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Sierra Leone Court
Monitoring Programme

**FROM THE TAYLOR TRIAL
TO A LASTING LEGACY:
PUTTING THE SPECIAL COURT
MODEL TO THE TEST**

FROM THE TAYLOR TRIAL TO A LASTING LEGACY: PUTTING THE SPECIAL COURT MODEL TO THE TEST

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Sierra Leone Court Monitoring Programme

ABOUT THE ICTJ

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. It 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. 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 nonjudicial 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 it works closely with organizations and experts around the world to do so. By working in the field through local languages, ICTJ provides comparative information, legal and policy analysis, documentation, and strategic research to justice and truth-seeking institutions, nongovernmental organizations, governments, and others.

ICTJ has worked in Sierra Leone since 2002, providing technical assistance to the Truth and Reconciliation Commission (TRC) and the Special Court for Sierra Leone (SCSL), as well as engaging in building capacity with civil society groups. ICTJ has provided technical assistance and expert advice on issues such as the legacy of the SCSL and coordination with the TRC. ICTJ has also worked with government and nongovernmental actors on issues such as reparations, the United Nations Peacebuilding Commission, training journalists, advising civil society partners, and the innovative National Vision for Sierra Leone project.

THE SIERRA LEONE COURT MONITORING PROGRAMME

The Sierra Leone Court Monitoring Programme is an independent monitoring program composed of human rights and civil society activists committed to promoting accountability and the rule of law in post-conflict Sierra Leone. It is headed by Mohamed Suma, a previous Open Society Institute fellow and SCSL outreach coordinator. The program monitors the Special Court for Sierra Leone as well as national institutions, including the national courts and the Anti Corruption Commission; it also monitors the implementation of the TRC's recommendations. The program is dedicated to building the capacity of civil society activists, as it believes that civil society's role is vital to the long-term development and consolidation of peace in Sierra Leone (www.slcmp.org).

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The Prosecutions Program has worked for several years with domestic and international justice initiatives, drawing on a range of experienced practitioners. Its work and analysis has included countries such as Argentina, Colombia, Serbia, Democratic Republic of Congo, Peru, Sierra Leone, Uganda, Cambodia, Lebanon, Iraq, Timor-Leste, and Indonesia. The program's goals

are to promote and support domestic, hybrid, and international criminal prosecutions for systemic crimes. Activities include strengthening the capacity of international and local actors to make informed decisions on prosecution options and strategies and to influence policy makers through detailed technical quality analyses of developments in the field. The program monitors significant trials, such as those of Saddam Hussein, Alberto Fujimori, and Charles Taylor. Related publications include:

Ellen Lutz and Caitlin Reiger (eds.) *Prosecuting Heads of State* (Cambridge University Press, 2009)

The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court (ICTJ, October 2008)

An Administrative Practices Manual for Internationally Assisted Criminal Justice Institutions (ICTJ, June 2008)

A Handbook on the Special Tribunal for Lebanon (ICTJ, April 2008)

Against the Current: War Crimes Prosecutions in Serbia (ICTJ, February 2008)

Dujail: Trial and Error? (ICTJ, November 2006)

Lessons from the Deployment of International Judges and Prosecutors in Kosovo (ICTJ, April 2006)

The Special Court for Sierra Leone under Scrutiny (ICTJ, April 2006)

The Serious Crimes Process in Timor-Leste: in Retrospect (ICTJ, April 2006)

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Table of Contents

- Executive Summary 1
- I. Introduction: The Establishment of a New Model 4
- II. The Jewel in the Crown: The Charles Taylor Trial 5
 - A. Overall Conduct of the Trial 5
 - B. The Substantive Case Against Taylor 8
 - C. The Taylor Trial and the Liberian TRC 10
 - D. Impact of Moving Taylor's Trial to The Hague 12
- III. Putting the Special Court Model to the Test 19
 - A. A Court with a Narrow Mandate 19
 - B. An Expeditious Court 20
 - C. A Cheaper Court? 22
 - D. Controversy around the CDF Trial and Its Impact on the Hybrid Model 22
- IV. Legacy of the Special Court for Sierra Leone 28
 - A. “Demonstration Effect”: How to Evaluate Outreach Efforts? 28
 - B. The Special Court: A Shared Responsibility? 30
 - C. A Case Study of Sierra Leone Police Officers at the SCSL 33
 - D. Impact on Domestic Legal Capacity 35
- VI. Completing the Court’s Work 38
 - A. What to Do with the Site? 40
 - B. What to Do with the Archives? 41
 - C. What to Do with Convicted People? 41
 - D. What about Johnny-Paul Koroma? 43
- VI. Conclusion 44
- Annex I: The AFRC Trial 46
- Annex II: The CDF Trial 51
- Annex III: The RUF Trial 54

Executive Summary

The Special Court for Sierra Leone (SCSL or Special Court) was established in 2002 when the two United Nations (UN) ad hoc international tribunals for the former Yugoslavia and for Rwanda had already existed for several years and when the first lessons could be drawn from their experiences. Many observers praised the Special Court model as an innovation because it contained several important features that distinguish it from the purely international tribunals:

- Its location in the country where the crimes occurred, a fundamental quality that was to affect its work more broadly.
- Its “mixed” or hybrid composition, including a minority of judges appointed by the government of Sierra Leone, which essentially meant that both nationals and internationals would be responsible for implementing the court’s mandate.
- Its potential, based on its hybrid nature, to reflect knowledge of the events, reach informed judgments, and build a full judicial record of the events in Sierra Leone through fair trials.
- Its more strictly defined mandate to focus only on “those who bear the greatest responsibility,” with the expectation that this would lead to judicial efficiency and a short timeframe for the court’s work.
- Its anticipated cost-effectiveness, based on a more flexible oversight mechanism through a management committee composed of the main donors and interested countries, and the expectation of reducing the running costs and avoiding UN bureaucracy.
- Its independence from the national judiciary, while retaining the potential to have a positive impact on national institutions and legal reform, and to be closer and more relevant to the population.
- Its ad hoc nature, meaning that it would only exist for a certain time before winding down.

In March 2006, the International Center for Transitional Justice (ICTJ) published a detailed report on the Special Court, providing a thorough analysis of the institution, its creation, its structure, its legal framework, as well as a preliminary assessment of its work in the first four years.¹ ICTJ publishes the present report as the court is nearing the end of its lifespan. It has completed three trials and two final appeals in Freetown. The court is expecting to complete the trial of former Liberian president Charles Taylor in The Hague by the second half of 2009.

¹ Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone under Scrutiny*, ICTJ, 2006.

These are some of our conclusions:

- *Charles Taylor: a well-run trial but insufficiently publicized in the region.* The trial of Charles Taylor is of enormous significance to the Special Court and is in many ways the jewel in its crown. The trial is advancing well and is bringing to light many important facts about the origins of the conflict in Sierra Leone. The simultaneous conduct of the trial with a Truth and Reconciliation Commission in Liberia has not given rise to serious problems. Instead, the two can be seen as constructing separate but mutually enforcing narratives. Nonetheless, moving the trial to The Hague has had a detrimental impact on the ability of people in Sierra Leone and Liberia to follow the case closely, a fact that the court did not sufficiently address from the outset. It is likely that this will lessen the impact and precedential value of the trial in the region.
- *Achievements in consolidating the judicial record.* The Special Court has now rendered decisions in three of its trials. These decisions have contributed both to a historical record of the conflict in Sierra Leone, and to the jurisprudence on important legal issues such as the recruitment of child soldiers and forced marriage. On the other hand, some aspects of the judgments and particularly the court's treatment of the concept of joint criminal enterprise are likely to be the subjects of discussion for some time to come. While the judgments are not discussed in detail as part of the report, they are considered separately in an annex.
- *Improvements still needed in efficiency.* Several of the court's features were meant to enhance its overall efficiency. The court's limited mandate has indeed contributed to making it more efficient than other international tribunals. Yet while the concept of trying "those who bear the greatest responsibility" remains popular with international policy makers, there are diverging interpretations of who should be covered by the concept. The prosecutor's focus on senior leaders of all factions from the conflict may not always have met local demands for pursuit of certain other categories of potential defendants, and the prosecutorial focus remains controversial in Sierra Leone. On a cost per case basis, the Special Court has not performed better than the ad hoc tribunals, nor has it completed its cases in less time. It is important to re-examine these aspects of the court's functioning for future models of tribunal design, particularly the time consumed by cases at trial.
- *Controversies around the CDF trial raise questions regarding the hybrid model.* The government of Sierra Leone originally requested the United Nations' assistance to establish a court to try the Revolutionary United Front (RUF), and for many the case against the RUF was the centerpiece of the Special Court's work. Yet it was neither the first trial to start, nor the first judgment to be issued. Much of the public debate centered on the Civil Defence Forces (CDF) case, which remains steeped in controversy, both in terms of splits in public opinion over whether to try people perceived to be the nation's heroes and later over the dissenting opinions of the Sierra Leonean judges in the final judgments and sentences in this case. Some commentators have argued that the national judges' lenience towards the CDF defendants calls into question the value of a hybrid composition. Others consider that these opinions reflect

the fact that national judges are more likely to have in-depth knowledge of the socio-political background to the crimes. These issues will continue to be debated.

- *Shortcomings in terms of legacy for the domestic justice sector.* While attention to its long-term legacy was not an explicit part of the Special Court's mandate, its in-country presence and commitments reiterated by senior court officials led international policy makers and Sierra Leoneans to expect that it would have a significant impact on rule of law at the domestic level. Sierra Leoneans in particular had frequently expressed hopes that the court would go beyond issuing convictions and contribute to a broader legacy. While the court has made some important achievements in this regard - specifically its outreach efforts and various training programs in general the impact on Sierra Leone's national legal system remains minimal. The high expectations in this regard therefore remain partly unfulfilled. While court officials laid out a vision on legacy early in the process, much of this vision has not been carried out. This may be a result of both external and internal factors: lack of clear political support to prioritize legacy; pressure to fulfill the court's primary mandate expeditiously; inadequate planning; the failure of the court and the national legal system to bridge the gaps between them; and the continued reliance on international staff in key posts. Responsibility goes beyond the specifics of the Special Court to the assumptions and structures of this hybrid model. The experiences of the Special Court call into question what elements are necessary for an in-country tribunal to carry out an effective legacy strategy. It also calls into question what expectations of legacy are realistic, at least in the short term.
- *More attention needed to residual issues.* The Special Court's completion strategy is raising some complex questions in terms of how to deal with residual functions that will continue beyond the completion of the cases, such as where to house the archives, who should supervise enforcement of sentences or continued witness protection, who should conduct any eventual trial of the only fugitive, Johnny-Paul Koroma, and what should happen to the Special Court's site. Unfortunately these issues are not receiving the attention they deserve from the court's political backers, which are largely leaving the Special Court to devise solutions on its own.

The Special Court's achievements remain significant, however. Many people in Sierra Leone seem to be familiar with its work at least in broad terms, and the court has by now rendered extensive, fair decisions in three of its four cases. Similarly, the Special Court model continues to have many commendable facets that may be worth replicating in future tribunals. But it is also important that policy makers and other stakeholders seriously reflect on certain flaws in implementing the model, both for the Special Court's remaining lifespan and for similar models in the future.

I. Introduction: The Establishment of a New Model

Sierra Leone experienced a particularly violent civil war between 1991 and 2002, during which much of the country was destroyed by a rebel group known as the Revolutionary United Front (RUF) as they fought government forces. A breakaway military group, the Armed Forces Revolutionary Council (AFRC) launched a coup in 1997 and later joined forces with the RUF. The atrocities mainly targeted civilians, including during the notorious invasion of Freetown in January 1999. Killings, amputations, forced recruitment of children, rape, sexual slavery, mutilation, and other such acts were widespread. While reports documented atrocities committed by all combatant groups, rebel forces were responsible for most. A combination of efforts by the pro-government Civil Defence Forces (CDF) and the Economic Community of West Africa Monitoring Group (ECOMOG), a regional peace-enforcement force, prevented the rebels from taking the whole country. In desperation, the government signed a peace agreement with the RUF at Lomé, Togo, in July 1999, but this did not end the conflict. In May 2000, the rebels took 500 UN peacekeepers hostage. International pressure to free the hostages, intervention by the British, and significant RUF losses in fighting in Guinea and in Liberia helped consolidate the Sierra Leone government's control of the country. By the first half of 2000, the UN established the UN Assistance Mission in Sierra Leone (UNAMSIL) that eventually numbered 17,500 troops. With time, relative stability returned to Sierra Leone.

The Lomé Peace Agreement granted a blanket amnesty to all combatants involved in the conflict; however, after it collapsed on June 12, 2000, President Ahmed Tejan Kabbah asked the United Nations Secretary-General Kofi Annan for assistance in creating a “strong and credible” court to try the RUF. The UN Security Council authorized the Secretary-General to negotiate an agreement with Sierra Leone to establish the Special Court.²

After 17 months of negotiations, in January 2002 the Special Court for Sierra Leone was established.³ As ICTJ described it in mid-2006, in many ways this court represented a new model of international justice and a conscious attempt to improve on the previously established tribunals. The Special Court was to be the first ad hoc tribunal based in the country where the crimes occurred. The court's jurisdiction is limited to “those persons who bear the greatest responsibility” for crimes against humanity, war crimes, and certain domestic crimes that took place in Sierra Leone since November 1996.⁴ Its hybrid composition brought together national and international staff, and the model seemed as though it would leave a positive legacy on the national justice sector, the people of Sierra Leone, and represent the efficient use of international justice in a manner that was relevant and accessible to those in whose name it was established.

