered to meet international standards. The same is true for conditions of detention, although local perceptions are that the accused enjoy a higher standard of living than many Sierra Leoneans.
- *Overall efficiency.* So far, the Special Court has achieved some of its most notable successes in the area of efficiency. The decision to narrow the Court's mandate has already had a decisive impact on the cost and length of time required to complete the operations of the Court. Indictments were issued after only nine months, although the trials have been slower and will likely run into 2007. Nevertheless, the Special Court model has demonstrated an approach of fewer trials at a lower cost, while still adhering to international standards. It has also been to the advantage of the Special Court that it is a "stand-alone" model, operating free from the difficulties facing the domestic system. But

some critics, and many Sierra Leoneans, would argue that the numbers tried amount to no more than a symbolic measure of justice, in particular if legacy remains limited. Also, the system of voluntary contributions has often placed the Special Court in a difficult position, particularly in terms of planning. On the other hand, freedom from UN rules has given the Court flexibility, especially in recruitment.

- *Legacy.* Efforts at legacy have to an extent been hindered by a faltering relationship with the domestic legal profession, and by the stand-alone nature of the Court. Nevertheless, there will be indirect benefits in having incorporated Sierra Leoneans within the Court's structures and other positive legacy initiatives are underway.

While it is too early to pronounce definitively on the Special Court's overall contribution, it is an approach which has yielded many valuable lessons for the future. Particular problems in implementation should therefore not lead to a rejection of the model but to its improvement in the future.

THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY

I. INTRODUCTION

A. Brief History of the Conflict

In 1991, a partly indigenous rebel group invaded Sierra Leone from Liberia and plunged the country into a decade-long civil war. When a cease-fire was finally declared at the end of January 2002, Sierra Leone had seen a bloodless and popular military coup in 1992, elections in 1996 with much of the country still in rebel hands, a violent and bloody military coup in 1997, a partial restoration of the government in 1998, and multi-faction violence until the end of disarmament and the official declaration of peace.

Several theories have attempted to explain the brutal conflict in Sierra Leone:

1. Some argue that Sierra Leone had become a “failed state,” or that the conflict was a crisis in government mainly driven by years of one-party rule and a small ruling elite’s exploitation of the country, widespread corruption and lack of accountability, and the disempowerment and militarization of youth.³
2. Some believe that the conflict was driven by various internal factions wanting control of the country’s rich diamond mines.⁴
3. Some postulate that the conflict was a proxy war driven by the personal political agendas of Charles Taylor, then-president of Liberia, and Mu’ammar al-Qadhafi, president of Libya.⁵
4. Some feel that the war was a subtle ethnic conflict between the Mende-dominated Sierra Leone People’s Party (SLPP) and the Temne-dominated All People’s Congress (APC).

All of these factors likely contributed to the conflict.

Sierra Leone is a small West African nation that occupies 71,740 square kilometers between Guinea and Liberia. Although no census has been conducted recently, the population is approximately 5 million, with an under-five mortality rate of 284 per 1,000 and a life expectancy of merely 34 years.⁶ The country has exceptionally rich diamond mines in the Eastern district of Kono, near the Liberian border. First named “Sierra Leone” by Portuguese explorers in the fifteenth century, the British subsequently designated Freetown, the area that became the nation’s

³ The Truth and Reconciliation Commission (TRC) supported a version of this view in its final report, “Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission,” Vol. 2, “Findings,” Oct. 2004. Many of the TRC’s recommendations were addressed regarding issues of governance, political rights, exclusion of women and youth, corruption, and natural resources. See also Joseph Opala, “What the West Failed to See in Sierra Leone,” *Washington Post*, May 14, 2000, and Ibrahim Abdullah, “Bush path to destruction: The origin and character of the Revolutionary United Front/Sierra Leone,” *Journal of Modern African Studies*, 36(2), 1998.

⁴ See Global Witness Report, “A Few Dollars More,” April 2003. See also Eric Pape’s interview with David Crane, “A New Breed of Tribunal,” *Newsweek*, March 4, 2003, available at www.msnbc.com/news/880718.asp?0cv=KB10&cp1=1#BODY. The TRC may have put forward a more accurate view in its final report, where it argues that control over mineral sources fueled, rather than caused, the conflict.

⁵ See, e.g., President Kabbah’s speech at Southern Connecticut State University in 2001, in “Kabbah on Diamond War,” *New Vision*, Freetown, Sept. 27, 2001.

⁶ See www.unicef.org/infobycountry/sierraleone.html.

capital, as a location for resettling freed slaves following the abolition of slavery in 1807. The main ethnic groups are descendants of the freed slaves—the Krios (10 percent), based largely in Freetown; the Temne (30 percent), based mostly in the North; and the Mende (30 percent), based primarily in the South. The country is predominantly Muslim (60 percent), but the Krios are mostly Christian, and many throughout the country also maintain traditional religious beliefs. While English is the official language, Temne and Mende are the main vernacular languages and nearly everyone understands Krio. The territory was held as a British colony until 1961, when independence was declared and power was transferred to the Sierra Leonean people.⁷

From 1971 to 1985, under the rule of President Siaka Stevens, Sierra Leone transformed from a relatively stable country, which some referred to as the “Athens of West Africa,” into a one-party state of endemic corruption. Stevens’ political party, the APC, was closely affiliated with the Temne people, as well as the Limbas of the Northern provinces, who felt disenfranchised under the Mende-based SLPP, which controlled the government since independence.

During the 1980s, an increasing number of reform-oriented students at Fourah Bay College (University of Sierra Leone) joined underground networks aimed at challenging the corruption and monopoly on power. Some of these students were recruited to Libyan training camps, which aimed to overthrow existing regimes in West Africa. These camps were run by Qadhafi, who was allegedly seeking to expand his power throughout the region. Yet most of the intellectuals and reformers in the movement refused to use the terror tactics in which they were trained, and by the time the group returned to Sierra Leone as an armed faction with the aim of displacing the corrupt APC-run government, its intellectual presence and support had diminished.⁸

On March 23, 1991, about 100 fighters calling themselves the Revolutionary United Front (RUF) crossed the border from Liberia into Sierra Leone. The RUF was led by Foday Sankoh and allegedly acted in concert with Charles Taylor, then warlord and later president of Liberia.⁹ It has been suggested that Taylor backed the RUF financially to gain access to Sierra Leone’s diamond reserves and destabilize the country.¹⁰ But some suggest that he was motivated by Sierra Leone’s support of the Nigerian-led ECOMOG¹¹ offensive against his forces in 1990, which thwarted his claims on Monrovia.¹² Taylor infamously declared in 1990 that “Sierra Leone would taste the bitterness of war.”¹³

⁷ See www.encyclopedia.com/html/section/sierrale_history.asp.

⁸ For an overview, see Nicole Fritz and Alison Smith, “Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone,” 25 *Fordham Int’l L.J.* 391, 2001, and Paul Richards, “War and Peace in Sierra Leone,” 25 *Fletcher F. World Aff.* 41, Summer 2001. For recent interesting articles on the Special Court, see also James Cockayne, “The Fraying Shoestring: rethinking hybrid war crimes tribunals,” 28 (3) *Fordham International Law Journal*, 616-680 (February 2005); and James Cockayne, “Hybrids or mongrels? Internationalized war crimes tribunals and unsuccessful degradation ceremonies,” 4 *Journal of Human Rights* 1-19 (2005).

⁹ See, e.g., *Prosecutor v. Foday Saybana Sankoh*, Case No. SCSL-03-02, Indictment, March 7, 2003, paras. 18–20, 26, and *Prosecutor v. Johnny Paul Koroma*, Case No. SCSL-03-03, Indictment, March 7, 2003, para. 23.

¹⁰ See International Crisis Group, “Sierra Leone: Time for a New Military and Political Strategy,” Report No. 28, April 11, 2001, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01, Indictment, March 3, 2003.

¹¹ The Monitoring Observer Group of the Economic Community of West Africa States.

¹² Taylor’s involvement is well documented in the sanction reports. See also International Crisis Group Report and the Special Court indictment, *supra* note 10.

¹³ Charles Taylor said this in a radio interview in Liberia in 1990–1991. See Centre for Public Integrity: Investigative Journalism in the Public Interest, “Making a Killing; Drugs, Diamonds and Deadly Cargoes,” available at www.openairwaves.org/bow/report.aspx?aid=156.

By this point the RUF fighters included a significant number of Liberians and some Burkinabes.¹⁴ As the group passed through the Southern region, it called for the overthrow of Joseph Momoh, Stevens' successor as president. The RUF's populist pitch failed to generate support, probably because of its horrific campaign of terror, which was characterized by systematic violence against civilians and forced recruitment of combatants. Any guise of popular revolution was further invalidated when a group of young military officers led a bloodless coup in April 1992 and installed the National Provisional Ruling Council (NPRC), led by 27-year-old Captain Strasser. This coup was met with popular support, rendering the RUF's stated *raison d'être*—namely, to overthrow the government—moot.

For the next decade, Sierra Leone was split into various faction alignments, all of which engaged in systematic war crimes. The NPRC kept the RUF from reaching Freetown, but lost and failed to win back substantial regions of the country, including the diamond and mining areas. The war rarely involved pitched battles or traditional troop manoeuvres, but mainly consisted of factions trading off control over villages, which resulted in massive human rights abuses against civilians. On some occasions, individuals served as soldiers "fighting" the rebels during the day and looting with them at night. This phenomenon was common enough to make the term "sobel" (a combination of "soldier" and "rebel") part of common parlance.¹⁵ The NPRC hired mercenaries from abroad who, with the help of citizens' militias, managed to weaken much of the RUF's military strength.

In 1996, the country had its first multiparty elections in decades, but the occasion was marked by brutal violence, including forced amputation of limbs to deter voting. The SLPP won the elections and Ahmed Tejan Kabbah became president. In November 1996, Kabbah and the RUF signed the Abidjan Peace Accord.¹⁶ However, violence escalated almost immediately, and within a year the peace had collapsed completely.

In May 1997, Kabbah was overthrown in an exceptionally violent coup by breakaway army officers who freed Corporal Johnny Paul Koroma (in prison for an attempted coup), installed him as the new leader, and made him head of the recently formed Armed Forces Revolutionary Council (AFRC). After years of blurring the distinction between soldier and rebel, the AFRC had close relationships with the RUF, and one of Koroma's first acts was to invite the RUF to come to Freetown and join his government.

The new regime was deeply unpopular with the majority of the population, and the international community never recognized it. In February 1998, a combination of Nigerian-led ECOMOG troops and civilian militias restored Kabbah's government to power in the Western Area, even though much of the country remained in rebel hands. The government formalized the citizens' militias, based loosely on traditional hunting societies, into the Civilian Defense Forces (CDF), which was put under the charge of Chief Sam Hinga Norman. While the CDF committed fewer atrocities than the RUF and was less likely to resort to sexual violence, Human Rights Watch and other groups documented rising incidences of systematic abuses from all factions as the war continued.¹⁷

¹⁴ Citizens of Burkina Faso.

¹⁵ See freespeech.org/sierra-leone/civilwar/background.htm.

¹⁶ Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, Abidjan, Cote d'Ivoire, Nov. 30, 1996.

¹⁷ See Human Rights Watch, "'We'll kill you if you cry': Sexual Violence in the Sierra Leone Conflict," Vol. 15 No. 1 (A), Jan. 2003, 46–48, "Sierra Leone: the Most Serious Attacks in Months," July 24, 2001,

The war went on as a standoff for much of 1998, but in January 1999 the rebels and ex-soldiers, led by the AFRC, returned to Freetown in “Operation No Living Thing,” which became one of the bloodiest weeks of the decade, leaving 5,000 dead and much of the city destroyed. This invasion was turned back by Nigerian ECOMOG troops, who in turn committed atrocities. After six more months of fighting throughout the country, all factions agreed to a peace agreement in Lomé, Togo, in July 1999.

The Lomé Peace Agreement remains a matter of controversy. Some feel it was a diplomatic failure in which international actors allowed Charles Taylor to dictate the terms of the peace, despite his close links to the RUF. Others argue that it was the only option in a desperate situation. In any case, the final agreement included an amnesty for all fighters from all factions for all crimes,¹⁸ as well as a power-sharing agreement in which Foday Sankoh was made Chairman of the Strategic Mineral Resources Commission, granting him formal authority over the country’s diamonds and other natural resources.¹⁹ The agreement also required that all Nigerian troops leave Sierra Leone, even though they had presented the key barrier to RUF advances.²⁰

Within days of the last ECOMOG troop departures in May 2000, the RUF took hostage 500 UN peacekeepers and confiscated their weapons. Weeks later, rebels closed in on Freetown, and 800 British paratroopers were deployed to evacuate citizens and secure parts of the Western Area. The British eventually freed the hostages, and the last ones were released by August. The May 2000 incidents signalled the return to low-intensity conflict throughout the country, which lasted until a new cease-fire was reached in November, but human rights violations continued.²¹ The RUF controlled much of the country, including strategic diamond regions, and had their headquarters in Makeni, less than 200 kilometers from Freetown.

However, by spring 2000, the United Nations Mission in Sierra Leone (UNAMSIL) had been established,²² and it was to become the largest peacekeeping force in the world, with 17,500 personnel at its height and an eventual budget of approximately US\$700 million per year.²³ UNAMSIL’s mandate included disarmament, demobilization, and reintegration (DDR). By the second half of 2001, UNAMSIL’s DDR program had processed more than 45,000 combatants, and by January the war was officially declared over pursuant to a weapon-burning ceremony. Four months later, the country witnessed peaceful and relatively fair elections in which the Kabbah’s SLPP captured 70 percent of the vote, while the APC won 20 percent.²⁴

“Recent Abuses Documented by Human Rights Watch,” Nov. 30, 2000, available at www.hrw.org. See also *Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14, Indictment, Feb. 5, 2004.

¹⁸ The Lomé Peace Agreement contained a comprehensive amnesty provision that granted “absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.” Lomé Peace Agreement, signed between the Government of Sierra Leone and the RUF, July 7, 1999, Art. IX. The United Nations, a moral guarantor of the agreement, attached a disclaimer that it did not recognize the amnesty as a matter of international law. See further discussion of the amnesty clause below.

¹⁹ See Ryan Lizza, “Where Angels Fear to Tread,” *The New Republic*, July 24, 2000; see also International Crisis Group, *supra* note 10.

²⁰ See Lomé Peace Agreement, *supra* note 18.

²¹ ICG, “Time for New Strategy,” *supra* note 10, at 13.

²² According to SC Res. 1270/2000.

²³ See www.un.org/Depts/dpko/missions/unamsil/facts.html.

²⁴ See www.ifes.org/eguide/resultsum/sierraleone-par02_res.htm.

While these developments raised hopes for lasting peace, security experts in the region noted that the root causes of the conflict remained. Charles Taylor retained power in Liberia with the same incentives to launch proxy wars, despite being hampered by international sanctions and an internal war. The army remained largely loyal to Johnny Paul Koroma, who received more than 90 percent of the military personnel vote in the May 2002 elections. Chief Sam Hinga Norman retained the loyalty of the Kamajors (traditional hunters), the core group of the CDF, and was rumoured to be in close contact with President Conte of Guinea and a major recruiter for the Liberian rebel faction, Liberians United for Reconciliation and Democracy.

As of early 2006 Sierra Leone has not fully stabilized. Large numbers of ex-combatant youth remain disempowered and without economic opportunity while becoming ever more militarized, and the SLPP shows few signs of progress on corruption or non-ethnic governance. As a result, foreign investment in Sierra Leone remains minimal. The economy, much of which had built up around donor assistance and an expatriate community in Freetown, is suffering significant difficulties and inflation. The situation remains tenuous as Sierra Leone heads for its second presidential election in 2007.