The country's political environment has changed since then. Presidential elections took place in August and September 2007 without serious violence. Vice President Solomon Berewa of

² Security Council Resolution 1315, Aug. 14, 2000, UN Doc S/RES/1315 (2000).

³ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002 (hereinafter Special Court Agreement).

⁴ Statute of the Special Court for Sierra Leone, Art. 15(1).

the Sierra Leone People's Party (SLPP) lost to the party's historic opponent, the All People's Congress (APC), headed by Ernest Bai Koroma. In February 2008, President Koroma confirmed that his government would support the Special Court.

But Sierra Leone remains plagued by extreme poverty and corruption. Even though the country has experienced some modest economic growth, health and education systems have not significantly improved since the end of the war. Basic commodities such as electricity remain scarce, even in Freetown. Competing priorities like these present a challenging context for the court. Political tensions continue to erupt, such as the violent clashes in March 2009 between APC and SLPP supporters in Freetown.

As the court moves into its final phases of operation, this report seeks to revisit these expectations and assess the extent to which the model has succeeded. The report considers the progress to date in the trial of the most high-profile defendant, Charles Taylor, and its likely impact. The report then analyzes key aspects of the Special Court as a model; this is intended to contribute to policy discussions relating to the future establishment of similar tribunals.

II. The Jewel in the Crown: The Charles Taylor Trial

The transfer of Charles Taylor to the Special Court for Sierra Leone on March 29, 2006, was a remarkable achievement for the Special Court itself and for international justice generally. Nearly three years had elapsed since the controversial timing of unveiling the court's indictment against Taylor while he was attending Liberian peace talks in Ghana. This was particularly significant considering the fact that the court did not have any enforcement powers in relation to Nigeria, neither under the Statute of the Special Court nor pursuant to external legal sources such as through the Security Council acting under Chapter VII of the UN Charter. The court, civil society, and several governments laid much of the groundwork beforehand.⁵

Because the trial is under way, it is too early to fully assess its effectiveness and impact. Nonetheless, it is possible to make some observations. This section examines the trial's progress, the facts that have already come to light, the trial's relationship with the concurrent Liberian TRC, and the impact of moving the trial to The Hague.

A. Overall Conduct of the Trial

The indictment against Charles Taylor was unsealed in June 2003 while he was still president of Liberia.⁶ Shortly thereafter - in August 2003 - he was offered asylum in Nigeria. It took two and a half years before Nigeria agreed to hand over Taylor to the new democratically elected

⁵ For a further discussion of these issues, see the epilogue in Perriello and Wierda.

⁶ Charles Taylor was attending peace talks in Ghana when the indictment against him was unsealed; authorities there did not arrest him and allowed him to return to Liberia. In August 2003, a peace agreement was brokered among warring parties in Liberia, and Taylor was given asylum in Nigeria as part of the agreement. Regarding the controversial public release of Taylor's indictment in June 2003 during peace talks in Ghana, see Perriello and Wierda, 22.

government in Liberia, which in turn arranged his surrender to the Special Court. On March 29, 2006, Taylor was flown from the Nigerian capital of Abuja to Monrovia, Liberia, and he was immediately transferred to the SCSL in Freetown. Internationally, Nigeria's retraction of asylum continues to be seen as a highly controversial event, but one that constitutes a definitive victory for international justice.⁷ The substantive part of Taylor's trial started on Jan. 7, 2008, in The Hague, less than two years after he was arrested and nearly five years after the court had indicted him.⁸

Taylor is charged with 11 counts of crimes against humanity (including murder, rape, sexual slavery, and enslavement), war crimes (including acts of terrorism, murder, and pillage) and other serious violations of international humanitarian law (conscription of children younger than 15 years old).⁹

His trial is taking place on the premises of the International Criminal Court (ICC) through a bilateral agreement whereby the SCSL uses the ICC's courtroom and pays for services that the ICC provides, including security services and video technical support. This may set an important precedent for the ICC to lend its premises to an ad hoc tribunal. At the beginning of the trial, the relationship between the SCSL and the ICC appeared strained. The ICC's security section has been criticized for making access difficult for court staff, including judges, as well as for the public and the media.¹⁰ Lack of ICC support delayed the proceedings on several occasions, but these were early problems that were corrected with time.¹¹ The use of the court's premises and popular misperceptions that the ICC is trying Taylor may prove to be advantageous for the ICC. At a minimum, it has given that court a chance to test the operating systems before starting its own trials.

In terms of efficiency, the trial has progressed well. The immediate pre-trial phase was relatively straightforward, in part because major jurisdictional challenges, such as whether Taylor was protected by the doctrine of head of state immunity, had been ruled on prior to his

⁷ See Priscilla Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice*, ICTJ & Centre for Humanitarian Dialogue, November 2007.

⁸ The prosecutor made an opening statement on June 4, 2007, but began presenting evidence in January 2008.

⁹ Prosecutor v. Charles Taylor, Case No. SCSL-03-01-PT, "Prosecution's Second Amended Indictment," May 29, 2007.

¹⁰ Members of the ICC's security staff in the public gallery have sometimes conveyed an inappropriate sense of hostility toward outsiders, and at times, they have been particularly insensitive to the few Sierra Leoneans present. Although the ICC has a spacious pressroom, it is much less media-friendly than the pressrooms in its sister courts. In fact, several reporters who have covered the ICTY for a decade have privately expressed their reluctance to cover hearings at the ICC due to the behavior of security personnel and the difficulty of obtaining access to court staff.

¹¹ Technical matters have sometimes dictated how long the trial chamber has been able to sit. The ICC video unit asked the SCSL Trial Chamber not to sit for more than two hours, because this was the maximum length of videotapes used. In an unrelated yet significant, incident on Jan. 18, 2008, the courtroom video camera remained static for two hours without explanation during the testimony of a particularly important expert witness, Stephen Ellis. The ICC later admitted that no staff member was available that day, suggesting the ICC's inability to provide the technical support needed for the trial. While ICC staff seemed disgruntled with the SCSL, their complaints were more difficult to discern.

surrender.¹² Before the trial started, court officials indicated that they hoped the prosecution phase would only last eight months. The defense lawyers also indicated that they might need only three to four months to present their case. When compared with similarly high-level cases before other international criminal tribunals, such deadlines looked particularly ambitious, if unlikely. The prosecutor initially presented a list of 144 witnesses, including 59 “insiders,” but expected to call only a few of them. However, after reviewing the witness list further, the prosecution decided to call 72 witnesses while seeking to submit written evidence from a similar number of purely “crime base” witnesses who would testify to the crimes committed but not necessarily to Taylor’s role.¹³ Because the trial chamber did not permit the submission of so much written testimony, the prosecutor chose to call 91 witnesses, while submitting six witness testimonies in writing. On Feb. 2, 2009, the prosecutor announced that he had called his last witness.¹⁴ Court officials now hope that the trial may be completed by the second half of 2009, with a judgment likely in 2010.

Outside commentators have remarked on the professional conduct of the bench and the parties. The judges are two women and one man, hailing from Uganda, Ireland, and Samoa respectively.¹⁵ Proceedings generally have been smooth, and prosecutors and defense lawyers are generally well prepared, serious, and competent. Both sides have focused on the merits of the case, with little argument in court on technicalities and no delaying tactics. Taylor has been cooperative after the court provided him with a strong defense team that he seemed to trust and that had reasonable means to prepare his case. In the initial stages, he appeared to be pursuing an obstructionist strategy similar to the one used by Slobodan Milosevic or Vojislav Seselj before the ICTY, challenging the legitimacy of the process.¹⁶ But since his initial failure to appear at the first trial hearing during which the prosecutor made his opening statement on June 4, 2007, Taylor has attended and has not disrupted the trial hearings nor addressed the court directly. Instead he has listened carefully to the evidence presented, taking notes, and passing on information or instructions to his lawyers.

The Trial Chamber has shown a clear commitment to move the trial along smoothly and rather efficiently, although it has on occasion been slow to rule on motions.¹⁷ In terms of efficiency, even from the start of the case completing one witness’s testimony would take a day and a half, a good pace when compared with similar trials. This included extensive expert testimony such

¹² For a detailed discussion of the pre-trial proceedings against Taylor, see Abdul Tejan-Cole, “A Big Man in a Small Cell: Charles Taylor and the Special Court for Sierra Leone” in Ellen Lutz and Caitlin Reiger, *Prosecuting Heads of State* (Cambridge University Press, 2009).

¹³ The prosecutor sought to submit the written testimony under Rule 91*bis* of the Court’s Rules of Procedure and Evidence.

¹⁴ In his press release, the prosecutor stated that out of the 91 prosecution witnesses who appeared before the Court, 31 were “insiders.”

¹⁵ During the first two weeks, the trial was presided over by Justice Julia Sebutinde of Uganda. She was then replaced for one year by Justice Teresa Doherty (Ireland) in accordance with an internal rule that the presidency should rotate every year. Justice Richard Lussick (Samoa) is the third member of the bench.

¹⁶ Charles Taylor refused to attend the first attempt to begin the trial in June 2007, citing complaints about insufficient time and resources to prepare his defense. Many thought that he would therefore choose a confrontational strategy.

¹⁷ As an illustration of its overall commitment to efficiency, when the ICC courtroom was unavailable one morning in January, the Trial Chamber made up the lost hours by sitting on the two following Fridays when it had not otherwise scheduled hearings.

as that given by historian and political scientist Stephen Ellis, or by human rights activist and former prosecution investigator Corinne Dufka. While the chamber has not always been able to maintain this pace, it still compares favorably to other tribunals. However, the chamber's overall efficiency cannot be fully evaluated until the trial is completed.

The Trial Chamber has also made efforts to make the trial as public as possible. As has been the case in most trials before the Special Court, the chamber sometimes decided to withhold identities of some witnesses until they appeared in court to reduce pressure on them. While many of the sessions have been public rather than closed, the manner in which the chamber applied protective measures occasionally confused some trial observers.¹⁸

In sum, the Taylor trial is highly complex, and, at a procedural level, it seems to be progressing very well. The logistical complexities of holding the trial in The Hague instead of Freetown have been handled well. Taylor's cooperation, despite his initial displays of opposition, has contributed to this, but it is also due to the coordinated efforts of all parties to the proceedings. In this respect, it may serve as an example to similar trials in the future.

B. The Substantive Case Against Taylor

The prosecution's evidence to date has been largely testimonial, consisting of expert evidence, "crime base" witnesses, such as Sierra Leonean victims of torture or abduction by the RUF, and an unusually large number of former aides of the accused and/or senior figures of the Sierra Leone rebel movement of the RUF, who are known as "insider witnesses."

However, the nature of the support Taylor is charged with giving the RUF means there is no smoking gun in his case. The prosecution's main challenge is to establish that Taylor was behind a network through which material and financial backing sustained the RUF/AFRC campaign. In the words of prosecutor Stephen Rapp, "We have to show the connection to Taylor, that he knew the RUF was targeting civilians for murder, for mutilations, for rape and sexual slavery, that they were recruiting children under 15 to commit horrible acts. If he knew that, and he nonetheless aided them, then he is guilty of the crime."¹⁹

However, the credibility of insider witnesses may often be questioned on grounds of their ethnic/regional/national loyalties, or because of their own implication in crimes. For instance, the first two "insiders" who testified publicly were senior members of the Liberian armed group ULIMO, which fought against Taylor for four years before sharing power with him. In March 2008 the infamous "Zigzag," a former member of Taylor's security services, gave

¹⁸ The prosecutor asked that the testimony of witness TF1-371 on Jan. 24, 2008, be held in camera. After discussing the possibility of using less restrictive measures such as a curtain and voice scrambling, the Trial Chamber ruled against the closed session and ordered a short adjournment to inform the witness. When the session resumed much later, the court changed its decision and ordered the testimony to be held in camera, without further public explanation.

¹⁹ Elenka Frenkiel, "Africa's Test for International Justice," *BBC News*, Feb. 26, 2008, http://news.bbc.co.uk/2/hi/programmes/this_world/7259238.stm.

shocking evidence in which he said he was personally involved in crimes including cannibalism.²⁰

The outset of the trial highlighted a controversy over Sierra Leone's diamonds and whether these were real cause of the conflict. "All of these are about diamonds. This is what our case is about," the prosecutor said when introducing video clips in relation to the testimony of Ian Smilie, his first witness, an expert on illegal diamond trade.²¹ At trial, however, numerous key witnesses for the prosecution gave more nuanced accounts and portrayed a more extensive, sophisticated analysis of the conflict's causes.²²

Four lawyers represent Taylor; in other tribunals, usually only two defense lawyers are present in court. Two members of his team are Courtney Griffiths, QC, and Terry Munyard, both of whom are highly experienced and impressive British barristers. Almost no time has been spent on unnecessary legal technicalities. The defense has focused on discrediting the insiders as people who did not have privileged access to Taylor (and therefore no direct knowledge of what they were alleging) or as his enemies now trying to settle scores or to opportunistically show renewed loyalty to their own communities or constituencies.