B. Nature of the Atrocities

A number of groups documented atrocities in Sierra Leone throughout the 1990s, including Human Rights Watch, the Campaign for Good Governance, and other nongovernmental organizations. Although there is general agreement that the crimes in Sierra Leone do not amount to genocide, they did constitute serious violations of the laws and customs of war²⁵ and crimes against humanity. During the war, more than two million people were forced to flee their homes, collecting in crowded internally displaced person camps around Freetown or in dangerous refugee camps along the volatile Guinean and Liberian borders. Forced displacement was the most prevalent violation during the war.²⁶

Sexual and gender-based violence was the most reported form of human rights abuse in Sierra Leone. Even before the establishment of the Special Court, Human Rights Watch concluded that sexual violence in Sierra Leone amounted to crimes against humanity.²⁷ Of more than 1,800 victims of sexual violence who sought medical attention from *Médecins Sans Frontières* (Doctors Without Borders) between 1997 and 1999, 55 percent reported being gang raped and more than 200 were pregnant.²⁸ Human Rights Watch has also documented patterns of abduction, molestation, sexual slavery, and insertion of foreign objects into genital openings. According to Physicians for Human Rights, more than half the women who came into contact with the RUF suffered some form of sexual violence.²⁹ Charges against all factions, but particularly against the RUF and AFRC, include rape of girls and women of all ages, and sexual slavery where women were forced to travel with armed factions; suffered regular rape; and bore the euphemistic title

²⁵ Common Article 3 of the Geneva Conventions.

²⁶ See “Findings,” supra note 3, at para. 86.

²⁷ Human Rights Watch, “Sexual Violence within the Sierra Leone Conflict,” Feb. 26, 2001, available at www.hrw.org.

²⁸ See “We’ll kill you if you cry,” supra note 17.

²⁹ Physicians for Human Rights, “War-Related Sexual Violence in Sierra Leone: A Population-Based Assessment,” 2002.

“bush-wife.” The sexual violence was intended to keep the civilian population in fear and destroy traditional community norms and systems of order.³⁰

Killings were also widespread. It is estimated that perhaps up to 100,000 people were killed during the conflict. Execution was used to install terror and obedience among the civilian population and within the forces themselves.

The Sierra Leone conflict is also known for the widespread use of child soldiers in the AFRC, RUF, and CDF. It is estimated that up to 7,000 children fought in this war.³¹ UNICEF estimates that more than 300,000 children were actively involved in armed conflict in sub-Saharan Africa during the late 1990s.³² Moreover, many of these children (and many adults) were forcibly conscripted. In the most common scenario, combatants stormed into a home, killed one family member, and forced a young male to kill another relative. The combatants were often drugged on a regular basis, particularly before going into battle, with a substance locally known as “brown-brown” that is thought to be a combination of heroin and cocaine or gunpowder. The goal was to eradicate a sense of family or community to which young men could return, so that their only means of survival was with the faction and commanders, who became like surrogate parents or community elders.

Another notorious atrocity in Sierra Leone was the intentional amputation of hands and feet or arms and legs. The RUF and the AFRC committed most of these crimes.³³ Most of the victims, estimated by the International Coalition for the Red Cross (ICRC) at 4,000, died from their injuries, but approximately 1,000 survived.³⁴ Other forms of mutilation, including cutting off noses, ears, and lips, were also common, and acts of cannibalism, particularly by the Kamajors, have been documented. The war also resulted in the large-scale destruction of property, including the RUF’s ransacking of Eastern Freetown in 1999. Kono and Kailahun suffered the most destruction.³⁵

³⁰ “The rebels sought to dominate women and their communities by deliberately undermining cultural values and community relationships, destroying the ties that hold society together. Child combatants raped women who were old enough to be their grandmothers, rebels raped pregnant and breastfeeding mothers, and fathers were forced to watch their daughters being raped.” See “We’ll kill you if you cry,” supra note 17.

³¹ See UNICEF, “Peace process falters for child soldiers of Sierra Leone,” July 2003, available at www.unicef.org/media/media_12200.html.

³² “Active involvement” includes use of children as soldiers, guerrilla fighters, porters, and spies, as well as for sex. See “Peace process falters,” id.

³³ See “Findings,” supra note 3, at paras. 150, 246. For example, the 1996 campaign on behalf of the RUF, “Operations Stop Elections,” entailed amputating hands and arms to prevent citizens—even the illiterate—from voting.

³⁴ The Association of Amputees and War Wounded, one of the most prominent victim groups in Sierra Leone, estimates that 800–1,000 amputees survive today, the youngest of whom was less than 2 when her hand was amputated.

³⁵ See, e.g., Sam Kiley’s report from Kono in May 1998 on BBC’s Network Africa Programme:

Koidu has effectively ceased to exist as a city in a way that you or I would understand it. Every single structure—and I mean every single structure—everything, from chicken coops to hotels, has been reduced to rubble by the AFRC/RUF forces... I have covered a large number of cities that have been very badly damaged during conflict, but this is a city that has been annihilated.

II. ESTABLISHMENT OF THE SPECIAL COURT FOR SIERRA LEONE

The Lomé Peace Agreement granted an amnesty for crimes committed by all parties and referred to the establishment of a Truth and Reconciliation Commission (TRC). Although the UN Special Representative of the Secretary-General present at the signing was not a party to the Agreement, he later appended a handwritten reservation to the amnesty stating that the UN would not recognize amnesty for “international crimes of genocide, crimes against humanity, war crimes and other serious violations of international law.”³⁶

For a while, it seemed as if the proposed TRC would be the only transitional justice mechanism available to address the human rights violations committed during the conflict. Civil society activists strongly supported the Commission as a way to ensure a measure of accountability. Legislation governing its establishment was passed in February 2000. The TRC was mandated to

create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone; ... to address impunity, to respond to the needs of the victims, to promote healing and reconciliation, and to prevent a repetition of the violations and abuses suffered.³⁷

Preparatory activities began in March 2002, and commissioners were sworn in during July. The TRC worked for about two years and handed over its final report to the president in October 2004.³⁸

However, shortly after the Lomé Peace Agreement, fighting re-erupted. In course of the attempted rescue of the UN peacekeepers taken hostage in May 2000, RUF leader Foday Sankoh was taken into custody. The government feared that a national trial of Sankoh and his co-conspirators would aggravate the conflict and fuel RUF desires to move on Freetown to disrupt the proceedings. Accordingly, on June 12, 2000, President Kabbah wrote to the Secretary-General requesting the assistance of the international community in creating a court to try senior RUF officers.

The Security Council viewed the taking of the peacekeepers hostage as a direct attack on the UN and felt obliged to assist in the prosecution of the perpetrators.³⁹ However, the Security Council and the Secretariat took strongly opposing views on how to accomplish this in light of the ICTY’s and ICTR’s financial drain on UN resources. For example:

- The Secretariat supported assessed funding, arguing that voluntary contributions would be dangerously uncertain, while the Council insisted the opposite;
- The Secretariat argued in favour of granting the Special Court enforcement powers under Chapter VII of the UN Charter, while the Council did not;
- The Secretariat wanted personal jurisdiction over “those most responsible,” rather than the narrower “those who bear the greatest responsibility” proposed by the Council.

³⁶ An official version of the Lomé Peace Agreement with this reservation does not exist, but there is general consensus that these are the terms used.

³⁷ Truth and Reconciliation Commission Act 2000, s. 6(1).

³⁸ Issues arising from the simultaneous existence of the TRC and Special Court are addressed below.

³⁹ See Michelle Sieff, “A Special Court for Sierra Leone,” May 2001, available at www.crimesofwar.org/tribun-mag/mag_sierra.html.

Negotiations came to a standstill, but eventually it was agreed that the Special Court would be established by treaty rather than by resolution so that it could proceed without committing UN members to funding. The Court would function independently from the UN bureaucracy, be subject to the oversight of a “Management Committee,” and have to raise its own funds. With this financial compromise, the Court’s operations were significantly scaled down and the Security Council prevailed on each of the above points of disagreement.⁴⁰

In August, the Security Council passed Resolution 1315, requesting the “Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution [. . .].”⁴¹ While the Resolution “reiterate[s] that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region,” unlike the ICTY and ICTR, the Special Court was not established according to the Council’s Chapter VII authority, but by an international agreement whose negotiation was requested by the Security Council.⁴²

After 17 months of negotiations, in January 2002, the UN and the Government of Sierra Leone finally signed the Agreement on the Establishment of a Special Court for Sierra Leone (Special Court Agreement), including as an annex the Statute of the Special Court for Sierra Leone.⁴³ This signing took place two days before President Kabbah declared the official end of the war.

In January 2002, the Secretary-General sent a planning mission to Sierra Leone to discuss with the government, nongovernmental organizations, and other groups arrangements for the creation and operation of the Special Court, including the selection of the premises; the structure, functions, and staffing; and the Court’s relationship with the TRC. In its report, released in March 2002, the mission concluded that the local resources needed for the Court’s operation were either “non-existent or extremely scarce.”⁴⁴ The mission noted, however, that while “not experienced in the relevant fields of international criminal law,” the local members of the legal professions “could render an important contribution to the work and success of the Special Court” with training. The mission proposed that, according to the Statute, the Special Court would be staffed by international and Sierra Leonean judges and personnel. The report also argued that given the limited duration and budget and voluntary financing, the Court would need “an exceptionally clear and well-defined prosecutorial strategy.”

Three months later, in accordance with the Statute, the Secretary-General appointed Robin Vincent from the United Kingdom as Registrar and David Crane of the United States as the Prosecutor. The Prosecutor and Registrar arrived separately in July and August 2002 with less than half a dozen staff to begin setting up the offices. On July 26, 2002, the Secretary-General announced the appointments for the three trial and five appellate judges, three of whom were nominated by the Government of Sierra Leone.

⁴⁰ See Beth K. Dougherty’s interview with David Scheffer, U.S. Ambassador for War Crimes (1997–2001), Washington, D.C., May 15, 2003, “Right-sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone,” *International Affairs* 80, 2, 2004, at 318–319.

⁴¹ S/Res/1315 (2000), adopted Aug. 14, 2000.

⁴² *Id.*

⁴³ Appendix II to the “Letter Dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council” that also included Annex I, “Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone” conducted on January 7–19, 2002.” The Agreement was signed by Hans Corell on behalf of the UN and Solomon Berewa, Attorney General, on behalf of the Sierra Leone Government on January 16, 2002.

⁴⁴ “Report of the Planning Mission on the Establishment of the Special Court in Sierra Leone,” S/2002/246, March 8, 2002.

A. International Political Context

The Special Court was established amidst growing international skepticism toward ad hoc tribunals. The ICTY and ICTR had been criticized for their slow progress, high costs, and lack of knowledge about the proceedings among victims under the court's jurisdiction.⁴⁵ The debates between the Security Council and the Secretariat resulted in reducing the Court's budget, minimizing its scope, and streamlining its operations. The decision to locate the Court in the country where atrocities were committed was aimed at addressing all these issues while enabling local input and respect for the sovereignty of Sierra Leone, and it was hoped that the Court's presence would inspire confidence in the rule of law and contribute to the enhancement of the domestic legal system. The government's willingness to host the Court and the presence of a large peacekeeping operation made this possible.

One of the clearest motives for establishing the Special Court—particularly among the British, who led the military operations in Sierra Leone—was maintaining peace and security. The international community was already investing massive resources in Sierra Leone in the largest peacekeeping effort in UN history, backed by a small, potent unit of British Special Forces. The consensus among many policymakers was that peace would remain fragile until certain individuals (and, by implication, factions) were neutralized. However, other policymakers felt that the Special Court might provoke instability, at least in the short term.

Another issue was the Rome Statute for the International Criminal Court (ICC). The United States had adopted a policy of opposition to the ICC, and a number of international justice advocates worried that American support for the Special Court must be motivated by a desire to demonstrate an alternate mechanism. On the other hand, most support for the Court came from a small, bipartisan group of members of the U.S. Congress, many of whom also support the ICC. Also, many organizations view both mechanisms as indispensable to the fight against impunity. Likewise, the Sierra Leonean government is a State Party to the ICC.⁴⁶

B. National Political Context

Much speculation exists around the national political context in which the Special Court was born. Some argue that apart from prevailing concerns about security, the president requested

⁴⁵ In part, this reaction by UN policymakers was in response to the "Report of the Expert Group to Conduct a Review of the Effective Operations and Functioning of the International Tribunals for the former Yugoslavia and Rwanda," UN Doc. A/54/634, Nov. 22, 1999. See also Ken Roth, "International Injustice: the Tragedy of Sierra Leone," *Wall Street Journal* (Europe), 2000.

⁴⁶ In fact, Ambassador Kanu, who represented Sierra Leone during the Special Court negotiations, successfully lobbied his government to be one of the first African countries to ratify the ICC and has served as Vice-President of the Assembly of State Parties. Ambassador Kanu addressed those who worried that the Special Court would undermine the ICC by saying that

his country had supported the establishment of a permanent criminal court from the start. It had been one of the first countries to sign and ratify the Statute. The crimes covered by the Court would augment and solidify the work of the tribunals and similar institutions, such as the special court established in his country. Those who had not supported the special court for Sierra Leone should do so. It was contributing to the establishment of a just international legal order. It upheld the rule of international law.

See Press Release GA/L/3214, Fifty-Seventh General Assembly.

assistance to try the rebels out of a sense of awareness of public skepticism over trials run by a victorious government implicated in the atrocities. Moreover, international assistance would be a powerful tool in neutralizing the RUF and AFRC.⁴⁷ In any case, national laws did not encompass war crimes or crimes against humanity, and the government had inadequate funds to investigate and try crimes on this scale without international assistance.⁴⁸ All these factors contributed to the government's willingness to cede jurisdiction to an international court, although its original request was limited to assistance in conducting trials of the RUF. An international NGO, No Peace Without Justice, worked closely with senior government officials on technical issues of international law and helped facilitate the Special Court Agreement.

In any case, the government's apparent political will makes it unique.⁴⁹ In fact, the government has provided considerable assistance to the Court. It donated the site on which the Court was built and facilitated the arrest of suspects through the Sierra Leone Police. The government also expeditiously integrated the Special Court Statute into domestic law in the form of the Special Court Ratification Act 2002, enabling other forms of cooperation.⁵⁰ But some observers remain sceptical of the intentions of eminent persons in government, including President Kabbah and Vice President (then Attorney General) Solomon Berewa. Some political analysts suggest that it was possible that the Court would assist in diminishing the most significant political threats to the current government, including Charles Taylor, Johnny Paul Koroma, and Hinga Norman.

C. Input of Civil Society

Several civil society organizations contributed to the Court's establishment, both in plenary and in working groups, formal and informal.⁵¹ One issue that received a great deal of national attention was whether juveniles should be tried in the Court. International actors were generally uncomfortable with the idea of trying those who had committed crimes while underage,⁵² but because many perpetrators were youths, a number of groups in Sierra Leone, including inter-religious leaders, felt that they should be considered for prosecution. The eventual compromise was Article 7 of the Statute, which stated that the Court could indict persons aged 15–18, but their

⁴⁷ See Abdul Tejan Cole, "The Special Court for Sierra Leone: Conceptual concerns and alternatives," 1 *African Human Rights Journal*, 2001, at 1.

⁴⁸ See Sieff, *supra* note 39.

⁴⁹ See Dougherty, *supra* note 40, at 321.

⁵⁰ In fact, the wording of the Special Court Ratification Act 2002 caused some controversy. For example, Section 14 stated that if the Court asked the Attorney General to refer a case or discontinue a proceeding, he would "grant the request, if in his opinion there are sufficient grounds for him to do so." Some argued that this gave him too much discretion and that the Special Court has primacy, but the debate remained academic because a conflict never occurred. Other controversies arose in relation to the Act and the TRC, which are explored below.