Taylor's lawyers have also made a point of stressing that all armed groups involved in the wars of Liberia and Sierra Leone committed atrocities. They have highlighted the involvement of many other countries behind armed factions opposed to Taylor, describing the conflict and explaining strategic war decisions by Taylor's National Patriotic Front of Liberia (NPFL) in the context of a broader regional conflict involving Nigeria, Sierra Leone, and Guinea. Pointing out these political complexities seems aimed at diluting Taylor's role in sponsoring the RUF. The defense maintains that backing rebels in a foreign country as such is not a war crime.

"My case is he should not be on trial at all," Griffiths said. "He is being tried for his foreign policy. There is nothing to distinguish between what he has done and what other leaders in the West have done historically. Why start with an African? Why has it got to be a black man? Why not start with the Americans who have been misbehaving in other people's countries for decades?"²³

The defense has also highlighted an assertion made in the Sierra Leone TRC's final report (and during Ellis's testimony): there was a breakdown in the relationship between the RUF and the NPFL in 1992. While this was originally brought up by the prosecution and the event itself is outside the court's temporal jurisdiction (which begins in November 1996), the defense hopes

²⁰ One example is Hassan Bility, a Liberian journalist who also testified in the RUF trial in Freetown and the trial of Charles Taylor's son Chuckie Taylor in Florida. When Bility testified in the Taylor trial in January 2009, he was accused by the defense of being associated with two of Taylor's Liberian rival fighting factions, ULIMO-K and LURD. He was also accused of being motivated by ethnic animosity.

²¹ Transcript, Jan. 8, 2007.

²² During Stephen Ellis's testimony, he said, "I disagree with the analysis that the war was about diamonds from beginning to end. It was about other matters—social, political. With the years, the nature of the war changed, not least because of the use of diamonds to finance the continuation of the war." Transcript, Jan. 16, 2009, 1438-439.

²³ Frenkiel, *ibid.* note 18.

this will undermine or at least complicate the prosecution's claim regarding Taylor's later relationship with the RUF.

The Appeals Chamber's judgment in the AFRC case, delivered on Feb. 22, 2008, may have a particular impact on the Taylor case.²⁴ The Appeals Chamber held that a defendant can be liable as part of a joint criminal enterprise either through pursuing the objective of the common purpose or the contemplated means to achieve that objective.²⁵ Rapp said this is "of significant importance for the trial of Charles Taylor [because] it is very important in conflicts where the person is not specifically present to recognize that many people work together, are involved in the crimes, and help one another. Taylor was never at the scene [of the crimes]. The joint criminal enterprise is very important for holding him responsible. The judges will now have to rule in compliance with the Appeals Chamber."²⁶

Taylor's team has submitted a motion arguing that a different aspect of the pleading of joint criminal enterprise in his case is fatally flawed since the "fluid and constantly evolving 'common purpose'" of the enterprise alleged amounts to a violation of Taylor's right to be given sufficient notice of the charges against him.²⁷

While it is too early to speculate whether the Taylor trial will result in a conviction, it is clear that the trial has already revealed many important facts about the origins of the conflict in Sierra Leone and its links with Liberia. However, these facts are not necessarily known or accessible in Freetown, an issue that is addressed in more detail below. The court should devise a special public information strategy to ensure that the judgment in the case is widely distributed and explained to audiences within the region.

C. The Taylor Trial and the Liberian TRC

The accountability efforts to date in Liberia are unique in that they include a single, high-profile trial for the former president before an international (or hybrid) criminal tribunal

²⁴ In another relevant ruling, on March 10, 2008, a Dutch appeals court acquitted Dutch businessman Guus Kouwenhoven of charges relating to violating a U.N. embargo by trading weapons for timber in Liberia for lack of reliable evidence. The Hague Appeals Court overturned a verdict from a lower court that had sentenced Kouwenhoven to eight years for trading guns and using his lumber company to smuggle weapons that militias used to commit atrocities in West Africa. The appeal also upheld an acquittal for war crimes. The 65-year-old businessman acknowledged close ties with Taylor, but denied any wrongdoing. The Dutch court ruling said there was little or no concrete evidence that Kouwenhoven's company, the Oriental Trading Co., dealt in weapons, despite such allegations by the U.N. and human rights groups. The court said that testimony on which the prosecution had relied was unreliable. This may have some impact on the Taylor trial due to some overlap between witnesses in the two trials.

²⁵ Prosecutor v. Brima, Kamara, and Kanu, (AFRC trial), Case No. SCSL-2004-16-N, Appeals Chamber Judgment, Feb. 22, 2008, para. 76.

²⁶ *International Justice Tribune*, no. 84, March 3, 2008.

²⁷ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-T, Consequential Submission in Support of Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, March 31, 2008. See also Cecily Rose, "Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes," *Journal of International Criminal Justice* (forthcoming 2009). Trial Chamber II denied this motion in a decision on Feb. 27, 2009.

located outside the country while a national TRC is under way at home. No further criminal trials are planned in Liberia at this stage, although the possibility remains that prosecutions may follow the TRC's work.

A day after the first presentation of evidence at Taylor's trial in The Hague, the Liberian TRC opened its first public hearings in the capital of Monrovia. While TRC officials denied any link between the two events, this seems unlikely because the TRC would have most certainly been aware of the opening date of Taylor's trial. The TRC in Liberia has had many problems and may have been hoping to benefit from some of the attention raised by the trial, but the opening of its hearings remained a relatively low-profile event.

When the trial and TRC hearings began, Taylor supporters feared that information given to the TRC would affect his case. Some of them suspected that the institutions shared information and that the Liberian TRC served as an investigative arm of the SCSL. Similar suspicions had been rife in the early stages of the Special Court's life when the Sierra Leone TRC was operating simultaneously with the SCSL. Earlier in 2006, Taylor's separate Liberian legal team filed a petition with the Supreme Court of Liberia to prohibit the TRC from hearing any evidence against Taylor since he could not be present to defend himself. The petition failed.²⁸

It is important to recall that Taylor's supporters in government and civil society, as well as his family members, continue to have significant political influence in Liberia. They have accused the government of betraying a fellow Liberian and former head of state as a ploy to eliminate him from the political landscape. On the eve of the opening of the trial, Liberians came out in numbers during a public prayer session for Charles Taylor held in Monrovia. The prayer session soon turned into a political rally as speaker after speaker damned the government for its perceived betrayal, comments that were echoed on an Internet forum on the trial.²⁹ Taylor's supporters have also requested that the Liberian government pay the cost of Charles Taylor's defense.

Under pressure, the government finally accepted responsibility in requesting the transfer but did not agree to sponsor the defense (the Special Court pays for his team). Still Liberia's political leadership has tried to distance itself from the Special Court to diminish pressure from Taylor's supporters who have remained vocal, even though his National Patriotic Party has only won a few seats in both houses of the National Assembly.

Another dimension of the potential relationship between the Special Court and the TRC that arose is whether Taylor should give a statement before the TRC. This question also arose in Sierra Leone, in relation to the case of CDF Chief Sam Hinga Norman and others. In that case, the Special Court decided that people indicted but not yet tried should not give public

²⁸ Amnesty International, *Liberia: Towards the Final Phase of the Truth and Reconciliation Commission*, July 2008, 15.

²⁹ See www.charlestaylortrial.org. The open forum on www.charlestaylortrial.org cannot be identified as representative of the public opinion in any way. But reading through it highlights a few concerns voiced by members of the public: the perception of "white man's justice" or post-colonial justice; the absence of evidence on crimes committed in Liberia; and the lack of prosecutions against other major warlords in Liberia, or of individuals like Benjamin Yeaten, as well as the former president of Sierra Leone.

testimony to the TRC, in order to safeguard the integrity of the trial process.³⁰ Taylor's lawyers made it clear in mid-September 2008 that he would say "a clear no" to a TRC request to interview him.³¹ The fact that Taylor, the key player in Liberian politics between 1990 and 2003, has not testified before the TRC may leave a considerable gap in its truth-seeking efforts. In fact, many key players in the Liberian conflict also have initially declined to testify, including President Ellen Johnson-Sirleaf.

The direct impact of the TRC proceedings on the Taylor trial is likely to be minimal. The vast majority of crimes examined by the TRC relate to acts committed in Liberia, whereas the trial is focused on Taylor's alleged links to crimes that occurred in Sierra Leone. The Special Court Office of the Prosecutor (OTP) has so far planned its presentation of evidence completely independently of the TRC agenda and has not relied on TRC information. The court's chief prosecutor, Stephen Rapp, told ICTJ that his office follows the TRC by monitoring the local press in Liberia. There may be some overlap in people who have participated in both, but it is not likely to have much impact on the trial.

Beyond that, in terms of indirect impact, there may in fact be a political utility for the Special Court in terms of simultaneous revelations of Taylor's crimes in Sierra Leone and Liberia. The prosecutor has told ICTJ that the Liberian people increasingly accept the trial's proceedings because of the TRC hearings. According to Rapp, public exposure of atrocities that Taylor's NPFL committed eroded the credibility of people hostile to the trial. The TRC, he said, has served to legitimize a trial that is politically controversial in Liberia. Nonetheless in Liberia opinions remain divided on whether the acceptance of the court and Taylor's trial have increased due to testimony about the NPFL's crimes. The divide remains mainly along partisan lines. Taylor's supporters still believe he is innocent and have expressed their opposition to the Special Court, which they say is a tool of the government of Liberia to get rid of their former leader. His critics feel vindicated by both the proceedings before the Special Court and revelations before the TRC.³² In general, the simultaneous functioning of these institutions has not given rise to any insurmountable problems, but instead can be seen as mutually reinforcing.

D. Impact of Moving Taylor's Trial to The Hague

The decision to move Charles Taylor to The Hague for trial was largely a political decision, but has come at a real cost to the access of ordinary Sierra Leoneans and Liberians. On March 29, 2006, the same day that Charles Taylor was transferred to Freetown, it was clear that efforts were already under way to ensure the trial would not take place there. U.S. President

³⁰ Appeals Chamber, Prosecutor v. Samuel Hinga Norma, Case No. SCSL-03-08-PT-122, Decision on Appeal by TRC and Accused against the Decision of His Lordship Justice Bankole Thompson to Deny the TRC Request to Hold a Public Hearing with Chief Norman, Nov. 4, 2003.

³¹ Radio Netherlands Worldwide, Sept. 15, 2008.

³² All of this debate takes place in the absence of other criminal proceedings for war crimes or crimes against humanity in Liberia. When the war ended after the Comprehensive Peace Agreement was signed in 2003, some civil society groups as well as members of the current national assembly advocated establishing a war crimes tribunal. This demand seems to have increased as more details emerge on the scope of the crimes. In particular, it seems that people in Liberia would prefer a hybrid court such as the SCSL to a national court (due to lack of confidence in the national justice system). ICTJ interviews in Liberia, April 2008.

George W. Bush declared, “There is a process to get Charles Taylor to the court in the Netherlands,”³³ even before the SCSL made public the fact that SCSL President Justice A. Raja N. Fernando had been in contact with the government of the Netherlands regarding the possible transfer.³⁴

Upon learning about the transfer request through the SCSL press release, Taylor’s defense counsel filed an urgent motion opposing any change of venue without seeking the views of the defense and asking the court’s president to withdraw the request for transfer, or clarify whether such a request had been made or approved.³⁵ The Appeals Chamber dismissed this motion, finding that neither the Trial Chamber nor the Appeals Chamber had the authority to rule on the actions of the president in making the request.³⁶ On June 19, 2006, the court’s new president, Justice George Gelaga King, ordered the Taylor trial moved to the ICC’s facilities in The Hague. In the decision, the president noted that the transfer would have a detrimental effect on “access for the public, local media, and victims and witnesses,” and requested that the registrar take necessary steps to ensure that the proceedings would be “accessible to the people of Sierra Leone and the region.”³⁷ Weighing decisively in favor of transfer, however, the president noted security concerns for the court itself. Similar concerns had surfaced when the Security Council had authorized the transfer; in that authorization, the council noted threats to regional peace and security if Taylor was tried in Freetown.³⁸

It is more likely that the reasons for Taylor’s removal pertained to the terms agreed upon when he surrendered and the fact that several policy makers viewed his presence as ultimately destabilizing rather than as an immediate security threat. Before Taylor’s arrest, the Liberian minister of information had expressed the desire to have the former head of state tried “in an environment that is not hostile,” i.e. not in Sierra Leone.³⁹ Liberian President Johnson-Sirleaf quickly expressed her support for the request. Solomon Berewa, then vice president of Sierra Leone, told the *New York Times* this solution would be preferable so as to avoid being “reminded of those atrocities every day.”⁴⁰ Speaking to the Reuters correspondent in Freetown, Berewa later said, “The intention to transfer Taylor to The Hague was not for security reasons as widely believed.”⁴¹ Former prosecutor David Crane also added: “I don’t think the court is

³³ Bloomberg, “Bush Says Charles Taylor May be Tried in Netherlands,” March 29, 2006.

³⁴ SCSL Press Release, “Special Court President Requests Charles Taylor be Tried in the Hague,” March 30, 2006.