⁵¹ See "Letter dated March 6 2002," Annex I, *supra* note 43, at paras. 4–6. Paragraph 5 states

Meetings were also held with the police and prison authorities, members of the Bar Association, and representatives of civil society and human rights non-governmental organizations. The mission also traveled to the provinces and the regional capitals of Bo and Kenema where it met the Paramount Chiefs, local government officials and NGOs. In Koidu, the capital of Kono district, it met with representatives of the Revolutionary United Front (RUF), Civil Defen[s]e Force (CDF) and the Movement of Concerned Kono Youth (MOCKY).

⁵² Indeed, there was strong opposition to the inclusion of this provision among international human rights circles. See Michael P. Scharf, "The Special Court for Sierra Leone," *ASIL Insight*, available at www.asil.org/insights/insigh53.htm.

punishment would be reform-oriented. The Prosecutor subsequently declared that as a matter of practice no one would be indicted for crimes committed while under the age of 18.⁵³

However, many national groups felt ignored by the negotiation process, which was perceived to take place largely at UN Headquarters in New York. There were procedural and substantive concerns. Many nationals were furious at the lack of Sierra Leoneans invited to an expert group meeting on the relationship between the TRC and the Special Court before the Special Court Agreement was signed. Although late attempts were made to include more locals in the process, this top-down approach aroused considerable resentment. Second, there was concern over the perceived subordination of the TRC to the Special Court. A large contingent of local NGOs signed a statement requesting parity between the Commission and the Court.⁵⁴ At the time the Special Court came into existence, public awareness of the TRC was much higher, and it had support among elites and civil society, partly because it was less divisive and controversial than the Special Court, but also because the TRC had been the result of consultation.

D. Conclusions on Establishment of the Special Court

The Special Court emerged from a unique convergence of a government eager for justice in the wake of a failed amnesty, yet unable to conduct the trials itself, and an international community anxious to stabilize the region by removing those who threatened the peace. The international community also wanted to implement a new model that would serve as an alternative to the ad hoc tribunals. Despite these serendipitous factors, the Special Court faced challenges. The strong U.S. presence at the outset was difficult, as general anti-American sentiment around the world intensified due to foreign policy developments in Iraq and elsewhere. Concerns over this subsided with time and with a reduction of the U.S. role in the Office of the Prosecutor. In addition, some within the UN felt that the Court presented a challenge for UN oversight. Currently the Court is more likely to be evaluated on whether it delivers viable justice to the satisfaction of Sierra Leoneans and the international community. The criteria that will guide this evaluation are discussed below.

It is worth noting that one of the main motivations behind the Special Court's establishment was a desire by the Government of Sierra Leone and the international community to stabilize the country. The government wanted the RUF leadership tried without the instability that would result from national trials. The international community wanted to prosecute those responsible for attacks on UN peacekeepers. While the evaluation criteria have since changed to encompass notions of legacy and promoting the rule of law, the Special Court was originally conceptualized as central to redressing security concerns.

⁵³ In October 2002, David Crane announced that he would not indict anyone for crimes committed as a minor, explaining that the standard of bearing the greatest responsibility was too high to include any youth. See Special Court Press Release, "Special Court Prosecutor says he will not Prosecute Children," Nov. 2, 2002.

⁵⁴ Summary Conclusions of the NGO Meeting on the Relationship between the Truth and Reconciliation Commission and the Special Court, Hosted by the National Forum for Human Rights, ICTJ, and the International Human Rights Law Group, 15 Jan. 2002.

III. LEGAL FRAMEWORK

A. Jurisdiction

The Agreement on the Special Court for Sierra Leone, as concluded by the Sierra Leone Government and the UN, was formally signed by both parties at a ceremony in Freetown on January 16, 2002. The most notable feature of Court is a reference in its Statute to investigating and trying only “those who bear the greatest responsibility,” which has become a catchphrase of public discourse in Sierra Leone. As mentioned above, the Secretariat initially wanted the Court to have jurisdiction to prosecute “those most responsible,” but the Security Council wanted to limit the Court’s scope and demanded a change. This aims to focus the prosecution on the key players, rather than lesser actors. This phrase has not been more clearly defined and opens the door to considerable prosecutorial discretion. Under Article 6(2), no official position, including that of Head of State, exempts a person from criminal responsibility or punishment.

The Special Court has jurisdiction over crimes against humanity,⁵⁵ serious violations of Article 3 common to the Geneva Conventions,⁵⁶ intentional direction of attacks against humanitarian or peacekeeping personnel,⁵⁷ conscription of children into armed forces or groups,⁵⁸ and a few select aspects of Sierra Leonean law relating to the abuse of girls and arson.⁵⁹ The Report of the Secretary-General explains that genocide was not included because of lack of evidence that killing was perpetrated in Sierra Leone “against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such.”⁶⁰ Grave breaches of the Geneva Conventions of 1948 are also excluded, largely because the conflict was seen as domestic and grave breaches apply only to international conflicts.

The inclusion of domestic crimes in the Statute has been attributed to various factors. In part it is an attempt to legitimize and revitalize the existing domestic legal system, which many see as complex and inaccessible.⁶¹ It has also been attributed to gaps in international criminal law regarding arson and crimes against girls and an attempt to ground the Court in the specific circumstances of the Sierra Leone conflict.⁶² Some suggest that including domestic crimes was a diplomatic gesture to the Sierra Leone legal profession. However, the decision not to include violations of domestic law in the indictments may be pragmatic in view of potential complications arising out of, for example, the Lomé Peace Agreement and adjustments to the rules of procedure and evidence that may have been necessary for prosecutions under domestic law.

⁵⁵ Special Court Statute, Art. 2.

⁵⁶ Special Court Statute, Art. 3.

⁵⁷ Special Court Statute, Art. 4(b), “Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.”

⁵⁸ Special Court Statute, Art. 4(c), “Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.”

⁵⁹ Special Court Statute, Art. 5.

⁶⁰ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, Oct. 4, 2000, at 3.

⁶¹ See Daniel J. Macaluso, “Absolute and Free Pardon: the Effect of the Amnesty Provision in the Lomé Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone,” *Brook. J. Int’l L.* 347, 2001–2002, at 362.

⁶² *Id.* at 363–366.

The territorial jurisdiction of the Special Court is limited to trying “crimes committed in the territory of Sierra Leone,”⁶³ but this has been interpreted to include acts planned or instigated outside Sierra Leone, the effects of which are felt within the territorial jurisdiction. The Special Court enjoys primacy over domestic Sierra Leonean courts,⁶⁴ although, unlike the ICTY and ICTR, this primacy does not extend to courts of other states.

The Court’s temporal jurisdiction is limited to crimes committed after November 30, 1996, the date of the Abidjan Peace Accord. Several dates were considered and this was the earliest, although most Sierra Leoneans find it strange that the jurisdiction does not stretch to 1991, when the war began. However, some policy-makers argued that going back to 1991 would make it difficult for the prosecution to produce solid evidence for decade-old crimes and impossible for the court to complete its work in three years. The truncated time frame leaves out the NPRC regime and the foundational period of the RUF, but most of the key individuals involved in the early 1990s remained criminally engaged after 1996. One problem is that most crimes were committed in the provinces, and the conflict reached Freetown only in 1997. The worst of the crimes in the provinces were committed earlier, and some have argued that it “sends the wrong signal” that the crimes under scrutiny affected the people of Freetown.⁶⁵

The temporal jurisdiction includes periods of time covered by the amnesty of the Lomé Peace Agreement, namely crimes committed prior to July 1999. Moreover, there is an express provision in the Statute asserting that amnesty shall not be a bar to prosecution with respect to international crimes.⁶⁶ The prosecution of crimes under domestic law covered by the Lomé Peace Agreement is generally considered impossible,⁶⁷ but to date this has not been tested (although a challenge to the amnesty under domestic law could be envisaged, none has been mounted to date). More generally, the Prosecutor has chosen not to exercise his power to prosecute under domestic law.

The Special Court can prosecute any person “who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of the international crimes mentioned above.⁶⁸ The category of “aided and abetted,” coupled with public statements from the Prosecutor, fuelled early speculation that financiers, including diamond or arms dealers, could face indictments under the Special Court. For example, the indictment against Charles Taylor involved charges including profiting from the war and allegations of command responsibility.⁶⁹ However, no one has been indicted only for financing the war.

B. Rules of Procedure

The applicable Rules of Procedure and Evidence are based on those of the ICTR, with amendments that were made over the judges’ subsequent plenaries.⁷⁰ The Statute specifies that the judges may be guided in amendments by the Sierra Leone Criminal Procedure Act 1965,⁷¹ but

⁶³ Special Court Statute, Art. 1 and Agreement, Art. 1(1).

⁶⁴ Special Court Statute, Art. 8(2).

⁶⁵ See Cole, *supra* note 47, at 116.

⁶⁶ Special Court Statute, Art. 10.

⁶⁷ See, e.g., Micaela Frulli, “The Special Court for Sierra Leone: Some Preliminary Comments,” *EJIL*, Vol. 11, 2000, at 859.

⁶⁸ Special Court Statute, Art. 6(1).

⁶⁹ The indictment reads, “25. The ACCUSED participated in this joint criminal enterprise as part of his continuing efforts to gain access to the mineral wealth of Sierra Leone and to destabilize the Government of Sierra Leone.” See *Prosecutor v. Charles Ghankay Taylor*, *supra* note 10.

⁷⁰ See Special Court Statute, Art. 14.

⁷¹ *Id.* at Art. 14(2).

most of the amendments seem to have been motivated by a desire to expedite the procedures of the ad hoc tribunals, rather than being based on domestic law. The system operable before the Special Court has cut out some of the civil law-oriented amendments that were made in the rules of the ad hoc tribunals; thus, it is essentially closer to the common law. Most of the judges have common law backgrounds and have resisted certain practices, such as reliance on written statements in lieu of oral testimony.⁷² In general, the emphasis has been on witness testimony rather than documentary evidence.

Major points of difference include allowing the Court to exercise its functions away from Sierra Leone, a rule used frequently by the Appeals Chamber (Rule 4); a rule that allows for closed sessions for national security or the security of the Special Court (Rule 79); the deletion of the *prima facie* standard of proof for confirmation of the indictment (Rule 47); a general reduction of time limits for filings (Rule 50 on preliminary motions, Rule 111 on appeals); a rule that allows the accused to be handcuffed in court (Rule 83); some differences in the rules of disclosure, such as less duty for the Prosecutor to disclose exculpatory evidence (Rule 68); abbreviated rules of evidence, without a Rule for the Chamber to call its own evidence; and more reliance on oral evidence.

One controversial change was to make the Appellate Chamber in effect the court of first and last resort on all preliminary motions raising serious jurisdictional issues.⁷³ This provoked condemnation from human rights groups, including Amnesty International, on the grounds that it deprives the accused of their right to appeal (most other aspects of the rules have not provoked any serious criticism).⁷⁴ The rules are more streamlined than those of the ICTY and ICTR and may become a reference point for future courts. They were initially relied on as the framework for Rules for the Iraqi Special Tribunal, although these subsequently took a different direction. On the other hand, the Special Court relies heavily on eyewitness testimony, and its rules are less elaborate than those of other tribunals in terms of how to deal with voluminous documentary evidence.

C. Jurisprudence

The Special Court has already confronted several significant legal questions, most of which relate to motions that challenge jurisdiction.

- *Relationship with domestic law.* Defence Counsel brought preliminary motions questioning whether the establishment of the Special Court violates the Sierra Leonean Constitution. The Appeals Chamber dismissed the motions, holding that as its creation was based on a valid treaty, the Special Court is acting under international law and independent of Sierra Leonean domestic law, as made clear in the report of the Secretary-General, and hence the Constitution does not apply. An important result was demonstrating that judges consider the Special Court to be entirely international. Nonetheless, a challenge to the Court's legality was subsequently filed before Sierra Leone's Supreme Court, but was dismissed.

⁷² Under Rule 92 *bis* of the ICTY, such statements are admissible on issues other than those relating directly to the guilt or innocence of the accused, but the Rules of the Special Court originally did not allow for the admission of written statements.

⁷³ See Rules of Procedure and Evidence, 72(E), 72(F).

⁷⁴ Amnesty International, "Sierra Leone: Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law," AI INDEX: AFR 51/012/2003, Nov. 1, 2003.

- *Recruitment of child soldiers a crime under customary international law in 1996.* On May 31, 2004, the Appeals Chamber held that the recruitment or use of children under the age of 15 was a crime under international law in 1996 and that defendants are subject to individual criminal responsibility for this offence during the entire period covered by the court's jurisdiction.⁷⁵ The Court relied on international instruments such as the 1990 African Charter on the Rights and Welfare of the Child. The Court noted that by 1996 Sierra Leone had ratified the 1949 Geneva Conventions, which call for the protection of children under 15 from the effects of war, as well as two Additional Protocols of 1977 and the Convention on the Rights of the Child (CRC), which prohibit the recruitment of child soldiers.⁷⁶ It also held that violation of these fundamental guarantees leads to individual criminal liability. A dissenting judge argued that the prohibition on recruitment of child soldiers emerged later, when the Rome Statute of the ICC came into force.
- *Head of state immunity in Taylor case.* On May 31, 2004, the Appeals Chamber ruled that heads of state are not immune from prosecution before an international criminal tribunal or court, unanimously rejecting Charles Taylor's preliminary motion to challenge the validity of his indictment on the grounds that he was president of Liberia at the time it was issued. In reaching its decision, the Court concluded that the Special Court is an international criminal court because of the UN's role in its creation.⁷⁷ This brought it within the exception to sovereign immunity laid out in *DRC v. Belgium (Yerodia)*.⁷⁸
- *Invalidity of the amnesty in respect of international crimes.* According to the Appeals Chamber, the amnesty granted under the Lomé Peace Agreement does not bar the Court from prosecuting international crimes and crimes against humanity committed before July 1999. The Appeals Chamber ruled that the amnesty applies only to national criminal jurisdiction and cannot cover international crimes, over which states may exercise universal jurisdiction.⁷⁹

It remains to be seen how far other courts will rely on these decisions, as the legal reasoning has not always been elaborate and has been criticized by some legal experts. So far the Appeals Chamber has often relied on common law precedent, as most of the judges derive from common law jurisdictions, but jurisprudence from the other international tribunals has also been used, as was anticipated in the Statute.⁸⁰ In its first year the Court's decisions were not widely available or posted on its website. Important decisions are now readily available, although motions from the parties, such as the pre-trial motions, are still not posted. It is also difficult to systematically track

⁷⁵ Appeals Chamber, Prosecutor v. Norman, "Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)," May 31, 2004.

⁷⁶ Additional Protocol I, Art. 77.2, Additional Protocol II, Art. 4, and CRC, Art. 38.

⁷⁷ The Appeals Chamber observed that pursuant to Article 6(2) of the Court's Statute, which is similar to the provisions in the statutes of the ICTY (Art. 7(2)), ICTR (Art. 6(2)), and ICC (Art. 27(2)), the position as Head of State does not relieve that individual of criminal responsibility or mitigate punishment, noting that these provisions are traceable to the Charter of the International Military Tribunal (Nuremberg Charter) (Art. 7). The Court further found that Article 6(2) of its Statute is consistent with other norms of international law.

⁷⁸ Judgment by the International Court of Justice, Feb. 14, 2002.

⁷⁹ The Court ruled that the Lomé Peace Agreement is not an international agreement because it created rights and obligations that are to be regulated by the domestic laws but not international law. It also noted that the RUF did not have treaty-making capacity. Therefore, the Court concluded that the Lomé Agreement does not affect the liability of the accused to be prosecuted in an international tribunal for international crimes and crimes against humanity.

⁸⁰ Article 20(3), "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."

the development of certain legal issues. In this respect, the Special Court has not performed as well as the other *ad hoc* tribunals in terms of transparency.