³⁵ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01-PT, Defence Motion for an Order that No Change of Venue From the Seat of the Court in Freetown be Ordered without the Defence Being Heard on the Issue and Motion that the Trial Chamber Request the President of the Special Court to Withdraw the Requests Reportedly made to (1) the Government of the Kingdom of The Netherlands to Permit that the Trial of Charles Ghankay Taylor be Conducted on its Territory & (2) to the President of the ICC for Use of the ICC Building and Facilities in The Netherlands During the Proposed Trial of Charles Ghankay Taylor, April 6, 2006.

³⁶ Appeals Chamber, Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-R72, Decision on Urgent Defence Motion Against Change of Venue, May 29, 2006.

³⁷ President of the Special Court, Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01-PT, Order Changing Venue of Proceedings, June 19, 2006 (hereinafter Change of Venue Order), paras. 7 and 13.

³⁸ Change of Venue Order, para. 10; Security Council Resolution 1688, June 16, 2006, UN Doc S/RES/1688(2006).

³⁹ Jonathan Paye-Layleh, “Taylor Move Challenges Liberia,” *BBC News*, March 26, 2006.

⁴⁰ Lydia Polgreen and Marlise Simons, “Sierra Leone Asks to Move Liberian’s Trial,” *New York Times*, March 31, 2006.

⁴¹ Thierry Cruvellier, “Why Try Taylor in The Hague?” *International Justice Tribune*, No. 44, April 10, 2006.

threatened. That's not an issue. The issue is regional instability and insecurity. It's a political decision, from both Sierra Leone and Liberia. Political realities have modified the model."⁴²

The arrangements concerning Taylor emerged much earlier, in October 2005. According to a senior member of the SCSL who participated in the talks, "The prosecutor received the following message from the U.S. government: If you want Taylor, it will have to be outside [the region] because it's too destabilizing for the region. . . . The chances of getting Taylor were so slim that many would have taken the deal."⁴³ On Oct. 15, 2005, prosecutor Desmond de Silva told the BBC that a trial outside Sierra Leone was being considered. "A number of countries—both Western and African—take the view that perhaps the interests of peace and security could best be served by a trial outside the region."⁴⁴

The decision was made against a backdrop of clear concerns regarding the fragility of the newly established democracy in Liberia and upcoming elections in Sierra Leone and Guinea. "It is political and could become a security issue if it is not well managed," explained an international analyst based in the region. But there were also reasons of local political perception and concern for the good relationships between Sierra Leone and Liberia. "In Liberia, there is also a mixture of embarrassment and anger [in having Taylor being tried in Freetown]. It is about pride, and it is about sovereignty," the analyst added.⁴⁵

While achieving the handover of Charles Taylor reflected a tremendous multi-year effort on behalf of the SCSL and civil society, and the conditions imposed by political leaders had to be taken seriously, it is not clear that the detrimental effects on the court itself were fully considered. The relocation of Taylor's trial profoundly challenged the advantages of the hybrid model that constituted the Special Court.⁴⁶ First, there was symbolic impact. A former senior member of the OTP at the court lamented that the court had sacrificed its philosophical underpinning for political concerns and ignored the negative symbolic effect of seeing an African head of state tried in Europe. "The SCSL took the easy route," concluded the director of a leading media group in Freetown.⁴⁷ The Special Court had previously garnered praise for sitting in the country where the crimes were committed and for being a "mixed" court that gave nationals a significant, if not equal, role in the process. Moving the main trial to Europe, even if still under the rubric of the Special Court, was detrimental to that approach.

SCSL officials were well aware of the challenge, and moving the trial to The Hague was by no means their preferred option. At the same time, there was little open debate on the issue, as Special Court officials simply cited security reasons for the transfer. Nonetheless, this was not

⁴² Interview with ICTJ, April 2006.

⁴³ Interview with ICTJ, April 2006.

⁴⁴ Thierry Cruvellier, "Why Try Taylor in The Hague?" *International Justice Tribune*, No. 44, April 10, 2006.

⁴⁵ Interview with ICTJ, April 2006.

⁴⁶ It is worth noting that in March 2003, the SCSL prosecutor sought in vain to have another defendant, Samuel Hinga Norman, transferred elsewhere, arguing that Taylor's supporters might attack the court. One former senior OTP official said, "We were expecting the worst with the Norman case, but nothing happened. People will evoke insecurity in the region, which is difficult to gauge since the region is not very stable. But do they understand what will be lost if this trial is not held in Africa?" Interview with ICTJ, April 2006. See International Crisis Group, *The Special Court for Sierra Leone: Promises and Pitfalls of a 'New Model,'* Africa Briefing No. 16, Aug. 4, 2003. See also Perriello and Wierda, *supra* note 1.

⁴⁷ Interview with Julius Spencer, ICTJ, Freetown, March 6, 2008.

necessarily logical or easy for the public to accept, as Charles Taylor spent three months in detention in Freetown without incident.

The transfer of the trial to The Hague has made it much less accessible to ordinary people affected by the conflict. In the Special Court president's order to transfer Taylor to The Hague, he asked the registrar to create programs to ensure that the trial remains accessible to people in Sierra Leone and Liberia even though "additional funding may be required."⁴⁸ To this end, the UN Security Council had requested that the court "make the trial proceedings accessible to the people of the sub-region, including through video link."⁴⁹ While this was attempted, the results were not always satisfactory, as will be explained below.

In Sierra Leone and Liberia, literacy rates are relatively low, and video and audio reports are the most important means of spreading information. Moving the trial to The Hague has introduced obstacles in this regard. When the trial opened on June 4, 2007, the Special Court set up at least two centers in addition to the court premises so the proceedings could be streamed live. The prosecutor's opening statement was supposed to be broadcast live. However, the broadcast at the court premises repeatedly faltered and halted,⁵⁰ and other problems beset the centers. Eventually, the court resorted to broadcasting coverage on CNN. When the proceedings resumed on June 25, 2007, the broadcast failed. The broadcast failed again during an appearance the following month. When presentation of the evidence started in January 2008, live streaming was available at the court premises, but the two additional centers were closed by then.

As a result, few people in Freetown have actually seen the trial of the man charged with causing much of the conflict that ravaged the region for more than a decade. Taylor's trial is only broadcast in one of the two courtrooms at the court's compound, and few people are there to watch.⁵¹ Even in this case, the live streaming is sometimes interrupted by technical problems.⁵² To some extent, this has been countered by the efforts of the Special Court's Outreach Program. The Taylor trial is discussed at the monthly civil society meetings and in up-country meetings where clips are shown by the outreach unit. The court has also been involved in getting at least 46 civil society activists to The Hague. This is a laudable step in the right direction, but is still necessarily limited.

In contrast, although few people regularly attend the RUF trial in Freetown, whenever the court's press and public affairs department announces that a witness of media interest is brought to court, local reporters cover the story. Given Taylor's importance and the particularly high number of important witnesses who appeared during his trial, local media interest would

⁴⁸ Change of Venue Order, para. 13.

⁴⁹ Security Council Resolution 1688, June 16, 2006, UN Doc S/RES/1688(2006), para. 6.

⁵⁰ See SLCMP's press release at www.slcmp.org, Freetown, July 3, 2007.

⁵¹ Usually only two people attend the hearings, a member of a civil society coalition and a retired man who comes out of personal interest.

⁵² On Wednesday, Aug. 20, 2008, during a training jointly convened by the Sierra Leone Court Monitoring Programme and Open Society Justice Initiative on Media Monitoring of the Taylor trial, a group of journalists went to the Special Court to view the live streaming. Even though the picture was clear, there was no sound despite the fact that the technicians tried very hard to restore it.

have been far easier to sustain if the trial was held in Freetown rather than The Hague.⁵³ A senior Sierra Leonean who has worked with the OTP has said:

I believed it was for us. If there is a major witness at The Hague, I have to go to New England [Freetown's district where the SCSL is headquartered]. How do we take ownership? We have the BBC and what is repeated on the national radio. It is very scanty, nothing substantial. There is no design for the SCSL to come down to people. . . News-wise, we are suffering a lot with Taylor being tried in The Hague. We only have secondhand information.⁵⁴

In the context of Sierra Leone, local reporters spend time and money covering the court. So the decision to make the effort to attend is risky for reporters if they do not know whether there will be something to cover. The court's website provides a live video stream, but it is largely useless outside the court premises because of the cost and poor quality of Internet facilities throughout Freetown and much of Sierra Leone, as well as regular electricity cuts.

This is not to say that the poor coverage is solely the result of limitations in the court's media strategy. The dire conditions in which the local press operates present a major obstacle to fostering greater interest in following the trials. In Sierra Leone, media coverage is largely dependant on what sources can give to journalists in a ready-made form that they can use immediately. Nonetheless, there is more that the court could have done. The court's public affairs section has been criticized for not notifying reporters about past or future witness testimony that may be of interest.⁵⁵ Also, contrary to other international courts, the SCSL does not have a pressroom. The only places where reporters can stay between court sessions are the cafeteria or the press office, if admitted. There is no Internet access for reporters on the site.

The difficulties encountered in Sierra Leone are even more pronounced in Liberia. The Special Court rented an office - one that can barely hold 50 people - to provide live video streaming of the Taylor trial proceedings as requested by the UN Security Council in its Resolution 1688. The streaming did not materialize during the opening of the trial in June 2007, nor did it work when the evidentiary phase started in January 2008. As in Sierra Leone, the Special Court has

⁵³ For example, the public testimony of key prosecution witness Isaac Tamba Mongor did not attract local media coverage because the court's media strategy drew attention instead to a defense witness in the separate RUF trial, a former UNAMSIL force commander. Around 1996, Mongor rose to number five in the RUF hierarchy after having been earlier a member of Taylor's NPFL. Along with Mike Lamin, he may be the highest ranking member of the RUF who is still alive and not on trial. Despite the historic nature of his testimony on the link between Taylor and the RUF's "Stop the Elections" operation, which included amputating voters' hands, the satellite video link was interrupted and a crucial part of the testimony was lost for anyone watching in Freetown. Additionally, nobody mentioned Mongor's testimony to local reporters; local coverage focused only on the UNAMSIL commander's evidence. Similarly, the testimony of another key witness, Joseph Mazah, aka "Zigzag," also was not covered because it was not broadcasted in Freetown; both SCSL courtrooms were occupied at that time by hearings in the RUF trial and the appeals judgment in the AFRC case. Again, nobody gave local reporters information about Mazah's testimony. In contrast, several international reporters in Europe were told about the significance of his testimony, and it was one of the very few hearings that the mainstream Western media covered and reported on between January and July 2008.

⁵⁴ Interview with ICTJ, Freetown, April 3, 2008.

⁵⁵ E-mail with member of Office of the Prosecutor.

blamed the faulty video-link on limited bandwidth.⁵⁶ Court officials discovered this problem in June 2006, yet it remains unresolved.

In April 2008, ICTJ asked several key NGOs and media outlets in Liberia about their interest in and access to Taylor's trial. The majority was anxious to receive information on the Taylor trial. However, they expressed their disappointment over the lack of access to the trial, which they blamed on the court's limited outreach.⁵⁷ People have been relying on newspapers and radio to follow the trial. Most were unaware that live streaming of the proceedings in The Hague was available through the SCSL website. They said no one had told them about it. The few who told ICTJ they were aware of the web-streaming link said that they have tried it several times, but it was either inaccessible or frequently interrupted.⁵⁸ None of the people interviewed had been to The Hague to watch the trial. They attributed their inability to travel there to lack of resources and difficulties obtaining visas.

The Special Court outreach offices in Monrovia used to show recorded video clips sent by the outreach section in Freetown. Unfortunately, the staff said they stopped showing those videos because they were badly received and the court was accused of "doctoring" the clips. The court also stopped conducting community town hall meetings that had accompanied the video screenings, mainly due to lack of funds.

Some hoped that moving the trial to The Hague might attract attention from the mainstream Western media. It has not. The opening day of the trial received wide coverage, but this did not last; after the first week, even the wire services had stopped covering the proceedings. While there has been sporadic coverage since, including around the testimony of Joseph "Zigzag" Marzah and former Liberian President and Vice President Moses Blah, attention to the trial in the mainstream media remains limited. Media attention on such long trials typically drops with time, but this was particularly quick and striking for such a high-level, unusual case. The only journalists covering the trial continuously were two from Liberia and Sierra Leone who were working on a special program founded and run by the BBC World Service Trust.⁵⁹ None of the media NGOs (IWPR, Fondation Hironnelle, and Internews) that have been covering extensively other international courts such as the ICTY, ICTR, and ICC developed any special coverage of the Taylor trial. The only other initiative to highlight the trial was the website and blog of the Open Society Justice Initiative (OSJI) at www.charlestaylortrial.org. The website offers comprehensive daily transcripts of the proceedings that lawyers have compiled. The site became the single most detailed source of information available on the trial, and local

⁵⁶ According to the Special Court, the available bandwidth is just 256 kilobytes, and at least 512 kilobytes is required.

⁵⁷ The people interviewed referred to a discussion about the Special Court Outreach Office's establishing a center in Monrovia where live streaming of the trial would be shown; they were not aware whether it has been established and where. A few people said they were aware that an outreach office has been established and had visited it a few times to view live streaming, but the streaming had never worked.

⁵⁸ They also stated that even if the website had been working properly, it would still have been inaccessible as a matter of practicality. Nobody interviewed was aware of the fact that MP3 files of the trial sessions are available on court's website. They said it would have been impossible to download the files because of lack of electricity and Internet access.

⁵⁹ Under this program, journalists from Sierra Leone and Liberia are flown to The Hague to view the trial and send reports back to the sub-Saharan region.

newspapers relied on its information although other local media may not have realized its full utility.⁶⁰

Limitations on media attention are to some extent inherent to these trials. Legal proceedings about crimes committed seven to twelve years ago may not make the headlines. It is particularly difficult for journalists to plan to cover an important witness because there is much uncertainty as to when his or her testimony will actually start and how long it will last. In addition, some journalists have commented that proceedings at the ICC are not media-friendly. Moving the trial to The Hague has seemingly not resulted in putting it more firmly on the mainstream media's radar.

Most media companies in Liberia said they used the OSJI website and blog as primary sources of information for their newspapers. The blog initially transmitted verbatim all of the open sessions. This format was well received in Liberia, because it was seen to be presenting the facts and leaving the readers to discern the issues presented. However, the blog was widely misunderstood to be a service from the court. When the blog decided to change its format from reporting verbatim to giving summaries of daily proceedings, this invoked a suspicious reaction. Nevertheless, media companies and NGOs continue to use it as a crucial source of information.

Radio has proven to be a more reliable medium for information on the trial in Liberia, but this too has limitations. As mentioned, the BBC World Service Trust and Talking Drum Studio have sent two journalists to cover the trial in The Hague on a quarterly basis. The journalists, one from Sierra Leone and one from Liberia, produce audio clips that are distributed to various radio and TV stations in their countries. The audio clips aired by various radio stations have been a major source of information on the trial. The majority of Liberians interviewed said that they frequently listen to the programs on various FM radio stations in Monrovia.⁶¹

Satellite communications, upon which the court's video-link depends, are subject to climate interference, technical incidents, or lack of facilities. So if not for the OSJI website, BBC World Service Trust, and outreach events organized by the Special Court, little or no information would be available on the trial. Unfortunately, none of these efforts, however well-meaning, can substitute for a first-hand experience of the trial. Lack of regional knowledge about the trial of a former head of state diminishes the importance of the precedent in that region. The precedent could have been an important component of delegitimizing former leaders accused of serious crimes. Moving the trial to The Hague has hindered direct access that would have bolstered such knowledge – an issue that perhaps should have been more central in the minds of those who decided to remove the trial from the region.

⁶⁰ From Aug. 18 to 20, 2008, the Open Society Justice Initiative and the Sierra Leone Court Monitoring Program hosted a three-day workshop for media practitioners in Freetown on monitoring techniques and on how to use the website, www.charlestaylortrial.org. Journalists from both print and electronic media and from Freetown and the provinces were invited to attend the workshop. The Sierra Leone Court Monitoring Program staff reported little ongoing interest among journalists and noted that additional workshops have been poorly attended.

⁶¹ While those interviewed commended the summarized content of the clips, they also pointed out that it lacked details and more thorough discussions of the evidence.

III. Putting the Special Court Model to the Test

Much hope was vested in the Special Court initially, that it would serve as a new, more effective model of internationally assisted justice than the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda. While this report has already examined some aspects of this model, in particular the accessibility of its proceedings to the affected population, the model was also premised on several more practical considerations. This “second generation” tribunal was supposed to avoid the mistakes of its predecessors by focusing its mandate and conducting its business efficiently and economically.⁶² This section seeks to examine whether the model has lived up to these expectations.

A. A Court with a Narrow Mandate

In a previous report, ICTJ has described in detail the strict interpretation that the SCSL’s first prosecutor, David Crane, made of the court’s mandate to prosecute only those “who bear the greatest responsibility” for the crimes committed in Sierra Leone during the civil war.⁶³ His policy – based on the criteria that the accused must have been in a position of senior command or rank – was maintained by his successor, Desmond De Silva.⁶⁴ This has made the Special Court the first clear example of a court that is pursuing a very narrow mandate.⁶⁵ As De Silva has said, it aimed at delivering justice within a “politically acceptable time frame.”⁶⁶

This mandate offered several clear potential advantages: clarity and consistency in the prosecution policy, and a more definite time limit on the existence of the tribunal. Avoiding the risk of prolonged trials at the ad hoc UN tribunals was a key consideration for many of the countries that sponsored the SCSL from the beginning, particularly the United States.

However, one of the disadvantages of such limited prosecutions and symbolic action is illustrated by examples of cases that were not pursued.

- The first relates to renowned perpetrators who, despite their lower rank or authority, became particularly notorious for their criminal actions during the war. The case of Savage, a former sub-commander of the AFRC already in prison in Freetown when the

⁶² For a discussion of this categorization, see Daphna Shrager, “The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions.” *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*. Cesare P.R. Romano, André Nollkaemper, and Jann K. Kleffner, eds., Oxford University Press, New York, 2004, 15-38.

⁶³ See Perriello and Wierda, *supra* note 1, 26-28.

⁶⁴ By the time Stephen Rapp became the third prosecutor in 2007, it had become unrealistic to bring any new indictment.

⁶⁵ The Extraordinary Chambers in the Courts of Cambodia (ECCC) also has a very limited mandate. However, the ECCC operates in a very different political context in which the Cambodian government, a powerful actor on the matter, has demanded a very narrow prosecution mandate. The final scope of the ECCC’s work is not known yet. Only five people have been prosecuted since the ECCC officially opened in July 2006. The international co-prosecutor is seeking to investigate six additional people (one of whom has since died), but his national counterpart disagrees with him on expanding the prosecution, even if very limited. Whatever the outcome, the likely number of indicted people before the ECCC will not exceed 10.

⁶⁶ Special Court for Sierra Leone Press Release, Feb. 7, 2006.

SCSL started to work, stands out. OTP investigators questioned Savage in prison, but never indicted him because he was declared not to have been in a position of high command. Yet to many Sierra Leoneans, he would arguably qualify as one of “those who bear the greatest responsibility” for the atrocities committed during the civil war.⁶⁷ This illustrates that the prosecutor’s mandate is susceptible to multiple interpretations. This is exacerbated by the fact that out of a total of 13 people indicted, two died before trial or arrest,⁶⁸ another one before judgment, and a third has remained at large and is feared dead.⁶⁹ This reduces the possible total number of people fully tried by the SCSL to nine and probably increases the impression that the OTP policy could have included people like Savage.

- Second, the SCSL thwarted hopes about the court’s ability to indict businessmen who benefited from the crimes. David Crane initially claimed he would “follow the money trail.” But he eventually admitted that he was unable to complete these investigations to the required level of proof. People like Ibrahim Bah, a financier close to Charles Taylor, have been subject to investigation, but there have been no results.⁷⁰
- The third case that remains a source of controversy or mystery is Benjamin Yeaten, Taylor’s head of security services in Liberia. He was widely thought to be a candidate for indictment, especially once Taylor was arrested. Yet, beyond the former head of investigations’ chaotic expedition to Togo to contact Yeaten,⁷¹ no attempt was made to indict him or any other senior Liberian. However, Liberian authorities recently indicted Yeaten for plotting the murder of a politician and two former ministers.

B. An Expeditious Court

Initially the court was expected to last three years, and the budget was based on that estimate. It will last at least eight years. As has already been exemplified by the ad hoc tribunals that were created to last for four years, but now could last more than 15, international criminal tribunals tend to last much longer than initial estimates.⁷² However, an important expectation of the Sierra Leone model was that it would improve upon the record of the ad hoc tribunals in terms of judicial efficiency.

⁶⁷ Savage’s alleged crimes in Kono were referred to in the charges against Kamara in the AFRC trial, because Kamara was held responsible as a superior.

⁶⁸ Foday Sankoh, the historic leader of the RUF, died in prison in July 2003. Sam “Mosquito” Bockarie replaced Sankoh in 2000 and was killed in Liberia in 2003, allegedly by order of Charles Taylor.

⁶⁹ Johnny-Paul Koroma, former head of the AFRC. See below.

⁷⁰ Similarly, international criminal tribunals have not had great success in investigating the financial means and resources of some of the accused in order to establish whether they are able to pay for their defense or whether they should be provided with legal aid. At the SCSL, there were strong reasons to believe that Taylor would have his own means to pay for his defense. Yet, in reality no concrete evidence of his assets was obtained in the court’s investigation. The Office of the Prosecutor has organized several media interviews on the issue, including one in March 2008. But strong statements on the matter, including references to reparations for victims, run a serious risk of raising victims’ expectations unrealistically. If they are not met, victims are bound to be disappointed.

⁷¹ See Perriello and Wierda, *supra* note 1, 22.

⁷² Similarly, the Extraordinary Chambers in Cambodia were expected to fulfil their mandate in three years, but these projections have now been extended to five years.

Has the Sierra Leone model demonstrated an approach of more expeditious trials? Not according to the external expert hired to assess the court by the management committee in December 2006. “Although meritorious in many respects, the new judicial body has not fully lived up to its initial expectations from the viewpoint of expeditiousness,” wrote Antonio Cassese, a former president of the ICTY, in his report.⁷³ He went on to say:

Assuming that [the proposed schedule for completing all proceedings] is respected—and it should be respected—proceedings against ten accused will have taken approximately seven and a half years from the Court’s inception in mid-2002, when the Registrar and Prosecutor arrived in Freetown. This is not a significant improvement on the record of the ICTR or ICTY, which within a comparable time frame tried many more accused, albeit with more judges, staff, and resources...⁷⁴ In fact, the Special Court’s trials have taken longer than many of the ICTR and ICTY multi-accused cases.⁷⁵

It should be noted that the AFRC trial was significantly shorter than all multi-accused trials before the ICTR.⁷⁶ But the fact remains that, when assessing the number of people tried in a given number of years, the SCSL has tried fewer people in the time available.⁷⁷ The Special Court’s investigations and indictments were fast. Within a year, it had issued 13 indictments, with fewer and more streamlined counts. But, with the exception of the ICC, the indictments at other tribunals were also filed at an early stage (although delays arose at a later stage from challenges on the grounds of vagueness).⁷⁸ The pace of SCSL proceedings had already begun to slow down by the pre-trial phase. Most delays occurred during the trial phase. This was exacerbated by the fact that one chamber was dealing with both the RUF and CDF trials in alternating sessions, whereas the other was dealing with AFRC, a comparatively smaller case. One official said, “There should have been three Trial Chambers from the beginning; it would cost a bit more for less time.”⁷⁹

The Appeals Chamber has been quite efficient with the time it has taken to rule upon appeals from final judgment. But this chamber has ruled on a comparatively small number of cases. In addition, this efficiency contrasts with its pace in handling some earlier interlocutory appeals

⁷³ “Report on the Special Court for Sierra Leone,” submitted by the Independent Expert Antonio Cassese, Dec. 12, 2006 (hereinafter Cassese Report).

⁷⁴ Cassese Report, paras. 3-5.

⁷⁵ Cassese Report, para. 66.

⁷⁶ All joint trials before the ICTR have taken at least one year per person. The AFRC trial, with three people accused, lasted a bit more than two years.

⁷⁷ In the six years since the investigations began, the SCSL has rendered verdicts against six defendants. In contrast, within the same period, the ICTR sentenced nine people, including three who pleaded guilty. In addition, the ICTR had simultaneously indicted three times as many people as the SCSL and had three times as many defendants in custody. The ICTY is known to have the best record of all international tribunals and, therefore compares favorably with both the ICTR and the SCSL. It is true that both ICTR and ICTY had bigger budgets than the SCSL, but as explained below (see sub-chapter E), the final cost per defendant does not show a significant gain at the SCSL. (In total, the SCSL should have tried 10 individuals in seven years, while the ICTR may be expected to have tried 69 persons in 15 years—including eight guilty pleas—and the ICTY 110 people in 16 years, including some 18 guilty pleas.)

⁷⁸ At the ICTR, the first indictment against 13 people was filed six months after the investigations began.

⁷⁹ Interview with a senior legal officer at Chambers in Freetown, March 28, 2008.

that took considerable time for decisions to be rendered, although the Appeals Chamber was not permanently constituted until the end of the first trial; this was perhaps a factor in any earlier delays.

Cassese identified three main factors that have contributed to the Special Court's overall lack of efficiency: "(i) the financial insecurity resulting from funding based on voluntary contributions; (ii) the lack of strong judicial leadership; and (iii) the initial failure to draw fully upon the available experience in international criminal proceedings."⁸⁰ In our view, the second factor may be the most significant factor. For instance, the RUF trial took four years to complete and is widely seen as having been poorly run. With a lack of planning by the bench, hearings starting late consistently, and extended breaks, the court often appeared to be rather inefficient.⁸¹

While the SCSL intended to avoid the cost implications of heavily staffed courts at ICTY and ICTR, this may have proved to be a false economy, particularly in circumstances where one Trial Chamber was conducting two simultaneous trials with only minimal support to manage the overwhelming documentation, research, and judgment preparation functions.⁸² Professor Cassese found that: "In sum, the Special Court has ended up suffering from the same two shortcomings that its founders intended to avoid by establishing a court markedly different from the ad hoc tribunals: excessive length of proceedings and costly nature of the institution."⁸³ The fact remains that the international appetite for tribunals will diminish if they are not seen to be more efficient.