IV. THE JUDGES OF THE SPECIAL COURT

The Special Court was originally composed of two Chambers—a Trial Chamber of three judges and an Appeals Chamber of five judges. A second Trial Chamber has now been established, at the request of the President, in accordance with the Statute.⁸¹ The Trial Chambers each comprise two judges appointed by the Secretary-General and one appointed by the Government of Sierra Leone. The Appellate Chamber contains three judges appointed by the Secretary-General and two by the Government of Sierra Leone.⁸²

The judges hail from Sri Lanka, the UK, Nigeria, Cameroon, Austria, Canada, Uganda, Samoa, Northern Ireland, and Sierra Leone. The national and international appointees were hired at the level of Under-Secretary-General of the UN for three-year terms and are provided with transportation and close protection officers. Currently three are women and five of the eleven judges are African,⁸³ including two Sierra Leoneans. However, the Sierra Leonean government chose to nominate two internationals out of its four nominations. This has contributed to the perception that the Special Court is mostly international, rather than a true hybrid institution.

Recruitment via the Office of Legal Affairs in New York has often been slow. In fact, when the Special Court requested a second Trial Chamber in March 2003, it took a full year for the chamber to be established. It has also been difficult to get quality candidates to apply, despite the fact that the salaries in Sierra Leone are much higher than in Timor-Leste or Kosovo, where other hybrid courts are in operation.

Several legal motions have been filed regarding recusal of judges. For example, defense counsel in the RUF case brought a motion for the recusal of Judge Robertson on the basis of his book, *Crimes Against Humanity: The Struggle for Global Justice*. Counsel argued that Robertson had prejudged certain central issues in the case and that the book read like a verdict before trial.⁸⁴ Moreover, it was argued there would be the appearance of bias if Robertson sat on RUF cases because he had an interest in finding them guilty, as determining otherwise would raise doubts about the accuracy of his book. Controversially, the Prosecution agreed with the Defence that there may be a perception of bias. After Judge Robertson had not recused himself, the remainder

⁸¹ Agreement on establishment of Special Court, Art. 2(1).

⁸² Hassan Jallow of The Gambia was formerly appointed a judge of the Appeals Chamber, but left the position upon being invited to become the Chief Prosecutor of the ICTR in September 2003. Other judges include Justice A. Raja N. Fernando (Sri Lanka) – President; Justice George Gelaga King (Sierra Leone) – Vice President; Justice Emmanuel Ayoola (Nigeria); Justice Renate Winter (Austria) Vice President; Justice Geoffrey Robertson (UK); Justice Pierre G. Boutet (Canada); Justice Benjamin Mutanga Itoe (Cameroon); Justice Rosolu John Bankole Thompson (Sierra Leone); Justice Richard Lussick (Samoa); Justice Teresa Doherty (Northern Ireland); Justice Julia Sebutinde (Uganda).

⁸³ The Special Court Agreement specifies that in selecting judges the Secretary-General will consider nominations by states, in particular member states of the Economic Community of West African States and the Commonwealth. See Arts. 2(2)(a), 2(2)(b).

⁸⁴ Appeals Chamber, *Prosecutor v. Issa Sesay*, SCSL-04-15-PT-140, “Decision on Defence Motion Seeking the Disqualification of Judge Robertson from the Appeals Chamber,” 13 Mar. 2004. The motion cited phrases from the book on the “guilty of atrocities of a scale that amounts to a crime against humanity, must never again be forgiven sufficiently to be accorded a slice of power: on the contrary, its leaders deserve to be captured and put on trial.” See Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, New York: Penguin, 2002 (2nd ed.), at 469.

of the Appeals Chamber heard oral argument and decided to disqualify him from sitting in the RUF case. All of this occurred when the Court was about to open for the first trial, and the issue received considerable attention from the international media. The disqualification of Judge Robertson was detrimental to the Special Court, partly because the matter of his prior publications should have been elucidated at the time of his appointment.⁸⁵

The following issues have been raised by observers of the Chambers:

(1) *Efficiency*. When the judges of Trial Chamber I began sitting, they averaged 1.5 hours per sitting day, which caused considerable concerns regarding their efficiency. However, gradually their sitting hours increased. Nonetheless, Trial Chamber still deferred the opening of the defense case in the CDF trial from the end of the summer break until January 2006. Certain motions were decided only after many months. Also controversial was the choice to start with the CDF, rather than the RUF, trial. Although this case may have been most trial-ready, many Sierra Leoneans view CDF members as war heroes. Also, the same Trial Chamber is trying the two largest cases, RUF and CDF, whereas a second Chamber is trying the AFRC case, which is much smaller.

(2) *Control over the courtroom*. There are concerns regarding the initial proceedings relating to confusion from the bench about rules and procedure.⁸⁶ When the trials began, judges did not display sufficient experience in controlling the courtroom. Some gave too much leeway to the parties or individual defendants (particularly Chief Hinga Norman), or were not adequately sensitive to witnesses. Conversely, there were concerns that the Appeals Chamber was too interventionist and occasionally adopted an inquisitorial approach. Human Rights Watch has noted some improvements over time, but significant delays in two of the three trials remain a problem.

(3) *Insufficient legal support for the Chambers*. For most of the first year the judges did not have any senior legal assistance, although this unit was subsequently augmented. Nonetheless, some still believe there are insufficient legal advisors to the judges.

(4) *President absent and inadequate Appeals Chamber time in Freetown*. In order to reduce spending and attract high-quality candidates, the Appeals Chamber judges still do not sit permanently in Freetown. This also holds true for the President of the Court, who does not reside in Freetown. Although this is a useful provision in terms of judicial economy, the time allocated for visits to Freetown has been too short. In particular, the absence of a President leaves a leadership vacuum in the Chambers.

(5) *Interaction with local judiciary*. Given the mixed nationality of the panels, the Chambers could make a positive contribution to the legacy of the Special Court. The two Sierra Leonean judges are well-respected members of the local profession and connected authorities in the national legal community, and several judges have expressed an interest in working with Sierra Leone judges. Although some efforts were made to reach out to the Chief Justice of Sierra Leone, there was little response and few formal programs have connected the Special Court judges with the local judiciary, and this potential may not be fully realized. A

⁸⁵ A further motion was brought by counsel for Hinga Norman, seeking the recusal of Judge Winter from sitting on the motion regarding the recruitment of child soldiers, due to her prior engagement with UNICEF. UNICEF had made submissions as *Amicus Curiae* in the child soldiers motion, and is well-known for its campaign work to criminalize the recruitment of child soldiers. The Defence therefore argued that she would be likely to exhibit bias on the issue of child soldiers. However, this motion was dismissed. See SC SL-04-14-PT-112, “Decision on motion to recuse Judge Winter from deliberation in preliminary motion on recruitment of child soldiers,” May 28, 2004.

⁸⁶ See International Crisis Group, “The Special Court for Sierra Leone: Promises and Pitfalls of a ‘New Model,’” Aug. 4, 2003.

complicating factor has been an application on the legality of the Special Court's jurisdiction pending before the Supreme Court of Sierra Leone.

V. THE OFFICE OF THE PROSECUTOR

The first Prosecutor of the Special Court, David Crane, was serving as a senior Inspector General in the U.S. Department of Defence, had taught international law and has a degree in West African studies. Backed aggressively by the United States, Crane's nomination was challenged by a candidate advanced by the UN, Ken Fleming, an Australian lawyer who had served as Acting Chief of Prosecutions for the ICTR. While many international law advocates had misgivings about an American adopting such a prominent position in the Court, a clear advantage would be continued political and financial support from the United States.

Crane quickly became one of the most recognized figures in Sierra Leone. Although opinions about him vary, he has received accolades for efficiency and producing quick results, including issuing the first seven indictments within nine months of his arrival. He placed great emphasis on making himself available to the general public throughout the country and did a lot of early outreach for the Court. However, his military background and rhetorical style, most apparent during his opening statements, also alienated some. The Deputy Prosecutor, appointed by the Government of Sierra Leone, was Desmond de Silva, a Queens Counsel currently of the United Kingdom and formerly of Sri Lanka. He practiced law in the United Kingdom for four decades and was admitted to the Sierra Leone bar in 1968, when he acted as defense counsel in the country's first treason trial. In July 2005, Desmond de Silva took over the Chief Prosecutor's position.

De Silva's original appointment as Deputy Prosecutor triggered significant resentment from the Sierra Leone Bar Association, as the Statute required the government to "appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor."⁸⁷ Whereas the Special Court Agreement allows the government to fill judicial positions with people of any nationality, the Deputy Prosecutor position was explicitly designated as national. The government amended the agreement through an exchange of letters and quietly had the Parliament amend the language of the implementing legislation in order to allow for their selection. The Sierra Leonean Bar Association objected to the implicit suggestion that its government deemed none of their members as qualified. In retrospect, the decision to exclude Sierra Leoneans from this post and as judges has been deleterious to the hybrid nature of the Court and resulted in the alienation of many Sierra Leonean legal professionals.

At the height of its operations, the Office of the Prosecutor (OTP) had a professional staff of approximately 65. Sierra Leoneans comprise more than one-third of the professional staff, the largest percentage by nationality. Nearly half the professional posts and almost every one of the senior ones are occupied by people from the Global North (mostly Americans and Canadians).⁸⁸ The OTP benefited greatly from hiring internationals that already had expertise on the ground. Also, a small cadre of Sierra Leone police officers joined the investigations team within the first two weeks of operations and have provided invaluable insights throughout the process. During particularly tense and delicate moments, such as the initial arrests, these senior officers were the essential bridge that helped those operations to succeed. The Prosecutor also hired a number of persons with extensive human rights experience in Sierra Leone to assist in investigations, including of gender crimes. This resulted in the inclusion of unique "forced marriage" charges in

⁸⁷ Agreement on establishment of Special Court, Art. 3(2).

⁸⁸ Statistics as of May 2004, courtesy of Eric Witte, former Special Adviser to the Prosecutor.

the indictments. The OTP has received praise for its attention to sexual crimes, including the creation of a specialized capacity on gender crimes, but women are underrepresented in its leadership.

The OTP's robust approach toward investigations has generated criticism. For example, there was much controversy around the unsealing of the indictment against Charles Taylor while he was in Ghana in June 2003 to attend UN-sponsored peace negotiations on Liberia. Many international policymakers viewed this action as taken in isolation of other objectives that the international community was seeking to accomplish. The Ghanaians, who claimed they did not have adequate notice of the indictment, provided a plane for Taylor to fly back to Liberia. This incident sparked much international debate about whether the indictment constituted an inappropriate interference in internationally supported efforts to secure peace in Liberia. Nonetheless, in August 2003, an agreement was brokered that enabled Taylor to leave Liberia for asylum in Nigeria. Subsequently, the Office of the Prosecutor has been able to mount considerable pressure on Nigeria to reconsider, including issuing an INTERPOL red notice, but there has yet to be a reversal in Nigeria's position.

Another controversial incident involved impounding the plane of the Secretary-General's Special Representative to Liberia in Togo. The Chief of Investigations had borrowed the plane to interview a high-profile, insider Liberian potential witness, Benjamin Yetan, and did not log a flight plan. When he showed up in Togo to interview the witness, accompanied by police, the witness fled. Observers have also expressed concern that evidence was insufficient at the time of confirmation and that additional investigations were needed. There is a reduced level of judicial review over this process because unlike in indictments before the ICTY and ICTR, there is no requirement for a case to meet the *prima facie* standard at the confirmation stage.⁸⁹ Finally, a controversy arose at trial, where the defense alleged that OTP payments to witnesses and offers of witness relocation were incentives that rendered witness testimony unreliable. This motion was dismissed, but similar issues may arise in other poverty-stricken contexts.

In terms of national-international intra-office dynamics, reports have been mixed. The top-down approach taken in most substantive decisions usually excludes national voices because few Sierra Leoneans hold senior positions. A number of senior Sierra Leonean lawyers have left the Office of the Prosecutor in discontent.

Nevertheless, an exemplary model of national-international teamwork was found in the investigations unit. Investigators from the domestic Sierra Leone system have been involved in planning some of the most important operations to date, and they serve in key roles in almost every team that goes into the field. In addition to long-term secondments, the OTP has set up a system of rotating Sierra Leone police officers on 90-day assignments, exposing them to complex criminal investigations and evidence handling. Some human rights observers have expressed concern privately about police involvement, given the negative track record of the police during the conflict, but in general the officers conducted themselves well and generated no complaints. Two of the officers who spent extended time working with the OTP have returned to top positions in the police, one as the third-highest ranking member of the office and another as director for the Eastern District.

⁸⁹ See Rules of Procedure and Evidence for the ICTY and ICTR, Rule 47.

As with all sections of the Court, the OTP has seen a high rate of turnover, although this may not be a negative reflection of the office.⁹⁰ However, burnout (as well as staff illness) has taken a toll, and toward the end of the Court's life a number of senior departures are beginning to pose a serious challenge, particularly for the OTP, where in-depth knowledge of particular cases can be accumulated only over time.

The Special Court has the most extensive practice among international tribunals in dealing with children as potential witnesses. A consultant with a background in juvenile justice was hired to draft guiding principles that would secure the collaboration of child protection agencies in the provision of psychosocial support and identification of potential witnesses. This led to the adoption of a protocol that included a vulnerability test and provided for confidentiality and security measures. Potential witnesses were interviewed by a specialized investigator, and about 20 were selected to testify at trial, although only a handful eventually did so. Although these witnesses were both over 18, they continued to benefit from special measures for children. This included granting pseudonyms and other measures to protect their identity. Closed circuit television was used to avoid confrontation in the courtroom and risks of re-traumatization (although some preferred to testify in the courtroom).⁹¹

VI. THE REGISTRY

The Registry's scope of work is broad and made even more challenging by the Court's short anticipated lifespan and the general lack of infrastructure. The Registry is responsible for managing the budget, personnel, infrastructure, and all non-judicial operations. In addition, it has set up the Defence Office, supported Chambers, and run the Court's outreach and press sections.

The Registry remained understaffed for much of the first year but expanded its presence in the second. The first Registrar, Robin Vincent of the UK, had 40 years of experience of working in Court Management in the domestic English legal system and has been praised for his leadership style and ability to support the Court efficiently and basically within tight time frames and budgets. His appointment illustrates the benefit of having a senior administrator in the post of Registrar, rather than a lawyer or judge, as has been common with the other Tribunals. However, the Office of Legal Affairs was not able to find a replacement within six months of Vincent's departure and appointed an Interim Registrar while recruiting for a permanent replacement. Most recently, Lovemore Munlow, formerly Deputy Registrar at ICTR, has been appointed to the post.

The Registry experienced some diplomatic setbacks in the first year. For example, there were considerable efforts to secure an agreement with the ICTY to hold certain accused in the tribunal's custody after arrest to avoid political instability and security difficulties in Sierra Leone. However, at the last minute the Dutch government determined that it could not extend this cooperation. In the confusion of this potentially volatile situation, the location of Hinga Norman's detention was withheld from the public until after his initial hearing. This fuelled rumours that Hinga Norman had not been treated well. Another major setback was Ghana's decision not to accept former RUF leader Foday Sankoh for medical treatment and examination. Negotiations

⁹⁰ As one former ICTY lawyer now working with OTP noted, unlike in The Hague, where staff members buy homes and move their families over, international staff in Sierra Leone see this as a temporary assignment. This may be because Sierra Leone is not a family duty station. The staff is therefore generally focused on working as hard as possible while in Sierra Leone.

⁹¹ Luc Cote, "Prosecuting Child Related Crimes at the Special Court for Sierra Leone: A Mid-Term Assessment," presented at UNICEF Conference on Transitional Justice and Children, Florence, Nov. 10-12, 2005.

over his transfer faltered after the unsealing of the Charles Taylor indictment, and Sankoh died in a hospital in Sierra Leone. Although there were no public suggestions of an unnatural death, this was problematic for the Court. In general, negotiations over medical care have faltered due to third-party states' concern that the accused may try to claim political asylum. Negotiations over the enforcement of sentences have likewise been difficult to conclude. Finally, the controversy surrounding the unsealing of the indictment against Taylor involved the Registry, as Ghana alleged that it had not been properly notified.