C. A Cheaper Court?

One of the main characteristics of the SCSL is its reliance on voluntary contributions and the role of a management committee, composed of the main donor countries and a few interested nations.⁸⁴ The committee was meant to oversee nonjudicial matters in order to give donors a direct role and to control costs. It was also designed to provide an oversight function similar to what the Security Council provides to the ICTR and ICTY. The overall cost of the Special

⁸⁰ Cassese Report, para. 6.

⁸¹ "A review of recent transcripts reveals that Trial Chamber I hearings usually start late. The Presiding Judge announces that Court will stand adjourned until 9:30 a.m. the following morning, but this goal is only rarely met. Instead, Court commences between 9:45 and 10:00 am. Other breaks in the hearing are similarly extended," Cassese said in his report.

⁸² In 2008 the maximum legal support staff for Chambers was one P4, one P3, and three P2 legal officers for a Trial Chamber (against two P3 and two P2 previously – split between each trial). In 2006, Cassese wrote, "Compared to the ad hoc international tribunals, the Chambers of the Special Court are dramatically understaffed. Each trial is supported by one P3 and one P2 legal officer. It is apparent that, until recently, staffing for Chambers has not been a priority at the Court. Legal officers were hired for Trial Chamber I only weeks before the trials began, more than a year after the judges arrived in Freetown. . . Finally, in 2006 as the judgment process began in earnest, requests for additional staff were granted. It is now envisaged that each Trial Chamber will have a P4 and each trial will have a P3 and two or three P2's. . . Only one of the seven legal officers currently in Chambers at the Special Court has significant drafting experience." Cassese Report, paras. 117-22.

⁸³ Cassese Report, para. 296.

⁸⁴ For a detailed account of the management committee, see Perriello and Wierda, *supra* note 1, 33.

Court remains significantly cheaper than that of the ad hoc tribunals,⁸⁵ and this is mainly due to its narrow mandate.

Court officials have said the voluntary contributions are part of the problem. “It is a court of the willing, and it comes with a lot of constraints,” said one of the senior staffers.⁸⁶ All hybrid courts rely on a small number of leading interested nations. Four have borne the brunt of the SCSL budget: the United States, Canada, Great Britain, and the Netherlands. “Other contributions have been sporadic,” said Registrar Herman von Hebel.⁸⁷

Has the Sierra Leone model been more cost-effective than other UN tribunals? The SCSL’s annual budget has always been significantly lower than that of the other tribunals. But the current “cost per indictee” remains high and certainly appears no better than the ad hoc tribunals. According to some rough calculations based on dividing the total cost estimate by the maximum number of people effectively tried, the cost per defendant at the SCSL may be around \$23 million U.S. dollars, compared with \$21 million at the ICTR and \$17.5 million at the ICTY. The cost of the Taylor trial is \$25 million. The War Crimes Chamber of the State Court of Bosnia and Herzegovina provides a stark contrast. As that court’s budget is increasingly the responsibility of domestic authorities, the estimated cost of a trial in 2008 was around 400,000 Euros (U.S. \$507,998).⁸⁸

The limited number of defendants before the SCSL is bound to inflate these calculations, because the considerable cost of establishing the institution (including building the premises from scratch) is spread across a far smaller number of defendants than at the other tribunals. Nonetheless, the cost of the Special Court remains much debated within Sierra Leone, where people frequently argue that the money should have been invested elsewhere such as in the domestic legal system. On the other hand, at an estimated \$230 million, the SCSL’s total costs have been a fraction of the other international tribunals, which are more than \$1.5 billion each.

D. Controversy around the CDF Trial and Its Impact on the Hybrid Model

The SCSL has completed three cases. The trials, sentencing, and appeals have been completed for three senior members of the AFRC and that of the three leaders of the CDF.⁸⁹ A judgment

⁸⁵ The annual budget for the Special Court in 2008 was \$36,124,200, but this was going to \$23,478,000 in 2009 and \$8,751,900 in 2010. The ICTY budget for 2008-’09 is \$342,332,400. This is significantly more than the total cost of the SCSL, which is estimated to be about \$230 million. The total cost of the ICTR and the ICTY may be at least \$1.4 billion and \$1.9 billion respectively. As to the ICC, it has already cost some \$500 million before it opened its first trial.

⁸⁶ Interview with the principal defender in Freetown, April 16, 2008. This comment was echoed by Antonio Cassese (para. 293).

⁸⁷ “I spend about a third of my time going around with a begging bowl. We need \$68 million to complete our work by 2010, and we have guaranteed funding of only \$23 million. The present funding will last until the autumn. It is a great worry,” the registrar said in a story in *The Times*, April 22, 2008. Cost estimates for the last three years are as follows in U.S. dollars: \$36 million in 2008, \$23.5 million in 2009, and \$8.5 million in 2010.

⁸⁸ Bogdan Ivanisevic, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* ICTJ, 2008, 24.

⁸⁹ For convenience, each of these three joint cases against nine people has become known by the title of the relevant faction to which each person belonged. This is a somewhat unfortunate convention and is not intended to suggest that the organizations themselves were on trial. Hence, the trial involving Allieu Kondewa, Moinina

was finally issued against the three leaders of the RUF on Feb. 25, 2009, even though more than eight months had passed since presentation of evidence ended and officials predicted that a judgment would come by the end of 2008.⁹⁰ The delay in the RUF judgment was surprising, considering the importance of the case to the Special Court and the fact that the original government request to the United Nations asked specifically for the creation a Special Court to try the RUF.

The judgments of the Special Court should be seen as important achievements. They contribute to the establishment of an authoritative historical record for Sierra Leoneans and the formation of new standards in society. The jurisprudence of the court has reaffirmed important norms, such as the prohibition on conscription of child soldiers; condemnation of a crime of forced marriage; and the denial of immunity as a bar to prosecution of a sitting head of state. The very fact that the trials are generally considered fair lends important credence to their long-term impact. A very important contribution of the court is to affirm that certain actions are never permissible in warfare, even if one is “fighting on the side of the angels” as da Silva famously put it.⁹¹ Further details on each judgment are given in the annexes to this report.

In spite of the CDF trial’s important contribution to reaffirming normative standards, it was mired in controversy from start to finish. The CDF was a security force that supported the Sierra Leone government’s fight against the RUF and the AFRC. It was composed mainly of “Kamajors,” traditional hunters who normally engaged in civil defense and preceded the CDF. When President Kabbah’s democratically elected government was ousted in a coup d’état by the AFRC on May 25, 1997, the CDF was established to coordinate the activities of the Kamajors and other civil militia groups and to support the military operations of ECOMOG. The Kamajors’ history of alliance with the government against the rebels (serving as guides for the military against the RUF in the early ’90s) and the growth of the movement in part as a reaction to abuses that the rebels and the army committed against civilians helped foster the CDF’s image as a defender of the country.⁹² Nonetheless, the CDF was the first trial to open at the Special Court, in spite of the fact that most considered the RUF and AFRC the main perpetrators of the conflict.

In contrast, many Sierra Leoneans considered CDF leaders, the late Hinga Norman in particular, as war heroes.⁹³ “In the conscience of many Sierra Leoneans, it never quite worked that you can condemn people who defended the country. This is not a partisan view; it’s a general one. Putting them and the rebels in the same basket created problems of comprehension to the whole nation, with what follows in terms of manipulation and interpretation,” explained a former member of Kabbah’s government.⁹⁴ “There were lots of

Fofana, and (prior to his death) Samuel Hinga Norman is known as the CDF case. The case involving Issa Hassan Sesay, Morris Kallon, and Augustine Gbao is known as the RUF case. The case involving Alex Tamba Brima, Ibrahim Bazy Kamara, and Santigie Borbor Kanu is known as the AFRC case.

⁹⁰ See SCSL press release, Aug. 5, 2008.

⁹¹ IRIN News “Special Court opens its Doors Amid Controversies,” March 15, 2004.

⁹² Mariane C. Ferme and Danny Hoffman, “Hunter Militias and the International Human Rights Discourse in Sierra Leone and Beyond,” *Africa Today*, Vol. 50, Issue. 4, (2004): 72.

⁹³ See International Crisis Group, *The Special Court for Sierra Leone: Promises and Pitfalls of a “New Model,”* August 2003. See also Perriello and Wierda, *supra* note 1, 38.

⁹⁴ Interview with ICTJ, Freetown, Feb. 18, 2008.

discussions among Sierra Leoneans on Hinga Norman,” said another former minister under Kabbah.⁹⁵ “The government public information was very weak. There was no real effort to educate the public. Some politicians capitalized on that and used it as a political tool. It became an issue.” Nonetheless, the Sierra Leone Truth and Reconciliation Commission found numerous reports of CDF atrocities.⁹⁶

Popular sentiment against the trial was exacerbated when Hinga Norman died on Feb. 22, 2007, while he was in custody after the trial was completed, but before judgment was rendered. Hinga Norman’s death was a serious blow to the court’s credibility. His supporters considered the proceedings against him politicized, with the intent of removing him as a challenger to President Kabbah. His death further fuelled these suspicions. Given that it was an election year, some of his supporters therefore decided to leave the ruling Sierra Leone People’s Party and formed a breakaway faction, the People’s Movement for Democratic Change.

The Trial Chamber judgment in the CDF trial gave rise to further controversy. Justice Bankole Thompson, the only Sierra Leonean judge on the three-member panel, argued that the two surviving defendants should have been acquitted on all counts on the basis of necessity and because they were engaged in “defensive military action to restore the lawful and democratically elected government” and thus their crimes were excusable.⁹⁷ At sentencing, the two international judges rejected Thompson’s reasoning on necessity as a full defense, but did take the goal of reinstating democracy into account as a mitigating factor warranting a reduced sentence.⁹⁸

The Appeals Chamber also rejected Thompson’s reasoning and found that the Trial Chamber erred in reducing the sentences on the basis of the just nature of the CDF cause, explaining that motive should not be considered in mitigation.⁹⁹ Again, a Sierra Leonean judge dissented. In his dissent, Justice George Gelaga King agreed that the CDF had undertaken a widespread

⁹⁵ Interview with ICTJ, Freetown, March 6, 2008.

⁹⁶ Statistical Appendix to the Report of the Truth and Reconciliation Commission of Sierra Leone, Oct. 5, 2004. See also No Peace Without Justice, *Conflict Mapping in Sierra Leone: Violations of International Humanitarian Law from 1991 to 2002*, March 10, 2004.

⁹⁷ Prosecutor v. Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-T, Judgment, Aug. 2, 2007 (hereinafter CDF Trial Judgment), Concurring and Partially Dissenting Opinion of Justice Bankole Thompson, para. 103.

⁹⁸ The judges wrote: “Validating the defence of necessity in international criminal law would create a justification for what offenders may term and plead as a ‘just cause’ or a ‘just war’ even though serious violations of international humanitarian law would have been committed. This, we observe, would negate the resolve and determination of the international community to combat these crimes.” Prosecutor v. Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, Oct. 9, 2007, (hereinafter CDF Sentencing Judgment) para. 79. They also noted: “The main distinguishing factor is that the acts of the accused and those of the CDF/Kamajors [traditional hunters who spearheaded the CDF] for which they have respectively been found guilty, did not emanate from a resolve to destabilize the established constitutional order. Rather, and on the contrary, the CDF/Kamajors were a fighting force that was mobilized and implicated in the conflict in Sierra Leone to support a legitimate cause which . . . was to restore the democratically-elected government of President Kabbah, which had been illegally ousted through a coup d’état.” They added: “Defending a cause that is palpably just and defensible, . . . certainly, in such circumstances, constitutes mitigating circumstances in favour of the accused,” and concluded, “A manifestly repressive sentence . . . will be counterproductive to Sierra Leonean society.” CDF Sentencing Judgment, paras. 83-95.

⁹⁹ CDF Appeals Judgment, para. 534.

attack directed against a civilian population and that the Trial Chamber had erred in acquitting the two accused of crimes against humanity. However, while his dissent acknowledged that a just motive did not excuse attacks on civilians and largely focused on factual disagreement with the majority as to whether civilians were the primary target of attacks, King argued that the fact the CDF was fighting to restore democracy was relevant to the consideration of whether civilians or rebel groups had been the primary target of attacks.¹⁰⁰

Thompson's dissent and arguments for acquitting all accused had provoked much criticism among international lawyers, who considered he was setting a terrible precedent for international criminal justice and a stain on the Sierra Leone model.¹⁰¹ Perhaps the greatest concern was that his arguments undermined the development of the legal principle that no rationale exists for committing core international crimes such as crimes against humanity or war crimes.

The appeals judgment seemed to correct this so-called "heresy," because the majority dismissed the argument regarding "just cause," added convictions, and more than doubled prison terms. This relieved international lawyers. Yet, King acquitted Kondewa and, along with Kamanda, opposed giving the two men heavier sentences.¹⁰² In King's view, Kondewa's status as a "High Priest" did not give him effective control over any subordinates.¹⁰³ Some commentators have criticized the court and the prosecution for an "un-nuanced" rejection of the importance of such traditional aspects of the CDF organization, which they argue has alienated some Sierra Leoneans.¹⁰⁴ Conversely, King chastised his colleagues for considering Kondewa's "reputed superstitious, mystical, supernatural and suchlike fictional and fantasy powers," which are "so ridiculous, preposterous and unreal as to be laughable and not worthy of serious consideration by right-thinking persons in civilised society."¹⁰⁵ King's opinion highlighted one of the key tensions of the CDF trial, in terms of the role of contextual evidence and how local and international judges understand it differently.