All of these incidents speak for the need for posts in the Registry and other parts of the Court for individuals with experience interacting with international and regional organizations, as well as foreign governments. More recently, the Registry has made considerable progress on securing funding and negotiating international agreements, such as international arrangements to host protected witnesses abroad.⁹² It is currently working on agreements with other states on the location of prisoners upon conviction.

Building the Court on time and within budget was also a considerable challenge. The planning mission had determined that there was no suitable site for the Court, so it was built on a rocky patch of ground, donated by the government of Sierra Leone, in the center of Freetown. The Court building has run beyond the anticipated timetable and costs exceeded early budgetary estimates. However, Sierra Leone will inherit \$6 million worth of real estate and a state-of-the-art court with two courtrooms after the Special Court finishes its work. The unique architectural design of the court itself, which is built exclusively from local materials, has also been praised but questions remain as to the sustainability of maintaining the facility over the long term.

Those accused in Special Court proceedings are detained in a special Detention Centre, located within the Special Court compound. Complaints about treatment voiced by family members of the accused were responded to by inviting inspections by human rights organizations. Prison conditions have come under some local public criticism for lenience, as they include satellite television, a well-balanced diet regularly tested and approved by the ICRC, a basketball court, and free medical care (as required by international norms), most of which are unattainable luxuries for most Sierra Leoneans. These issues present a key challenge for running a Court up to international standards in one of the world's poorest countries.

Although the security section is affected by the withdrawal of UNAMSIL in late 2005, a continued security presence in the form of a limited number of troops (currently from Mongolia) has been negotiated for the Court through UN Department of Peacekeeping Operations (DPKO). Security will become a particular concern during the presidential elections in 2007, which could result in instability.

The Special Court operates a witness-protection program that seeks to meet victims' and witnesses' needs, including psychological assistance, before, during, and after trial. Most witnesses before the Court benefit from protective measures. There is currently at least one contempt proceeding pending for disclosure of the identity of a protected witness. Some witnesses have required relocation, either to neighbouring countries (usually under informal arrangements) or overseas. It has been difficult to find countries willing to conclude formal arrangements to host witnesses and their relatives, particularly so-called "insiders." Also unclear is what will happen to such discretionary arrangements in the long term.

⁹² Co-operation Agreement Between the International Police Organization–Interpol and the Special Court for Sierra Leone, Nov. 3, 2003, available at www.sc-sl.org.

Virtually all of the leadership positions in the Registry are occupied by internationals, including all chiefs of sections, with the exception of Outreach and Information Technology. The Court has established some policies to encourage Sierra Leonean applications for professional positions, including a system that classifies posts, rather than individuals, as national or international. There is also a policy of short-listing Sierra Leonean applicants for interviews. Although the Court has a majority of Sierra Leoneans, at about 60 percent, many national staff members are in non-professional posts (drivers, close protection officers, cleaners, etc.).

On occasion, behaviour of some Special Court employees has caused tensions with the local population, and eventually a Code of Conduct was passed to regulate such issues. Such Codes should form part of any future hybrid tribunal and should be passed at the outset. In the case of the Special Court, a senior member of the OTP was charged with sexual misconduct before a domestic court. He voluntarily submitted to the domestic jurisdiction and was detained in Pademba Road prison. He was later acquitted on appeal.

VII. THE DEFENCE AND FAIR TRIAL STANDARDS

One of the most innovative aspects of the Special Court for Sierra Leone is its Defence Office, which may be a promising new model for defence services in international tribunals. The system combines a core group of in-house defence counsel with the traditional system of a listing of individual lawyers who can be assigned to each defendant. The Defence Office is intended to provide a degree of institutional support to the Defence as a whole, while still allowing for qualified teams of lawyers, often comprising both internationals and nationals, to represent individual defendants.

Under this system, as soon as someone is arrested, the Defence Office provides legal advice through Duty Counsel, which is always available at the Detention Facility. The defendant can subsequently choose his own counsel, who must file a power of attorney with the Registrar; otherwise, a Duty Counsel will “advise and assist the defendant, as well as provide initial legal representation if the defendant so chooses.”⁹³ The Defence Office also ensures that a list of eligible defence counsel is available and, on request, can assist defendants in choosing from this list.⁹⁴

The Defence Office attempts to impart to the Defence some of the “repeat player” benefits normally confined to the Prosecution. The office has developed expertise and experience on motions filed to date, background to the conflict, and patterns of atrocities, all of which it can share with assigned Defence Counsel. The Registry has committed substantial resources to this new arrangement, including a Chief and Advisor position, three Defence Associations, and financial and administrative support staff.

⁹³ See www.sc-sl.org.

⁹⁴ Rules of Procedure and Evidence, Rule 45(A), “The Defence Office shall, in accordance with the Statute and Rules, provide advice, assistance and representation to [“suspects being questioned” and “accused persons”].” Rule 45 (B), “The Defence Office shall fulfil its functions by providing, *inter alia*:

- (i) initial legal advice and assistance by duty counsel who shall be situated within a reasonable proximity to the Detention Facility...;
- (ii) legal assistance as ordered by the Special Court in accordance with Rule 61, if the accused does not have sufficient means to pay for it, as the interests of justice may so require;
- (iii) adequate facilities for counsel in the preparation of the defence.”

Indigent defendants are provided with assigned counsel. A capping system ensures that counsel can spend only a certain amount on each stage of the defense, but the cap can be exceeded if justified by the complexity of the case. This is a departure from the rules of the ICTY and ICTR and has proven popular. It has ensured that defense teams, including nationals and internationals, have chosen diverse structures to maximize efficiency. A number of international counsel are experienced in international criminal law, having taken cases before the ICTY or ICTR. There are also provisions to prevent fee-splitting—the cause of several scandals at the ad hoc tribunals—that have been successful.

One controversial issue that arose in the first year was that of communication with counsel. Many Defence counsel, at least before the start of trials, were based in Europe and did not have ready access to their clients. This was a problem when detainees were being kept in Bonthe, where, according to reports, the telephones were positioned (albeit unintentionally) so that conversations could be overheard, raising confidentiality issues. To remedy this, detainees were given mobile phones. This raised considerable concerns, as there were rumors that Chief Hinga Norman was using his phone to stir up trouble involving the Kamajors. Mobiles have since been withdrawn.

Sierra Leonean nationals are well represented in both the Defence Office and the Defence teams. Three out of the 10 teams are led by Sierra Leoneans. The Defence Office has made a considerable effort to include local lawyers on the teams, whether as co-counsel or legal assistants. In one case, a single counsel represented two clients. Although the Defence Office attempted to have him removed from representing one client, the judges upheld counsel's motion and he continued to represent both clients.⁹⁵

The Defence Office represents a considerable improvement over approaches in other criminal courts, where the defense has typically suffered a lack of institutional support and the trials have been plagued with issues of inequality of arms. Current international observers agree that in general terms, the trials before the Special Court are in compliance with fair-trial standards, which is largely due to the Defence Office's role. Although there have been valid complaints regarding late disclosure of materials by the Prosecutor (including revealing the identity of a witness 21 days before he was called), insufficient funding for investigators and experts, and problems of performance by individual Defence counsel,⁹⁶ steps have been taken to address some of these concerns.

VIII. PROSECUTORIAL STRATEGY

A. “Those bearing the greatest responsibility”

The governing standard of prosecutorial discretion at the Special Court has been “those bearing the greatest responsibility.” This has enabled the Prosecutor to focus his attention on only a few select cases, which has been crucial to the goal of “delivering justice within a politically acceptable time frame.” Thirteen accused are currently indicted. Although it is not widely known how this issue was approached, the following may have played a role in focusing the investigations.

⁹⁵ Prosecutor v. Alex Tamba Brima et al., Case No. SCSL-04-16, “Brima—Decision on Applicant's Motion against denial by the Acting Principal Defender to enter a Legal Service Contract for the Assignment of Counsel,” May 6, 2004.

⁹⁶ See Human Rights Watch, “Justice in Motion: The Trial Phase of the Special Court for Sierra Leone,” Oct. 2005.

1. Much time went into planning the investigations and deployment of the office, even before the Prosecutor came to Sierra Leone. While this contributed to efficiency, it may have detracted from local ownership. It also gave rise to rumors that a “list” existed from the outset.
2. There was pre-existing documentation, including a mapping exercise of violations that the Office of the High Commissioner for Human Rights carried out for the TRC, and a further mapping project carried out by No Peace Without Justice.
3. Consultations were held to discern which names were part of the public discourse on who bears responsibility. When members of the public were asked who was responsible, the responses were fairly consistent. Consultations were also held on the concept of “forced marriage.”⁹⁷ However, the Prosecutor has been discreet in elaborating his investigations strategy, much of which has rested on demonstrating that the various accused participated in a joint criminal enterprise, be it the RUF, CDF, or AFRC.

A first round of indictments was issued in March 2003 and included the chief-in-command of all three major factions in the war, the RUF (Foday Sankoh and Issa Sesay), the AFRC (Johnny Paul Koroma), and the CDF (Sam Hinga Norman). This batch of indictments also included the indictment of Charles Taylor, although it was kept under seal. These arrests were known within the OTP as “Operation Justice.” Further arrests were made in June and September 2003.

The indictments largely matched predictions and expectations of most national and international experts. Even those defending Hinga Norman recognized that his indictment as a senior commander of the CDF was likely, given the Special Court’s mandate. Also, many in Sierra Leone see Charles Taylor as the person most responsible for the war and violations of international law.

The 13 indictments resulted in 10 arrests. Two indictments have been withdrawn because of the deaths of Foday Sankoh and Sam Bockarie.⁹⁸ Two indictees remain at large—Charles Taylor, who is in exile in Nigeria, and Johnny Paul Koroma, whose whereabouts are unknown since he allegedly took refuge in Liberia.

- Each of the indictments includes charges under international law, including *inter alia* serious violations of Common Article 3 of the Geneva Conventions and crimes against humanity. All include charges relating to the recruitment of child soldiers.
- The indictments include fewer than 20 charges each. The Prosecutor has noted that the ICTY Prosecutor and her staff strongly advised him to focus his indictments rather than follow their tradition of including numerous cumulative charges.
- In January 2004 the Prosecution filed amended indictments in all cases. These expanded the time frames of crimes charged and added a new charge of forced marriage. This charge has been criticized by gender advocates, who argue that it contributes to stigmatization of victims and that it could be adequately subsumed by existing legal concepts such as enslavement and rape. They believe that this constitutes bad precedent. The OTP argues that the decision was taken pursuant to consultation with women’s groups in Sierra Leone and is sensitive to the particular cultural context, and that the charges form part of its vigorous approach in investigating and prosecuting gender

⁹⁷ This is discussed in greater detail below.

⁹⁸ Sam Bockarie, also known as “Maskita,” was killed in Liberia along with his family. Charles Taylor allegedly ordered his death. Bockarie’s body was handed over so that to the Special Court could affirm his death.

violations. The Trial Chamber deemed the changes permissible for the RUF and AFRC cases in a decision issued in May 2004 but denied permission to amend the CDF indictment on the ground that this was filed too late.⁹⁹

- The Trial Chamber also upheld a Prosecution motion to join various cases in January 2004, with the result that the cases of the nine defendants currently held in detention were grouped into three trials of three defendants each.¹⁰⁰ Accordingly, the Court's caseload is grouped into one trial each for the RUF, AFRC, and CDF.

Throughout, the OTP has refused to estimate the number of indictments it will issue. As of early 2006, it is presumed that the Prosecutor will not bring additional indictments unless Charles Taylor comes into the Court's custody. Although the original indictments were expeditious, periods of pretrial detention were longer than initially anticipated, and the first trial (of the CDF) got under way 15 months after the indictments were issued. The intervening time was taken up by a variety of motions, including jurisdictional issues and allowing the Defence to conduct its investigations.

Original predictions of numbers of witnesses that the OTP would call ranged in the hundreds; however, these numbers were cut back. In the CDF trial, for example, the Prosecutor has called 78 witnesses.¹⁰¹ Since the start of trials in June 2004, considerable progress has been made in at least two of the cases (CDF and RUF), but these trials are not necessarily being conducted at a faster pace than those before the ICTY. The Prosecution has concluded presenting its case in the CDF trial and is due to finish its cases in the RUF and AFRC by early 2006. Current predictions are that the Defence will not call as many witnesses and that trials (but not appeals) may finish by the end of 2006. The Court will likely need at least five years to finish its work.

B. Perceptions of Prosecutorial Strategy

Several concerns have emerged about the exercise of prosecutorial discretion in Sierra Leone.

1. Some fear that the Special Court is *prosecuting too few perpetrators*. There is a widespread public perception that the "greatest responsibility" standard will allow too many key actors to remain at large and, of particular concern, in the army.¹⁰² Court officials have noted repeatedly that many are eager to see more individuals held accountable for the suffering.¹⁰³ Civil society groups have also questioned the amount of effort and expense that is going into the prosecution of a handful of individuals. Also, the Prosecutor has discussed the role of those who financed the war, and some are eager to see the Special Court test the limits of liability for profiting from commodity conflicts. However, indictments are likely to come from the Special Court itself. While Charles Taylor has been charged with financing the war, he is not charged with profiting from it. But the Prosecutor has assisted the

⁹⁹ Prosecutor v. Issa Sesay et al., SCSL-04-15, and Prosecutor v. Alex Tamba Brima et al, SCSL-04-16, "Decision on Prosecution Request for Leave to Amend the Indictment," May 6, 2004.

¹⁰⁰ See, e.g., Prosecutor v. Sam Hinga Norman, Case No. SCSL-03-08, "Decision and Order on Prosecution Motions for Joinder," Jan. 27, 2004.

¹⁰¹ This is roughly comparable to similar cases at the ICTY, but not significantly below it.

¹⁰² See, e.g., the report on the National Victim Commemoration Conference, held in Freetown on March 1–2, 2005. Human Rights Watch has also argued that commanders from the Sierra Leonean Army should have been indicted.

¹⁰³ See, e.g., Eric Pape interview, *supra* note 4.

Dutch authorities in the prosecution of Gus van Kouwenhoven, the Dutch businessman accused of breaching the arms embargo in Liberia.¹⁰⁴

2. A related concern is that given the limited number of accused, a significant number will *never be tried*, including the most notorious perpetrators, such as Charles Taylor, Foday Sankoh, Sam Bockarie, and Johnny Paul Koroma. Some would argue that the Court is rendering symbolic justice to the figureheads of factions without regard to their post-war conduct or whether they continue to pose an ongoing threat.
3. Some have complained that some potential indictees may be *shielded for political reasons*. For example, some have questioned why President Kabbah has not been indicted, given that he acted as Minister of Defence during the war while Hinga Norman was only Deputy Minister of Defence.¹⁰⁵ President Kabbah fueled debate on this issue during an appearance before the TRC when he refused to take responsibility for any of the crimes committed by the CDF or the Army that helped restore him to power. Others have wondered why Blaise Compaore, president of Burkino Faso, was not indicted for his alleged links to the violence, and some have speculated that he was spared in part because of his allegiance to the United States in the war on terror.

IX. EFFICIENCY AND FUNDING

A. Timelines and Budget Projections

From an international perspective, one of the most important factors on which the Special Court is being assessed is whether it will conduct its operations more cheaply and efficiently than the ad hoc tribunals. To date, the Special Court's annual budget, currently about \$25 million, is far lower than those of the ICTY and ICTR, which hover at around \$120 million each.

The amount of time the Court is taking should be assessed against the fact that there are only three trials dealing with three accused each. This has greatly focused investigations from the outset. The Prosecutor had initially argued that the RUF and AFRC indictments should be joined into a single trial, but the Trial Chamber decided against that approach. Further delays were caused by the fact that a second Trial Chamber was not sworn in until January 2005. The Prosecution has concluded its case in both the CDF and AFRC trials. The Court predicts that trials will be completed at the end of 2006, with appeals taking until mid-2007 (not including the case of Charles Taylor), although some feel that this is too optimistic.¹⁰⁶ In any case, the Special Court will likely take considerably longer than the three years of its originally projected lifespan.

Some may argue that these original predictions did not consider the vagaries of the judicial process. However, others believe that the Special Court's proceedings have not been significantly faster than those of other international tribunals, considering that its scope of investigations and indictments has been far less than those of the ICTY and ICTR. Main points of delay have included lengthy adjournments or time required for judges' decisions, and the year-long delay in appointing a second Trial Chamber.

¹⁰⁴ See Thierry Cruveiller's interview with David Crane, Chief Prosecutor of the Special Court for Sierra Leone, "No Debt Relief for Nigeria unless Taylor is Handed Over," Issue No. 28, June 27, 2005.

¹⁰⁵ See, e.g., his remarks at the opening of the TRC public hearings and interviews on Radio UNAMSIL.

¹⁰⁶ The Court is making efforts to finish earlier. See identical letters dated May 26, 2005, from the Secretary-General to the President of the General Assembly and the President of the Security Council, May 27, 2005, A/59/816-S/2005/350, Annexing Special Court for Sierra Leone Completion Strategy, May 18, 2005 (Special Court Completion Strategy), para. 31.

Apart from this, there have been several instances where expenses exceeded original projections.

- *Security.* The Special Court began operations within months of the war's end. Security concerns were deemed substantial, although these risks have not materialized. For example, the Special Court constructed a provisional detention facility on the remote island of Bonthe so that indictees would not have to be held in Freetown.
- *Building facilities.* The cost of the permanent facilities increased considerably when designs were expanded to allow for a second courtroom within the main building. The decision was justified by the understanding that the expanded structure (without the real estate) is worth about \$3.8 million and will be an asset to the Sierra Leone judiciary.
- *Witness protection.* Sierra Leone is a small country in which information travels quickly through informal networks, and ex-combatants of all factions remain in the community. In building complex criminal prosecutions, the OTP has interviewed hundreds of witnesses and placed dozens of them in various forms of protected custody. Many witnesses have required relocation. The costs of witness protection are inevitably high when the court is located in-country.
- *Other costs.* In some areas, staff projections have increased; e.g., Chambers, with the establishment of a second Trial Chamber. The price of fuel has also risen substantially over the past few years.
- *Lack of UNAMSIL cooperation.* Despite the expressed intention of the Secretary-General,¹⁰⁷ originally UNAMSIL offered little technical, logistical, or administrative support. The Security Council adopted a Resolution in March 2002 stating that the Security Council "endorses UNAMSIL's providing, *without prejudice to its capabilities to perform its specified mandate*, administrative and related support to the Special Court on a cost-reimbursable basis."¹⁰⁸ However, this text left room for interpretation, thus allowing UNAMSIL leadership to adopt the position that the Special Court posed a potential threat to Sierra Leone's fragile peace process and that giving it assistance would be contrary to UNAMSIL's mandate. As a result, the Special Court lost months and millions of dollars in replicating structures for procurement, finance, personnel, and other services.¹⁰⁹ With time and the express support of the Secretary-General for the Special Court, the relationship between UNAMSIL and the Special Court improved.

In any case, pressures of efficiency have kept the Court's budget significantly smaller than that of the international tribunals. The UN Planning Mission assessed that the Special Court would cost \$114 million over three years. Member States said that was too high and halved the budget to \$57 million.¹¹⁰ The current revised projection for the Special Court budget is \$104 million (from 2002 until the end of 2006).

Attitudes toward this total figure depend largely on the point of comparison. The total revised budget is still below the original estimate and the overall budget remains less than a single year of current operations at either of the ad hoc tribunals. However, considering the limited number of indictees, the cost per indictee is comparatively large. Sierra Leoneans often speculate about other

¹⁰⁷ See Report of the Secretary-General, Oct. 4, 2000, UN Doc. S/2000/915, paras. 66–67.

¹⁰⁸ S/RES/1400 (2002). Emphasis added.

¹⁰⁹ Two exceptions to UNAMSIL's general stance were the Human Rights Section and the military side, under General Opande of Kenya. Opande's leadership and cooperation was vital for the security of many early Special Court operations.

¹¹⁰ See S/2001/693, "Letter dated 12 July 2001 from the Secretary-General addressed to the President of the Security Council," at 1.

uses for tens of millions of dollars.¹¹¹ Opinions vary on whether the Special Court funds could have been spent differently or whether in fact its presence and international profile have stimulated more funds to come into Sierra Leone.¹¹²

A comparison with peacekeeping may provide yet another perspective. At the height of its operations, UNAMSIL's budget was \$700 million per year. The Court's total budget over its first three years (\$75 million) will be less than six weeks of UNAMSIL's during its height of operations in 2002 peacekeeping (more than \$80 million).¹¹³ From a UN perspective, comparative costs also measure contributions to building a sustainable peace.¹¹⁴

Budgetary pressures have forced the Special Court into a more disciplined approach to conceptualizing its work. The Court laid out an extensive completion strategy and refined it comparatively early in its mandate. The completion strategy, which the Registry put forward, includes projections for the completion of the so-called "core activities," including the rendering of final judgements against all accused, and projections for a set of "residual activities," including supervision of enforcement of sentences, continued witness protection, conduct of contempt and review proceedings, and conduct of any proceedings of accused still at large by the time the Court winds down.¹¹⁵

Innovative aspects of the Court's completion strategy include personnel policies that provide incentives for internationals to stay on until the Court is finished, such as bonus payments and policies that emphasize the identification of qualified Sierra Leoneans to take over international positions or help national staff to find other positions after the Court is finished. The Special Court's experience will likely promote more detailed planning on behalf of international actors, such as the Office of Legal Affairs, in terms of the residual activities, including review proceedings, archiving, and all such other issues.

While the total costs of the Special Court are likely to remain significantly lower than those of the ad hoc tribunals, this is largely the result of its more limited mandate and more careful and rigorous planning. Whether there is a difference in efficiency is unclear and worthy of further analysis. While investigations and trials before the Special Court have certainly been cheaper, their scope has also been much narrower.

B. Voluntary Contributions

The Special Court is the first international court required to raise its own funds. Rather than funding through assessed dues, as with the ICTY or ICTR, or through the budget of an existing UN mission, as with the UN Mission in Kosovo, the Special Court has been funded primarily by direct voluntary donations from states. The goal was to establish maximum protections against runaway budgets. The Secretary-General was opposed to this approach from the outset. The need to raise funds has weakened the Special Court diplomatically, as its senior officials must travel the world with their hands out. The Registry and OTP have also required other types of support,

¹¹¹ The Registrar is always quick to observe that although there could indeed be many other uses, without the Court this money would not be in the country at all.

¹¹² Sierra Leone receives about \$250 million in foreign aid annually.

¹¹³ The UNAMSIL budget for 2002 was \$700 million.

¹¹⁴ The relationship between the Special Court and peace in Sierra Leone and Liberia is a much discussed issue and ripe for further exploration.

¹¹⁵ See Special Court Completion Strategy, May 27, 2005, para. 3.

such as witness protection, arrests, extradition, and receiving detainees. Fundraising obligations have weakened leverage over these areas.

Overall, the innovation of voluntary contributions has been a mixed success. Aside from the issues mentioned above, insecurity in funding has also made planning difficult and may have contributed to inefficiencies. Despite this, the funding mechanism has been useful in keeping the budget low and exerting pressure to work swiftly and efficiently before sources run dry.

The flexibility of being able to depart from UN staff and financial regulations has been an advantage to the Court in terms of the speed with which it was intended to start and finish. On the other hand, departure from the ordinary rules and regulations has provoked many difficulties. Disputes on these issues caused a number of months of delay in the Court's start-up phase. Finally, reliance on a small group of key donors may have reduced the Court's independence.

Main donors to the Special Court for Sierra Leone (Contributions received in US\$)¹¹⁶

	Year 1 (2002/2003)	Year 2 (2003/2004)	Year 3 (2004/2005)
Canada	654,063.95	696,880.12	766,239.62
Denmark	237,792.34	145,074.71	674,465.59
Finland	297,332.97	320,000.00	
Germany	500,000.00	584,854.00	
Ireland	112,030.00	250,951.04	604,968.97
Japan	500,000.00		
Netherlands	3,994,173.46	5,255,682.60	5,347,316.87
Norway	500,000.00	499,970.00	
Sweden	337,448.99	491,979.99	671,456.39
United Kingdom	3,609,300.00	3,556,000.00	3,556,000.00
United States	5,000,000.00	10,000,000.00	7,000,000.00

In early 2004, the situation became critical when the Court borrowed against pledges for its third year of operations in order to complete its second year of work,¹¹⁷ as voluntary contributions were insufficient and pledges did not match the budget. In late 2004, the Registrar issued a warning about the Court's grave financial situation, which resulted in an intervention and meeting between the Secretary-General and permanent representatives of the UN to secure a "subvention grant" from assessed contributions to allow the Court to finance its third year of operations. The Special Court has received only \$54.9 million of the \$104 million needed for four years of operations, with no assurances of funds for the second half 2006.¹¹⁸ A donor conference was held in New York in September 2005 that yielded \$9 million and some new donors, but there is still a considerable shortfall. The United States did not make its pledge during the time of the conference because of internal timelines of its budgetary process, and has pledged a considerable contribution (although the final amount is still in doubt). Also, the situation beyond these pledges and into 2007 is still unclear. This issue will be particularly important in relation to residual functions of the Court.

¹¹⁶ Supplied by the Special Court. Other donors to the Court, for smaller amounts, include Australia, Belgium, Chile, Cyprus, Czech Republic, Greece, Israel, Italy, Lesotho, Liechtenstein, Malaysia, Mali, Mauritius, Mexico, Nigeria, Oman, Philippines, Senegal, Singapore, South Africa, and Spain.

¹¹⁷ In-kind contributions included personnel from Canada and Switzerland and furniture from China. See Special Court for Sierra Leone, Annual Report 2002/2003.

¹¹⁸ Statement of President of Special Court for Sierra Leone to the Security Council, May 24, 2005.

C. The Management Committee

The fact that the Special Court is funded by voluntary contributions left open the question of what or who would take the place of the UN Secretariat in terms of managing the contributions. Along with the zeal to cut the budget came the realization that it would be difficult to operate the Court within the UN's financial rules and staff regulations. This led to the establishment of the Management Committee, the formation of which came out of the convening by the Legal Counsel of a "Group of Interested States," an informal gathering of states who were contributors to the Court (in funds or in kind).¹¹⁹

The following terms of reference were agreed upon for the Management Committee's functions:

1. Assist the Secretary-General in ensuring that adequate funds were made available for the functioning of the Court.
2. Assist in the establishment of the Court, including the identification of nominees for the Courts "principals" (e.g., Prosecutor, Registrar, etc.).
3. Consider reports of the Special Court and give advice and policy direction on all non-judicial aspects of the Court's operations.
4. Oversee the Court's annual budget and other financially related reports and advise the Secretary-General on these matters.
5. Encourage all states to cooperate.
6. Report to the Group of Interested States.

The Management Committee was originally meant to be composed of "important contributors," including the United States, the UK, Canada, and the Netherlands, but this was interpreted broadly to include Lesotho and Nigeria. Finally, after lobbying, the Government of Sierra Leone was allowed onto the Committee, and the UN Secretariat was also included. The new structure was lauded as an advance in the field, allowing departure from the rigidity of the structures of the UN and involving the UN, the Government of Sierra Leone, and donors.

All in all, the Management Committee has not carried its expected political weight. A number of the members attending on a regular basis are legal advisors from the Sixth Committee, with no financial or administrative training and very busy schedules. Also, many are mid-ranking, rather than senior, diplomats. As a result, the Management Committee has become a mere oversight mechanism, unable to rally the necessary financial or political support. It is clearly unrealistic to expect the Management Committee to be able to fulfill the role that the Security Council handles in the ad hoc tribunals.

Also, the political composition of the Management Committee, which is very small, has been dominated by the biggest donors—the United States, Canada, the UK, and the Dutch. The perceived U.S. and UK dominance may have contributed to diminishing enthusiasm of strong ICC supporters such as France and Germany (although the latter provides financial support to the Court). African states in particular have remained passive, both within the Group of Interested States and as donors.

¹¹⁹ See Phakiso Machochoko and Giorgia Tortora, "The Management Committee for the Special Court for Sierra Leone," *Internationalized Criminal Courts and Tribunals*, edited by Romano et al., PICT and Oxford University Press, 2005, at 141–156.

X. ISSUES OF STATE COOPERATION

A. Host Country Cooperation

Sierra Leone is often cited as an example of positive political will in terms of government support for the Court. The Sierra Leonean government compares favourably to a number of other governments that have interacted with hybrid or international tribunals. However, the government has been careful to distance itself from the Special Court's work. The government is represented on the Management Committee in the form of Ambassador Kanu, but other senior government officials often decline to comment on the Court, arguing that doing so would have implications for its independence. However, while it would be inappropriate for political leaders to comment on the particularities of cases or on ongoing trials, the government's "hands-off" attitude has contributed to the perception that the Special Court is imposed and run by internationals, which has diminished its relevance.

On the other hand, in certain crucial matters, such as executing its warrants of arrest, the Special Court has benefited greatly from close cooperation with the Sierra Leonean police, including the arrest of five suspects within a matter of hours in March 2003. This cooperation stems from the Special Court Ratification Act, which incorporates into domestic law the obligation to assist the Special Court wherever possible.¹²⁰ UNAMSIL peacekeepers have also been vital in facilitating arrests, such as those in July 2003.

B. Cooperation by Other States

One of the central issues relating to State Cooperation has been the Court's lack of Chapter VII powers. While Chapter VII powers alone do not secure state cooperation (and the early experiences of the ICTY attest to this), having such powers would allow the Court to use legal, in addition to political, grounds to rally support for enforcement of indictments.

The most dramatic lack of state cooperation with the Special Court has been the failure of Ghana, and then Nigeria, to surrender Charles Taylor. Taylor accepted asylum in Nigeria on August 11, 2003, under the condition that he was to leave Liberian politics forever. Although INTERPOL has issued a red notice, this is more a political instrument than a legal measure to force Nigeria to hand him over, as such notices do not have powers to require enforcement. Moreover, unlike the ICTY, which has a procedure that allows for evidence to be given in public in the course of review of an indictment, the Special Court's rules of procedure do not enable the Court to try him *in absentia* or to hear evidence in the absence of the accused.¹²¹ Some feel this is unfortunate: the open airing of such evidence may put political pressure on authorities to hand Taylor over to the Court.

¹²⁰ See in particular Part IV, "Mutual assistance between Sierra Leone and Special Court," which sets out the obligation of the Attorney General to assist the Court or give reasons for his inability to do so, and also establishes a reciprocal procedure whereby the Attorney General can request the assistance of the Special Court. Part V asserts that orders issued by the Special Court will have the same force as those issued by a domestic court. Part VI specifies that arrest warrants issued by the Special Court will have the same force as those by domestic courts. Section 29 specifies that any immunity attaching to the position of the person against whom an arrest warrant has been issued shall not be a bar to arrest.

¹²¹ Rule 61 of the ICTY Rules of Procedure and Evidence provides that if within a reasonable time an arrest warrant has not been executed and all reasonable steps have been taken to cause arrest, the Prosecutor can submit evidence to the Trial Chamber and examine witnesses in open court. If the Chamber is satisfied that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, "it shall so determine."