These apparent rifts portrayed a deeper one in relation to the hybrid model. In the international justice sector, many felt this was a consequence of having local judges and that this result was "detrimental to the credibility of hybrid courts."¹⁰⁶ Moreover, perceptions of bias in favor of the CDF cause invariably raised questions about the potential for bias against the CDF's opponents, the RUF.¹⁰⁷

¹⁰⁰ CDF Appeals Judgment, Partial Dissent of Justice King, May 28, 2008, para. 29.

¹⁰¹ See Human Rights Watch, *Political Considerations in Sentence Mitigation for Serious Violations of the Laws of War before International Criminal Tribunals*, March 2008.

¹⁰² Kamanda agreed with the findings of the majority on the guilt of the accused but was reluctant to impose a heavier sentence on appeal.

¹⁰³ Prosecutor v. Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-A, Appeals Judgment, May 28, 2008 (hereinafter CDF Appeals Judgment), Partial Dissent of Justice King, para. 73.

¹⁰⁴ James Cockayne, "Hybrids or Mongrels? Internationalized War Crimes Trials as Unsuccessful Degradation Ceremonies," *Journal of Human Rights*, vol. 4 (2005): 455-73.

¹⁰⁵ CDF Appeals Judgment, Partial Dissent of Justice King, paras. 69-70.

¹⁰⁶ Interview with SCSL senior staff at Chambers, Freetown, March 28, 2008.

¹⁰⁷ This argument was raised by two of the three RUF defense teams in an application to disqualify Justice Thompson from continuing to hear the RUF case; it was ultimately dismissed by Trial Chamber I. See Prosecutor v. Sesay and Gbao, Case No SCSL-04-15-T-909, Decision on Sesay and Gbao motion for voluntary withdrawal or disqualification of Hon. Justice Bankole Thompson from the RUF case, Dec. 6, 2007.

To many Sierra Leoneans, Thompson's position and the reasoning behind the low sentences were appealing from a historical or moral point of view because they were considered appropriately informed by the national context. "A national judge may be more practical and realistic, rather than look at the law," King said.¹⁰⁸ Thompson also conceded that a national judge might strike a different balance between law and history. While he stressed that deciding in such cases can represent "moral agony," he said, "Some say it was an advantage to have Sierra Leone judges. But it is also possible to take the view that Sierra Leone judges have come with their intellectual or moral baggage."¹⁰⁹ Abdul Tejan-Cole, a former member of the OTP at the SCSL and current head of Sierra Leone's Anti-Corruption Commission, said, "I don't think it kills the hybrid model. It provides an opportunity for those judges to raise the context issue. Thompson's dissent puts [forward] the perspective of many Sierra Leoneans."¹¹⁰

A final controversy around the CDF trial concerned the timing of the judgment against the two remaining CDF members, which was made public on Aug. 2, 2007, only two weeks before the general and presidential elections took place. The sentencing came two months later on Oct. 9, right after the official results of the elections were pronounced. As mentioned in this report earlier, the Sierra Leone People's Party (SLPP) government lost the elections to the All People's Congress (APC). This was partially because the SLPP lost in strength after an internal split led by Charles Margai, a party leader and lawyer for the CDF. When Norman was arrested, Margai and part of the old SLPP electoral base attacked the government-President Kabbah and Vice President Berewa in particular-for betraying a man who had fought for them and the restoration of democratically elected government after the army-led coup in May 1997.

The Special Court is an independent judicial institution, and it must be presumed that the release of the judgment was not timed to influence political events. Nonetheless, the timing of the judgment raised questions for some Sierra Leoneans. Foreign journalists present during the elections observed the importance of the CDF case in the electoral debate.¹¹¹ According to a defense lawyer at the SCSL, top authorities, including a cabinet minister, even visited the CDF members in prison between the two rounds, allegedly to invite them to speak to their followers.¹¹² As a former cabinet member explained:

The Norman case changed the face of the campaign and the "Margai effect." Sometimes the two coincided. There were too many questions left unanswered. People wanted to know why Norman had been brought to justice and why him and not others. His death made the mystery even bigger. It was catastrophic for the government, which seemed to bury its head in the sand: it acted as if it wasn't so important. They underestimated the symbolic impact of Norman. It is his arrest that made Norman the harbinger for the opposition to Berewa/Kabbah within the SLPP. Norman gave a reason to dissent when the SLPP had also neglected the development of the South and East.¹¹³

¹⁰⁸ Interview with ICTJ, Freetown, April 4, 2008.

¹⁰⁹ Interview with Justice Bankole Thompson, Freetown, April 16, 2008.

¹¹⁰ Interview with ICTJ, Freetown, April 22, 2008.

¹¹¹ Interviews with ICTJ, August 2007.

¹¹² Interview with ICTJ, Freetown, March 4, 2008.

¹¹³ Interview with ICTJ, Freetown, Feb. 18, 2008.

Nonetheless, Norman's arrest and trial cannot be said to have led directly to the SLPP defeat in the 2007 elections. Many other factors led to the APC's electoral success, including the fact that the SLPP government was largely considered to have failed in addressing the most basic needs of the population after 11 years in power.

IV. Legacy of the Special Court for Sierra Leone

A recent UN policy tool defines legacy as “a hybrid court's lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity. The aim is for this impact to continue even after the work of the hybrid tribunal is complete.”¹¹⁴ In spite of the fact that legacy was never specifically part of the Special Court's mandate, many had high hopes that as the first in-country court, the SCSL would be able to maximize its impact in Sierra Leone.¹¹⁵

It is fully accepted that a hybrid court cannot by itself rebuild a legal system, but it can still act as a catalyst to impact certain areas, including demonstrating the value of trials for the rule of law through outreach and other strategies (the “demonstration effect”). While the Special Court sits outside the Sierra Leonean legal system and cannot impact directly on national laws through the application of precedent, it still was expected to enhance the domestic legal system by virtue of its presence, both in exporting best practices, building the capacity of nationals, and giving impetus to a legal reform agenda. The UN Security Council expressed its appreciation for what it called the Special Court's “vital contribution to the establishment of the rule of law in Sierra Leone and the subregion” in its 2006 resolution.¹¹⁶ The Special Court itself has contributed to raising expectations for legacy in highlighting this area as a priority, including in a series of regional events culminating in a large victim commemoration conference in March 2005.¹¹⁷ As the Special Court nears the end of its work, it is timely to revisit these criteria. In this analysis it is important to consider (1) whether the Special Court maximized its potential and (2) whether expectations in this regard are realistic or should be adjusted.

A. “Demonstration Effect”: How to Evaluate Outreach Efforts?

From the early days of the Special Court's operations, there was a clear sense of priority for court officials to raise awareness, explain, and get support for their work. This was at least in part due to the court's location in the country where the crimes occurred. Established in 2002, the outreach program was expected not only to educate the public about the existence and

¹¹⁴ Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States, Maximizing the legacy of hybrid courts*, (2008), 4-5.

¹¹⁵ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915, Oct. 4, 2000. As early as 2002 ICTJ engaged in discussions on legacy issues with the Special Court. See ICTJ, “The Legacy of the Special Court for Sierra Leone,” Draft Discussion Paper, Sept. 29, 2003.

¹¹⁶ Security Council Resolution 1688 (2006).

¹¹⁷ ICTJ supported the regional consultations and participated in the national event.

operation of the court, but also to explain efforts to rebuild the national judiciary and promote the value of building the rule of law, the absence of which was an underlying cause of the war. Early outreach efforts were central in helping the prosecutor interact with Sierra Leonean communities and to ease the way for investigators to begin work. Despite the crucial nature of the outreach program to the core functions of the court, it rarely got priority in terms of funding,¹¹⁸ and a management committee decision forced the court to look for separate funding for the program.¹¹⁹ In light of this, evaluating the court's outreach efforts must take account both of the individual efforts made and of the institutional commitment to outreach overall.

The outreach efforts and actions the SCSL has taken have been viewed abroad as a major success of the Sierra Leone experience. In the field of international justice it is widely considered a model and the best practice to date. Clearly, from the court's very early days, senior officials at the SCSL, in particular the registrar and the prosecutor, gave unusual attention to reach out to the population and organize sustained, creative efforts to inform people about the court and its functions. Top officials from the OTP and the registry attended town meetings throughout the country in 2002 and continued over the years with Defense Office officials beginning to participate in early 2003. A nationwide outreach program with local meetings and screenings was set up as early as 2003 and was sustained throughout the existence of the court. With a budget five or six times smaller than the sister courts of ICTR and ICTY, the SCSL can certainly boast a much better record in this respect.

The Special Court's efforts on outreach have continued throughout its lifespan. A priority of the outreach program has been to reach the remote areas of Sierra Leone in a context where there is very little access to electricity and low literacy rate. According to the SCSL, the outreach unit's 17 officers conduct 272 outreach programs per month in Sierra Leone (four a week in the provinces and four in Freetown). Sixteen outreach events are scheduled each month in Liberia. The press and public affairs section continue to produce short video segments on trials, which are important tools for outreach activities among illiterate populations where other forms of mass media are limited. These provide a much-needed glimpse into relevant portions of the witness testimonies and some of the courtroom dynamics. Unfortunately there is often a time lag of many weeks or months between the production of the summaries and the proceedings they feature. Nonetheless, the outreach section organizes weekly screenings. A variety of local NGOs meet with SCSL senior staff once a month in the Special Court Interactive Forum. There is no question that the outreach effort has been ambitious, sustained, creative, and coherent.

A more difficult question relates to its results and evaluation. In March 2007, the SCSL itself published a "nation-wide survey report on public perceptions of the SCSL" that affirmed that "79% of whole country, inclusive [sic] of male and female indicated that they understood the

¹¹⁸ Perriello and Wierda, *supra*, note 1, 35; see also Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone: Accomplishments, Shortcomings and Needed Support*, (2004), 34.

¹¹⁹ One of the primary extra-budgetary donors has been the European Commission. In 2008, the outreach budget is 538,000 euros (about \$750,000), including 200,000 euros (\$280,000) for trips to The Hague. In 2006, the program's budget was 480,000 euros (\$672,000), and in 2007, 400,000 euros (\$560,000). "I think that outreach is a court operation and that it has to be in the budget," said SCSL Registrar Herman von Hebel. "It makes a clear difference. I believe there is a better understanding, because of the experience here, of the need for such activities. But it takes quite a bit of initiative." Interview with ICTJ, Freetown, April 16, 2008.

role of the court,” that “91% of the general respondents indicated that they strongly agreed that the Special Court has contributed to building peace after extreme violence,” and “that 88% also affirmed that the Outreach was doing a good job.” However, the survey was closely associated with the court itself, which may cast some doubts on the evaluation’s independence. An August 2008 survey by the BBC World Service Trust, ICTJ, and Search for Common Ground as part of a project known as “Communicating Justice” found that 98 percent of men and 94 percent of women had heard of the Special Court. Of those, only a much smaller number (7 percent) said they knew “a lot” about the Special Court (among university graduates, this figure was a slightly higher at 11 percent). Asked whether they felt the SCSL had been successful in communicating its work to the people of Sierra Leone, 60 percent stated that it been either very or quite successful.¹²⁰

However, random interviews in Sierra Leone, including among well-educated elites in Freetown, revealed gaps in basic knowledge on the court’s activities and its main decisions.¹²¹ The question here is what results a court can achieve in informing the population and educating on the rule of law, even when setting up a competent outreach network. Outreach is particularly difficult to evaluate and may not necessarily take into account to what extent such trials are of interest to whom, for how long, and depending on what factors. Not everyone is interested in war crimes trials. It remains unclear what part of the population should be a reasonable target for an outreach program, and what credible, useful evaluation system could be created to make outreach efforts better focused. The SCSL experience may contribute to an understanding of this. The long-term impact of the Special Court’s work on the perception of the population of the rule of law remains to be seen.

The SCSL’s outreach unit was also laden with many tasks in addition to outreach. While most organs of the court focused out of necessity on the primary task of conducting trials, a large share of the other aspects of its legacy and impact on the domestic realm fell to the outreach section. In spite of this, outreach received comparatively little money or support. If the program had been properly supported and coordinated with more comprehensive efforts to have an impact on the domestic legal and academic systems, as well as civil society, outreach could have accomplished even more for the SCSL. In reality, the program often ended up being the only public face of the court for many Sierra Leoneans.

B. The Special Court: A Shared Responsibility?

As a hybrid model, the Special Court for Sierra Leone was designed to be an institution in which internationals and nationals would share responsibility for the work.¹²² In a country as poor as Sierra Leone, with few well-trained professionals, and a population living in abject

¹²⁰ BBC World Service Trust, ICTJ, and Search for Common Ground, *Peace, Justice and Reconciliation in Sierra Leone: A Survey of Knowledge and Attitudes Towards Transitional Institutions in Post-Conflict Sierra Leone*, August 2008.

¹²¹ In March 2008, only five months after the CDF sentencing judgment—clearly the most important and sensitive case for Sierra Leoneans—the author asked a number of mostly well-educated people in Freetown about the sentences and the reasoning behind them. Hardly anyone could respond accurately.