So far, the Court's main route to obtaining Taylor has been through negotiations with Washington and other governments to put pressure on Nigeria, but the U.S. State Department has shown only tepid support for Taylor's transfer and the United States has not put systematic pressure on Nigeria. A suit was brought against Taylor in Nigeria, arguing that his presence violated asylum laws due to crimes committed against Nigerian nationals. Another approach has been to argue that Taylor has violated the terms of his asylum through continued interference with Liberian politics, but Nigeria has failed to act on these allegations. Nigeria has maintained that the international community requested the nation to take Charles Taylor, and that it should not be pushed to hand him over now. When the Court failed to arrest Taylor in Ghana, the President of the Court wrote to the Secretary-General requesting Chapter VII powers, but without success. Efforts have been made to securing Resolutions from the Security Council, but the Council has declined to make any direct reference to Nigeria. A Security Council Resolution of June 30, 2005, "encourage[s] all States to cooperate fully with the Court," while "underlining the importance of ensuring that all those indicted by the Court appear before it, in order to strengthen the stability of Sierra Leone and the sub-region and to bring an end to impunity."¹²² A later Resolution pertaining to Liberia grants the UN Mission in Liberia the power to arrest Taylor if he returns.¹²³

Other avenues for securing the apprehension of Charles Taylor are being explored, and the Court has collaborated widely with international NGOs such as Human Rights Watch, Amnesty International, the Open Society Institute (OSI) Justice Initiative, and the Coalition for International Justice to keep the issue alive in the international media and diplomatic realm. Most recently, Liberia's new president, Ellen Johnson Sirleaf, has indicated that she may ask for Charles Taylor to be handed over to the Special Court in due course, pursuant to regional consultation.

Other circumstances in which the absence of Chapter VII powers was detrimental to the Court include attempts to secure medical treatment abroad for ailing rebel leader Foday Sankoh, and attempts to create an agreement with the ad hoc tribunals to temporarily house detainees.

XI. OUTREACH, PRESS, AND PERCEPTIONS OF THE COURT

The Special Court for Sierra Leone boasts the strongest outreach program of any tribunal to date. Outreach has been an enormous challenge, as Sierra Leone has a largely rural-based population with high rates of illiteracy.

A. Outreach Efforts

Outreach receives no funding from the Court's core budget, yet its efforts have achieved considerable success. The earliest outreach efforts began before the Special Court opened its doors, when national NGOs began public education efforts. Most groups in Sierra Leone shied away from outreach efforts because appearing to advocate for the Special Court brought the risk of animosity, or worse, from ex-combatants who feared it. Two groups led the charge—the core staff of the Special Court Working Group (SCWG) and the Post-conflict Reintegration Initiative for Development and Empowerment (PRIDE). SCWG launched national efforts, had a consistent presence on local radio, and began to build district coordinating teams of local leaders with basic knowledge of the Court. PRIDE launched a program to educate ex-combatants throughout the

¹²² S/RES/1610 (2005), June 30, 2005.

¹²³ S/RES/1638 (2005), Nov. 11, 2005.

country about the Special Court and the TRC.¹²⁴ Other organizations, like the Campaign for Good Governance (CGG)¹²⁵ and the National Forum for Human Rights, also contributed.

A major complaint about the Court's official outreach program is that it got off to a late start and was unable to organize a widespread program prior to the first arrests. The outreach unit within the Registry was established in March 2003, more than six months after the Court began operations and a couple of weeks after the first five arrests. Also, the outreach team was not consulted sufficiently in designing the broader public relations strategy, namely relating to the national media. The failure to resolve the question of where outreach should be located, and the consequent failure to do targeted outreach prior to the indictments was costly to the Court.

During the period before the Registry's official program, the Prosecutor made it a top priority to "meet the people" in every district to establish a connection with the process and get a feel for people's concerns and hopes. He organized "town hall meetings" in each district that were typically attended by more than 350 people. However, the Prosecutor and the Court had become conflated in the eyes of many, and the Registrar and the Principal Defender had to work to correct that perception.

The Special Court outreach office is run by Binta Mansaray, a Sierra Leonean activist with extensive experience with civil society. Several other very talented Sierra Leoneans have participated in the program, which is the only section of the court entirely composed of national staff. Prominent donors have included the EU and OSI West Africa. Almost all the staff is Sierra Leonean, which has facilitated communication with local groups and helps contribute to a sense of national ownership. The outreach unit staff speaks Krio and other local languages and are well equipped to gauge context and audiences.¹²⁶

The outreach unit travels around the country, usually holding several events per week, as well as specialized outreach efforts for high-priority groups. For example, there was some concern about unrest within the military, based on loyalty to Johnny Paul Koroma and a general fear that the prosecutions would spread down into the ranks. The outreach team put together a comprehensive strategy for speaking to every group of soldiers through extensive workshops with opportunities for participants to ask questions and air opinions. Despite these efforts, fears are not always allayed, as there are several areas of genuine conflict of opinion.¹²⁷ Other target groups have included the Sierra Leone Bar Association, women's networks, and regional NGOs.

The outreach unit has also developed a network of district coordinators and general contacts throughout the country and around Freetown. Coordinating national efforts is challenging in a country with poor roads and limited phone coverage, but the unit has managed to create a system

¹²⁴ These groups showed considerable courage discussing the Special Court at a time when many commanders told combatants that a witch hunt was under way. PRIDE's efforts were in coordination with the ICTJ. See "Ex-Combatant Views of the Truth and Reconciliation and the Special Court in Sierra Leone," Aug. 2002, available at www.ictj.org. On one of PRIDE's first trips to Kailahun, long held by rebel forces, members were threatened with beheading after giving an education session on the Special Court.

¹²⁵ CGG ran Sierra Leone's first nationwide public opinion poll, collecting data in December 2002 and releasing the findings in February 2003. See www.slugg.org/opinionpoll.pdf.

¹²⁶ Interviews with Special Court staff, May 2004.

¹²⁷ For example, when the Prosecutor spoke at an outreach event to a Norman-supporting military group in Makeni in February 2004, individuals raised important questions about the fairness of Hinga Norman's indictment, the Court's and the United States' relationship to the ICC, and the definition of "greatest responsibility."

for getting feedback from every district within 36 hours of any new arrests or other developments. In each area, the team has met with traditional chiefs and religious leaders, women's groups, youth, ex-combatants, and other major constituencies. The outreach unit has pioneered a gender outreach program and has worked closely with students.

B. Press and Public Affairs

The Special Court has also emphasized public information and media relations. The press, both local and international, gave extensive coverage to the Court in the first few months, with front-page stories in most national newspapers on a regular basis. Relationships between the press office and the local media, which were difficult at the outset, gradually improved. There is now one press officer focusing on the international press and general strategy, while another works specifically with the national press. An original program also makes available video and audio segments of the trials to the public.

Difficulties in assessing local press coverage also stem from the lack of fully independent media, lack of understanding of court processes and differences in reporting styles in the international press. For example, applications to appeal decisions have been reported as a major conflict within the Court, although these are generally seen as part of the ordinary criminal procedure.¹²⁸ The Special Court and its senior officials, have been the subject of negative local press coverage, but much of this has been of a tabloid variety. Conversely, at times other stories that warranted public debate have not been pursued with sufficient vigor or only focused on selected aspects.¹²⁹

C. Overall Perceptions of the Court

Public opinion within Sierra Leone on the Special Court has not coalesced into a "conventional wisdom." It is difficult to measure the diversity of views, given the politically motivated stance of much of the press and the fact that opinions in Freetown do not necessarily reflect those of others around the country. Even within Freetown, the views of the educated class often diverge from the rest of the population. Public understanding remains low, but a poll conducted in March 2003 by the Campaign for Good Governance found that those who had heard of the Special Court thought it was necessary (62 percent) and that it would benefit the people of Sierra Leone (61 percent). There is no recent empirical information available on perceptions of the Special Court, although the Court has received funds from the EU to conduct a further survey.

A National Victim Commemoration Conference organized by the Special Court and held in Freetown in March 2005 provided an opportunity for measuring public perception. Prior to the national conference, four regional conferences were held for two days each in Bo, Koidu, Makeni, and Freetown. Approximately 350 delegates gathered for the national conference, which a number of international experts also attended. The following impressions emerged, in addition to continued concern about the Court's limited mandate:

1. Delegates expressed a strong desire for reparations, although they generally understood that this was not within the Court's mandate.

¹²⁸ For example, the Prosecutor sought leave to appeal the Trial Chamber decision to join the trials into three groups, but this leave was denied.

¹²⁹ For example, once press releases were issued stating that the problems between the TRC and the Special Court had been resolved and were only a question of mis-communication, the press largely abandoned the story.

2. Attendees felt that more should be done on reconciliation efforts, considering the continued presence of lower-level perpetrators in the communities.
3. Delegates were less concerned about the indictments and potential convictions of some of the perpetrators than they were about the potential legacy of the Court.
4. Delegates felt that the Court had a positive impact on promoting women's issues, including rape and forced marriage; restoring dignity of children; raising awareness of international law, human rights, international humanitarian law in Sierra Leone, and awareness on witness protection; and creating job opportunities.

However, delegates thought that the outreach program should be expanded, that the visibility of the Court and accessibility should be increased, and that trials should be held in different parts of the country. The conference also aimed to draw up performance indicators to measure the Court's progress on the domestic level.

Other perceptions of the Court among particular sectors of the population include:

- *Victim groups.* Direct interaction with victims other than witnesses has remained limited. In terms of outreach events, particular victim groups have been targeted. There have been some direct contacts relating to the Amputee Association to rally its support for the Court, but that group has mainly advocated for reparations. Also, at some stage the Amputee Association threatened to boycott the Court over demands for reparations, but the boycott was averted due to an intervention by the OTP and the Amputee Association has shown general support for the Court. Child protection agencies played an important role in relation to children as potential witnesses. Less is known about role played by victims themselves, but one positive example is that local women's groups were consulted in formulating charges on forced marriage. But victims were not always treated with sensitivity in the courtroom, and their participation has been mostly limited to testifying.
- *Sierra Leone legal community.* The Sierra Leone Bar Association has given mixed reviews to the Special Court. Many in the Bar believed that half of the Court's professional posts would go to national lawyers and had an inaccurate high perception of how large the total legal staff of the Court would be. This misplaced expectation fueled early disappointment. Against the backdrop of a gravely underresourced judicial system, many also preferred to invest more resources in the domestic legal system.
- *Hinga Norman supporters.* The most aggressive criticisms of the Special Court has come from those who believe that Hinga Norman has been wrongfully indicted. The Court's decision to start with the trial of the CDF, often seen as liberators, may have exacerbated these tensions. For many, Hinga Norman is a war hero who deserves to be celebrated rather than incarcerated, and rumors about his conditions of detention have persisted.¹³⁰ Support is particularly strong in some of the Southern provinces. Some of these issues have also been seized upon by potential presidential candidates such as Charles Margai, currently a defense counsel before the Special Court.
- *Elites in Freetown.* Elites have been less supportive of the Court since its inception. Many have argued that holding people accountable is "not how we do things in West Africa" and have cited fears of disrupting the peace.
- *Military actors.* Some, particularly in the military, perceive the Special Court as an arm of U.S. foreign policy, particularly due to some of the remarks of the first Chief

¹³⁰ None of the rumors regarding Norman's mistreatment have been substantiated in any way.

Prosecutor.¹³¹ Aggravating this tension, the United States pressured the government to sign a bilateral immunity “Article 98” agreement in March 2003 specifying that Sierra Leone would not hand over U.S. nationals to the ICC. Sierra Leoneans, who had celebrated the country’s leadership on international justice, expressed deep anger at perceived U.S. coercion for this concession.

XII. LEGACY

Early on, expectations of the Court in terms of legacy, or spin-off benefits to the domestic legal system, were very high. Court representatives were enthusiastic and often referred to the concept, but there was no formal or coherent approach. The UNDP and the ICTJ wrote an early report in 2002.¹³² After some time, a legacy officer was appointed in the Registry and a white paper was produced in late 2005.

However, a variety of factors have limited progress. There has been much pressure on the Court to stick to its “primary mandate” of trials of those bearing the greatest responsibility. The Special Court remains outside the national legal system, and relations with the legal system have been somewhat complex.

The following have been some of the positive developments on legacy:

- *Infrastructure.* The Court will leave behind the building itself and the prefabricated offices from which it has been run, complete with furniture, computer equipment, and generators. The national legal system is currently suffering under severely inadequate resources, and despite training and donations of computers is still run entirely on paper. The system should benefit considerably from the legacy of additional equipment, providing there is further computer training. Although Freetown’s two existing high courtrooms are impressive, others are woefully inadequate and two new courtrooms with modern facilities will be helpful. Furthermore, the Court will leave behind a modern detention facility, which should lessen the burden on the massively overcrowded Pademba Road prison, the main national facility based in Freetown. The Court is planning to conduct a consultation exercise on how the site should be used in the future.
- *Substantive legal reform.* Legal reform is taking place, but not necessarily with the direct involvement of Special Court officials. Local legal activists are working on these issues, including with the Legal Reform Initiative (LRI). Successful LRI initiatives have included redrafting the Code of Criminal Procedure and drafting a Code of Conduct for Judges. There has also been a successful gender initiative promoted by the Human Rights Committee of Sierra Leone’s Parliament, which will result in new legislation providing protections for women. But there have been only a few connections between these initiatives and the Special Court.¹³³
- *Professional development.* The Special Court has presented professional development opportunities, but most of these have been within the Court itself. Capacity building has

¹³¹ Some in Freetown have said that the former Prosecutor, who is often the most public face of the Court, “sounds like George Bush” when he “oversimplifies the conflict,” talks about good and evil, and makes references to al Qaeda’s presence in the region. See also “Promises and Pitfalls,” supra note 86, at 14.

¹³² See ICTJ / UNP, “The Legacy of the Special Court for Sierra Leone”, Sept. 2002 at <http://www.ictj.org/downloads/LegacyReport.pdf>.

¹³³ Some of these initiatives received funding from UNDP, and some of the lawyers involved also work for the Court in various capacities. In addition, two members of the OTP were allowed to donate some of their time to developing the initiative from the outset.

not been a specific emphasis and mainly consists of “on-the-job” learning, but the opportunities afforded by the Court are significant. There have not been as many parallel programs for domestic counterparts outside the Court, but that does not discount the significant opportunities within the Court, including the training provided to criminal investigators from the Sierra Leone police. National police officers have worked side by side with international staff in a number of areas, including close protection, investigations, and trial preparation. Some work with the Court for only a few weeks on a rotational basis while others have worked since the outset of investigations. This is perhaps the most successful legacy to date, as it has already fed expertise back into the national system. The Special Court has also trained a number of Sierra Leoneans in the Court Management section. Local defense counsel will benefit from exposure to international law and practice, and learn a great deal by facing experienced international counsel.

- *Demonstration effect.* There have been significant successes in terms of “demonstration effect,” largely due to the efforts of the Court’s outreach efforts. At the same time, concerns linger about the perceived relevance of the Special Court. There is still a danger that the Court will be seen as a “spaceship phenomenon.” A significant legacy initiative is the Court’s proposals to establish, in collaboration with the BB trust, “Radio Justice,” a regional radio station that would highlight themes of justice. While it is impossible to quantify, some commentators also believe that the Court has contributed to an erosion of the concept of impunity for “big men,” even though many major architects of the violence continue to elude justice.
- *Impact on civil society.* The court has allowed civil society activists valuable opportunities to interact with senior court officials, including at the Special Court’s Interactive Forum, which is chaired by the Registrar. Other examples include the establishment of a Sierra Leone Court Monitoring Program, including the Anti-Corruption Commission, which covers the Special Court and national courts.

Less successful areas of the legacy include the Court’s relationship with the domestic legal community, which has felt removed from the workings of the Special Court and resentful of the funds donated to it. Special Court staff have given lectures at the Fourah Bay College Law School, although this has been on an ad hoc basis rather than through a formal program. Despite the willingness of many individuals within the Court to train or otherwise be involved with the domestic system, there have been few successful initiatives, partly because there is no explicit mandate for the Court to do so.

XIII. RELATIONSHIP WITH OTHER TRANSITIONAL JUSTICE MECHANISMS

The co-existence in Sierra Leone of a hybrid tribunal and a truth commission captured the imagination of policymakers around the globe, but conclusions on successes and failures tend to vary widely. In essence, it is not possible to classify this complex dynamic as a success or failure; it is more useful to analyze some of the conflicts that arose, many of which may be avoidable in the future.

Much of the debate prior to the establishment of the TRC and the Special Court focused on whether and under what circumstances the Commission should be compelled to disclose information taken in confidence to the Special Court. The TRC Act and the Special Court Agreement and Statute were silent on the issue of the relationship between the two institutions. This debate prompted several position papers by NGOs and dominated the convening of an Expert Group discussion at the UN. Several organizations called for an MOU between the two

institutions.¹³⁴ One reason this debate was so prevalent was that it had an ideological dimension, and Commission supporters feared that such a power could fatally undermine the TRC process. On the other hand, Court supporters tended to emphasize its legal status and the supremacy of international over domestic law.¹³⁵ In practice, the scope for conflict on this issue was greatly reduced by the Prosecutor's early commitment that he would not seek information from the TRC. An MOU was never concluded.

Some feel that the focus on information sharing was exaggerated.¹³⁶ However, another dimension was more difficult to manage. Despite the Prosecutor's assurances, the co-existence of the two institutions may have prevented cooperation with the TRC because of public confusion about the distinction between the two and because people may not have trusted, or chosen, to rely on such assurances. This problem of public perception was compounded by the fact that: (1) both mechanisms were staffed by internationals who were seen together in public; (2) both occupied offices on the same road in Freetown, prompting rumours of a tunnel between the two; and (3) at least one TRC statement-taker went to work for the Court. Nonetheless, the TRC was able to secure a large number of testimonies, although only a very small percentage (less than 1 percent) constituted "perpetrator testimony."¹³⁷

The ideological debate regarding the "primacy" of the Court (in a political, rather than legal, sense) also played out strongly among local NGOs, which tended to group into TRC supporters and Special Court supporters. To some extent, this rift was mirrored among international NGOs, which also tended to be labelled as Special Court or TRC supporters. Debates on the substantive issues sparked much rivalry among the two groups, as each was, in a sense, protecting its "livelihood." Many of these conflicts erupted in the context of the discussion on information sharing, but dissipated once the two institutions became operative, and this gave rise to more nuanced positions at many NGOs.

Despite these issues, each institution managed to function distinctly and separately without undermining the operations of the other. For much of the TRC's operations, the two institutions had a cordial relationship, and the leaders made several joint appearances during which they affirmed each other's mandates.

However, the situation deteriorated when the TRC requested access to persons in Court detention, particularly Chief Hinga Norman, first for the purposes of a confidential interview session, and later to hold a public hearing.¹³⁸ This gave rise to an extensive negotiating process between the two institutions, followed by litigation before Special Court judges. The TRC based much of its

¹³⁴ See ICTJ, "Exploring the Relationship Between the Special Court and the Truth and Reconciliation Commission for Sierra Leone," June 2002, available at www.ictj.org.

¹³⁵ The situation was not clear-cut in legal terms. Sierra Leone has a dual legal system and required implementing legislation in order for the obligations in the Special Court Agreement and Statute to assume force within domestic law. The implementing legislation, the Special Court Ratification Act 2002, contained a clause stating that all persons, natural or legal, were under a duty to comply with orders of the Special Court. This clause had been inserted by technical advisors to the government and had not been put to public debate. The drafters of the clause therefore tried to pre-empt the debate in favor of the Special Court, but some commissioners disputed the interpretation of the clause.

¹³⁶ See, e.g., William Schabas, "The Relationship between Truth and Reconciliation Commissions and International Courts: The Case of Sierra Leone," *Human Rights Quarterly* 25(4), 1035–1066.

¹³⁷ TRC Final Report, Appendix 1 (Statistical Report), at 3. See www.trcsierraleone.org, under "Appendices".

¹³⁸ It is presumed that Chief Hinga Norman wanted to speak to the TRC in order to rebut the testimony of President Kabbah when he denied any responsibility for the CDF's activities.

argument to acquire access on its powers under the Act and argued that its truth-seeking function would be undermined by an inability to hear some of the key participants in the conflict. It insisted on hearing the detainees under its powers of confidentiality. The Special Court, on the other hand, tried to balance the interests of the Prosecution and Defence and the integrity of the proceedings by drafting a Practice Directive that would regulate the access of the TRC and other institutions to detainees. Although the Registry Directive was inclined to grant the TRC permission to give an interview, it insisted on its own duty to monitor the interviews, which would occur within its detention facility.

The Court's internal process for finalizing the Practice Directive was complex, consuming roughly four months. The Commission applied to a judge of the Special Court for a public hearing pursuant to the Court's process. This request was denied by the Trial Chamber judge on the grounds that such a hearing might violate the presumption of innocence that the Court was bound to uphold. The TRC appealed, but the President of the Appeals Chamber also denied the request for a public hearing. The President argued that the TRC's truth-seeking function could be fulfilled through an interview or written statement rather than a public hearing, which he took to be mainly for the purpose of stimulating reconciliation. He found that in the case of Chief Hinga Norman, the integrity of the proceedings before the Special Court outweighed the TRC's interests in promoting reconciliation.¹³⁹ By the time these procedural steps had been exhausted, the TRC argued that it was out of time to pursue this option.

The TRC declined to pursue the interview and issued press statements that the Court had not acted in good faith in entertaining the Commission's request. Instead, it gave several interviews expressing its anger to the media and wrote an extensive chapter on the episode in its final report.

This process, as well as the substantive disagreement, caused much tension between the two institutions. Lessons that may be drawn from this experience are (1) an unregulated and organic relationship between two institutions of this nature can run into serious problems that should be anticipated and negotiated earlier in the process; and (2) if two transitional justice mechanisms are to co-exist, the leadership of each should have a deep and thorough understanding of the mandate and functioning of the other. International NGOs could have done more to enhance this understanding.

While the TRC was not able to capture the views of certain stakeholders for the purposes of its final report, it is unlikely that these views would have caused it to fundamentally shift its direction in terms of findings or recommendations. In that sense, the existence of the Special Court did not undermine the TRC's ability to function, and the co-existence of the institutions was not a policy failure. Likewise, although the simultaneous functioning of the TRC may have complicated certain Court tasks, in general the Court was able to conduct its core investigations and witness protection without any major issues. Indeed, some feel that issues of evidence would have been more complex if the TRC had preceded the Special Court.

¹³⁹ See *Prosecutor v. Samuel Hinga Norman*, "Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman JP Against the Decision of His Lordship, Mr. Justice Bankole Thompson Delivered on 30 Oct. 2003 to Deny the TRC's Request to Hold a Public Hearing with Chief Samuel Hinga Norman JP," Nov. 28, 2003. Judge Robinson's decision is extensive and interesting. However, the notion that TRC used public hearings mainly for reconciliation purposes portrayed a certain lack of understanding of the TRC process. Some also argued that the Special Court, and not just the TRC, could have benefited from allowing Hinga Norman to appear in public, and that his rights and the integrity of the Special Court's process would be adequately protected by warnings against self-incrimination and the presence of counsel.

All in all, the simultaneous operation of two transitional justice mechanisms in Sierra Leone reflects the fact that such options are often pursued as part of an integrated approach to justice, rather than as mutually exclusive alternatives. This is a welcome development in the field of transitional justice and has been affirmed by the UN Secretary-General in a report on transitional justice and the rule of law in August 2004.¹⁴⁰ Some have argued that the combination of a TRC and a Special Court is “ideal,” because the Court can try the architects of the conflict, whereas the TRC provides a forum for the remainder of perpetrators and for victims. However, this is also an oversimplification and does not accurately reflect the experience in Sierra Leone. The main virtue of the TRC process has been its strong diagnostic final report, in which it made firm recommendations on steps the government should take to remedy fissures in Sierra Leonean society and avoid future conflicts. The main virtue of the Special Court is its ability to deliver justice in the cases of some of the architects of the violence. But the reality is that the vast amount of perpetrators will not appear before either institution or any other court. Also, there are areas in which neither mechanism has had measurable impact to date, such as providing concrete assistance for victims or stimulating institutional reforms.¹⁴¹ But the Sierra Leonean experience can be used to inform future efforts.

XIV. CONCLUSIONS

Questions will linger about whether limiting the number of accused renders justice that is pragmatic and satisfactory, or whether it is ultimately incomplete. The Special Court’s narrow mandate is widely hailed as a new model for international justice and has been followed by the ICC. Within Sierra Leone however, many feel that the Court’s mandate is too narrow and that many lower-level perpetrators remain free in the communities. The fact that many argue that the Court should have prosecuted more people may in a sense be seen as an endorsement of its work. However, others argue that the low number of accused does not justify the cost and that funds should have been allocated elsewhere.

In terms of legitimacy, a reduced Sierra Leonean role has meant that the Court is perceived predominantly as international. This has posed questions regarding its local relevance and leaves the Court in danger of being perceived as a “spaceship phenomenon”; i.e., a Court that is perceived as an anomaly but not as a feature of permanent change on the domestic level. All these factors have implications for longer-term restoration of the rule of law, and establishment of trust in judicial mechanisms in Sierra Leone. On the other hand, a proactive approach to outreach and civil society interaction have ensured visibility for the Court, and civil society has generally interacted more with the Special Court than with domestic courts. This may lead to indirect benefits in terms of a “demonstration effect”, which may still positively impact on the long-term legacy of the Special Court.

Internationally the Court’s credibility hinges on its ability to complete its core mission in a focused and efficient manner. So far it has succeeded in keeping down the costs through a more focussed approach in the numbers and scope of indictments, although trials have not moved significantly faster than elsewhere. Some may argue too much deference has been given to the international policymakers who wanted to avoid high costs, and that there has to be an acceptance of what is realistically involved in conducting trials of mass crimes up to international standards.

¹⁴⁰ See the Secretary-General’s Report on “The rule of law and transitional justice in conflict and post-conflict societies,” Aug. 2, 2004, UN Doc. S/2004/616.

¹⁴¹ The TRC recommended both, but so far the government has not committed to implementing the recommendations.

The question of cost and efficiency seems to predominate at the UN, and the Special Court has been called a “victim of the experience” of ad hoc tribunals.¹⁴² But the Special Court should not be included in that category, as its overall annual costs remain at a fraction of those of the ICTY and ICTR.

The Special Court has enjoyed certain advantages by being outside of the UN system, but there have also been disadvantages to that arrangement. The absence of sufficient political backing for the Court in terms of achieving the handover of Taylor and other forms of third-country cooperation continues to affect its credibility. The disadvantages of the absence of Chapter VII powers or a link to the Security Council has on occasion been acutely felt by the Special Court, which continues to receive its main financial and political support from a few select member States.

The system of voluntary contributions for funding has placed the Special Court in a difficult position for most of its life. Although voluntary contributions were sufficient in the first two years, pledges were not redeemed, and in the second year the Court had to borrow against third-year pledges and approach the UN for a subvention grant. All of these issues have complicated planning and tied up senior officials in fundraising. On the other hand, freedom from UN rules has given the Court flexibility, particularly in recruitment. The Court is able to offer competitive salaries that attract high-quality staff and is able to recruit quickly, but Special Court staff members are not UN employees and forgo pensions and other benefits.

The Special Court has had the advantage of largely existing as a microcosm that is insulated from problems affecting Sierra Leone’s legal system. As a result, it has been able to enforce its own standards and is generally considered to have conducted proceedings that comply with international standards of fairness. Defense counsel have generally enjoyed a higher level of institutional support than at any of the other tribunals, although they still point to certain shortfalls.

While the Special Court is still underway, the question of creating similar stand-alone tribunals has been held in abeyance. The current tendency is to encompass rule of law issues within the peacekeeping mandate, which has been the approach taken in places such as Liberia and DRC, and not to create further tribunals. However, this has to date not resulted in an alternative approach to prosecuting mass crime in countries that are not otherwise under UN administration. While it is probably too early to be able to determine the impact of the Sierra Leone model, this paper suggests that overall the model should not be dismissed prematurely, and still has much promise for the future. While there certainly are areas that could be improved in implementation, particularly in terms of ownership and legacy, ultimately the Special Court has proved able to fulfill many of its objectives. It is hoped that the lessons detailed in this paper will help to inspire policymakers to replicate its successes elsewhere, while avoiding its pitfalls.

¹⁴² See Ralph Zacklin, “The Failings of Ad Hoc Tribunals,” *Journal of International Criminal Justice* 2, 2004, 541–545.

-EPILOGUE-

The Arrest and Transfer of Charles Taylor to the Special Court

On 5 March 2006, a formal request was sent on behalf of President Ellen Johnson-Sirleaf to President Olusegun Obasanjo for Charles Taylor to be transferred to Liberia. President Obasanjo had previously indicated that he would respond to such a request from a democratically elected government in Liberia, and on 25 March 2006 he officially indicated that Liberia would be free to take Charles Taylor into custody, but without specifying a modality. Confusion then prevailed as on the evening of 27 March 2006 it became clear that Charles Taylor had fled his guarded residence in the South of Nigeria. An announcement of this fact was followed by strong international public condemnation, including the possibility that President Bush would refuse to meet with President Obasanjo on a scheduled state visit of the latter to the US on 29 March 2006. Early that morning and hours before the proposed meeting, Nigerian authorities announced that Charles Taylor had been apprehended on the border with Cameroon, some 600 miles from his residence. He was transferred to Abuja and then flown to Monrovia, where he was transferred into the custody of the UN Mission in Liberia (UNMIL) and flown by helicopter to the Special Court in Freetown.

Needless to say, the arrest and transfer of Charles Taylor on 29 March 2006 to the Special Court for Sierra Leone will have a radical impact on how the Court is perceived.

Some of the key issues are as follows:

- (1) The events leading up to his successful transfer will be analyzed for some time to come, but are in large part due to a courageous decision on behalf of the new Liberian leadership and also due to sustained political pressure on Nigeria, mainly from the United States. Advocacy strategies employed by civil society organizations and the Court itself ultimately proved successful in this regard.
- (2) The transfer of Charles Taylor to the Special Court is likely to have a significant impact on the perceptions of Sierra Leoneans towards the Court. The reaction in-country was jubilant. His initial appearance is of enormous symbolic significance in the country that he once promised “would taste the bitterness of war.” He also becomes the first African head of state to be tried for such crimes.
- (3) The indictment against Charles Taylor was reduced from 17 counts to 11 counts in the weeks leading up to the transfer, indicating that the Prosecutor will feel pressure to try him as expeditiously as possible, particularly in the aftermath of the death of Milosevic in the detention facility of the ICTY before the conclusion of his trial.
- (4) Immediately after the transfer, discussions turned to the question of where he may be tried. The same day as Taylor’s transfer to the Court, the President of the Special Court, Justice Raja Fernando, wrote to the President of the ICC and the government of the Netherlands requesting that the Court conduct the trial in The Hague. There are indications that this request was a result of detailed discussions initiated by the US and UK. While the main reason given to date is a fear of causing instability in the region, there are also suggestions that the Netherlands is

better able to handle such a “substantial trial”. However, moving the trial abroad may have implications for how the trial and the Court as a whole are perceived in the region. The suggestion to move the trial to a Western country may send an unwarranted signal about lack of confidence in the original structures of the Special Court. It may also allow African leaders to distance themselves from what will be perceived as a Western-run proceeding, and may allow the Government of Sierra Leone to elude some of its responsibilities under its Agreement with the United Nations. Conversely, trying him in Sierra Leone in the full view of Sierra Leoneans and Liberians will presumably have a larger and more lasting impact on the region. Interesting questions may also arise out of the relationship with the Truth and Reconciliation Commission in Liberia.



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