¹²² Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000//915, Oct. 4, 2000.

poverty due to bad governance and war, the SCSL was expected to help build the profile and esteem of the national judiciary that had been largely disempowered.

The overall progress on legacy remains limited, despite the creation of a post of legacy officer and various legacy projects such as creating links with academic institutions like Fourah Bay College.¹²³ In the last two years, the court has increased its efforts to provide specific capacity-building programs, with an emphasis on practical skills that court employees as well as staff from other institutions could use in the future. These efforts are commendable, and they should continue. However, legacy should ideally go beyond isolated training on practical skills.

What factors have limited its impact? One is insufficient integration of senior Sierra Leoneans into the court itself. The most visible aspect of the hybrid model was the fact that, while the prosecutor was to be international, his deputy would be Sierra Leonean.¹²⁴ However, this provision was amended to allow the appointment of an international deputy prosecutor. The Sierra Leonean government appointed a third of the judges;¹²⁵ yet has often chosen to fill these positions with foreigners; only one of the first two national nominations to the Appeals Chamber was a Sierra Leonean.¹²⁶ The second Trial Chamber, established in 2004, did not have a Sierra Leonean judge at all. So until Justice King became the court's president according to the rotating presidency, none of the top judicial officials of the SCSL were Sierra Leonean. Instead, the face of the Special Court was international. While 60 percent of the Special Court's staff members are Sierra Leonean, most nationals remain in junior positions or particular functions where language skills are an asset, such as in dealing with witnesses or detainees. Until recently very few Sierra Leoneans held positions of high responsibility (either judicial or administrative). The model that the SCSL presents is that of an international tribunal incorporating nationals.

A number of factors explain the lack of deeper institutional involvement of Sierra Leoneans in the process. The government did not push for nationals to play a significant role in the court. The government's argument that it could not find qualified Sierra Leoneans to fill the positions was not always tenable. Some attribute the government's eagerness to assign internationals as a way to keep local power brokers from accessing sensitive political information that the Special Court would handle. Since the country was emerging from war, drawing from an already overburdened domestic court to fill key positions at SCSL would have deprived the national court system even more of its experienced personnel.

As a result of the government's stance, particularly on the issue of the deputy prosecutor, Sierra Leonean lawyers with reservations about the establishment of the Special Court were alienated further and became openly opposed to the court, according to a former Sierra Leonean member of the Office of the Prosecutor. He said that members of the legal community who could have helped bridge the gap between the local legal profession and the SCSL became hostile to the court or considered it irrelevant. "Whichever benefits were expected to accrue to the judiciary simply did not materialise," he wrote. "In sum, the benefits to the domestic legal

¹²³ Interview with Memunatu Pratt, legacy officer at the SCSL, Oct. 30, 2008.

¹²⁴ Special Court Agreement, Art. 3.

¹²⁵ Special Court Agreement, Art. 2.

¹²⁶ Perriello and Wierda, *supra* note 1.

system which ought to have been gained by the tribunal's being a hybrid have not been achieved."¹²⁷

Deputy Registrar Binta Mansaray, one of the few senior Sierra Leonean court officials, has said:

At the beginning, there was a deliberate effort to keep away from the national judiciary, for political reasons, in order to remain independent from it. There was a time when the national judiciary felt alienated from the process. That was a time when the court should have made contact.¹²⁸

By contrast, nationals at the War Crimes Chamber in Bosnia and Herzegovina asserted their right to play a leading role.¹²⁹ In Cambodia, the government has ensured that nationals remained central to the process, although that process faces challenges of its own, including allegations of corruption within the national staff. In Sierra Leone, it seems that delegating the court's work to internationals suited the government's interests.

The SCSL also shows the need for internationals to push for nationals to take charge. More effort could have been put into looking for Sierra Leoneans (including in the diaspora) able to assume key positions, or promoting Sierra Leoneans to senior positions more quickly. Mansaray, former head of the outreach section and the only Sierra Leonean to head a section back in 2003, was the only national to be promoted to a key decision-making position when she became deputy registrar in August 2007. Two other nationals became heads of section in the recent past.¹³⁰ At the Office of the Prosecutor or among support staff at chambers, almost no Sierra Leonean reached a senior position until the trials were at a very advanced stage in Freetown.¹³¹ Joseph F. Kamara became deputy prosecutor in August 2008; prior to this, the highest ranking Sierra Leonean at the OTP in Freetown was a senior trial attorney.

The OTP has also generally filled top investigator positions with international staff. However, some of the investigators, while experienced in their national systems, are loaned by their home governments often on a short-term basis and are not always well prepared. Sierra Leonean investigators have better local knowledge and are available to work long-term, yet they do not fill senior posts.¹³² Apart from paid interns under a European Commission-backed program, no Sierra Leoneans are part of the Trial Chambers' legal support staff.¹³³ This has diminished the potential of former Special Court employees to have impact on the national judiciary. As Cassese's report notes, the promotion and training of Sierra Leonean staff is vital

¹²⁷ Abdul Tejan-Cole, "Peace versus Justice? The Dilemmas of Transitional Justice in Africa," paper prepared for the Center for Conflict Resolution in South Africa for publication in 2009.

¹²⁸ Interview with Binta Mansaray, Freetown, April 21, 2008.

¹²⁹ Bogdan Ivanisevic, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, ICTJ, 2008.

¹³⁰ The head of the information technology and court management sections are Sierra Leoneans from the diaspora.

¹³¹ In August 2008, Kamara was named deputy prosecutor when the last trial held in Freetown had already ended.

¹³² E-mail from member of Office of the Prosecutor to ICTJ.

¹³³ The situation seems better at the Appeals Chamber, where there are at least two Sierra Leoneans.

not only to the current functioning of the court, but also to the possibility of future trials before Sierra Leonean courts.¹³⁴

International staff members have said there are too few trained lawyers at the national level who are able to do the work according to international standards. There is no doubt that the national judiciary in Sierra Leone has been in a state of decay for some three decades. However, when it came to composing defense teams, a significant number of Sierra Leonean lawyers were chosen as lead counsel. These lawyers were deemed able to defend the rights of the accused, prepare complex legal cases, and help provide a fair trial.¹³⁵ On occasion, however, there has been tension between national and international members of the defense teams. Despite an informal requirement that each team include national and international lawyers, in practice some teams are completely national and others completely international.

As mentioned, a particularly striking example of the failure to share responsibilities is in the trial of Charles Taylor. The Trial Chamber (three judges plus a substitute judge) is exclusively composed of internationals, as is the legal support staff. Of the prosecution team's seven-member team, only one is Sierra Leonean. None of the four defense lawyers are Sierra Leonean (or Liberian). Despite Cassese's calls to the contrary, the SCSL's Trial Chamber in The Hague is de facto fully international.¹³⁶ All of this attests to a missed opportunity for the court. As stated by Abdul Tejan-Cole, formerly a member of the OTP:

The Court was expected to be an instrument for transforming the local judiciary. . . . Sadly . . . the impact of the court on the local judiciary has been minimal. . . . The SCSL was created as a separate and distinct entity from the local judiciary and it always maintained its distance.¹³⁷

C. A Case Study of Sierra Leone Police Officers at the SCSL

The recruitment and experience of members of the Sierra Leone Police (SLP) who were hired as investigators for the Office of the Prosecutor has been heralded as one of the most important, successful legacies of the Special Court in reinforcing national institutions. Indeed, the Special Court has made a significant effort to incorporate SLP members, to elaborate their skill sets, and to deliver trainings to the SLP more generally. However, a more thorough examination shows a much more complex picture in terms of the difficulties faced in trying to create connections between an international and domestic institution. The project suffered from insufficient planning on legacy issues and also unrealistic expectations of what could be achieved.

A dozen members of the SLP joined the OTP investigation teams over the years, including one woman. Four of them were recruited at a very early stage, in the summer of 2002. Two of these were the most senior SLP officers ever hired. They stayed a year and a half. One is now

¹³⁴ Cassese Report, para. 12.

¹³⁵ At the trial stage, there were at least three lead counsels and eight co-counsels from Sierra Leone.

¹³⁶ Cassese Report, 70.

¹³⁷ Abdul Tejan-Cole, "Peace versus Justice? The Dilemmas of Transitional Justice in Africa," supra 117.

assistant inspector general of the police; another is a commander with the Economic Community of West African States in Nigeria. The two others have remained at the SCSL. They have thus provided the OTP with continuity and spared it the turnover that often undermines international tribunals.¹³⁸ Their contribution to OTP's work is widely acknowledged.¹³⁹ "We would not have been able to do the work without these men," said a senior member of the OTP. "They have the knowledge of the conflict; they know it by heart. They have the knowledge of the territory; they know what door to knock at. They have the right physical appearance, the culture, and the language."¹⁴⁰

In addition to hiring these investigators, between 2005 and 2006 around 100 SLP officers of all ranks were given two-week training classes on topics including "major case management" or source and witness management and protection. In 2009, additional instructions on fundamental investigation techniques were given to other institutions such as the Anti-Corruption Commission, Human Rights Commission, Prison Services, and representatives from NGOs.

It is clear that the national investigators themselves learned important principles and practices at the SCSL. For instance, the principle of disclosure of evidence and its impact on guaranteeing a fair trial was cited as a new development by all those interviewed, investigators as well as lawyers.¹⁴¹ "In domestic investigations, we concentrate entirely on prosecution witnesses. We do not encourage people who try to give evidence contrary to what we want for prosecution," one investigator explained. "Even if exculpatory evidence comes out, we normally don't encourage that. This is the one thing I have learned here: exculpatory evidence and disclosure."¹⁴² In fact, in Sierra Leone, evidence and witness statements are not usually disclosed to the defense prior to trial.

In spite of this exposure, it is doubtful how much the experiences of the Sierra Leonean investigators can directly impact national institutions. Investigators who have returned to the police force have had trouble using the knowledge they gained at the court. Tamba Pujeh

¹³⁸ It is worth noting that the international chief of investigations has also been at the SCSL since the beginning of operations, first as deputy then as head of the section.

¹³⁹ Questions about internal promotion were raised regarding local investigators. The highest ranking SLP member at the OTP is a P3. He is one of the two first policemen hired in 2002.

¹⁴⁰ Interview with ICTJ, Freetown, Feb. 17, 2008.

¹⁴¹ Justice Alusine Sesay, 39, is the youngest High Court justice in the nation's history. In 2003, as secretary general of the Sierra Leone Bar Association, he said that the SCSL was a waste of resources and worked against national reconciliation. In 2004 he joined Norman's defense team. "What changed my perception was the evidence that I started to hear of what had actually happened," he said. "This should not have been left to lie. There was a need for a court." Among the things he said he learned during his three years working at the SCSL was the principle of disclosure of evidence. As a judge today he applies the principle, although it is not in the law: "There was a land dispute between two people," he recalled. "I gave directions that each party should serve the other with the documents they had and should tell me how many witnesses they have. I gave them two weeks to comply. They did. And they appreciated it a lot. I advised them to file in writing. In one month we closed the case instead of one year usually." Sesay has concretely benefited from the SCSL experience. (A High Court judge is also a very comfortable position by national standards. The salary is around \$4,000 USD a month in a country where much of the population lives on less than \$1 a day.) But he says he has seen Sierra Leonean lawyers he knew from the SCSL trial plead before him now without using the good practices they learned through international exposure.

¹⁴² Interview with SLP staff at SCSL, Freetown, March 10, 2008.

Gbekie was the director of the Criminal Investigations Department (CID) and had 22 years of experience as a policeman when he joined the OTP as an investigator between August 2002 and December 2003.¹⁴³ He was one of the two most senior SLP officers the court hired, and he returned to the SLP as assistant inspector general. When asked what lessons he learned from the Special Court, Gbekie referred to interview techniques (their structure and focus), witness management in order to build confidence and get access to information, disclosure of evidence, and attention to exculpatory information. Yet the police have not implemented reforms in these areas. “Because of the small number of police officers who will have benefited from the SCSL, they will not be able to create the impact,” he explained. “It will create problems with their immediate superiors.”

In addition, several factors have conspired to undermine the court’s ability to ensure that the Sierra Leonean investigators it hires are well placed to make as substantial a contribution to the court’s legacy as initially envisioned. One of the SLP investigators was hired by the ICTY in The Hague. Another departed for Norway after two years with the SCSL. Another was granted three years of leave to study in the United Kingdom after four years with the OTP. As of April 2008, seven Sierra Leonean SLP members are still working at the SCSL. Based on interviews with several of them, they all expressed a desire to follow in the footsteps of their colleagues if they had a chance to obtain work overseas.¹⁴⁴ The idea that Sierra Leonean investigators would bring back their experience to the national police is at this stage more of a hope than a guarantee. While this phenomenon is hardly new and cannot fairly be laid at the court’s feet, it does illustrate some of the real difficulties in terms of implementing legacy.

Senior members of the OTP also say that the court’s witness protection program could be left to a special team of Sierra Leonean police trained at the SCSL. It is unclear whether this will actually happen and when it will be put in place. In any case, this section would need to be supported financially to operate effectively, and a mechanism would probably still need to be put in place to allow international involvement in protecting witnesses if it becomes necessary due to changing circumstances in Sierra Leone or due to the difficulty of Sierra Leonean officials working with protected witnesses in Liberia.

This case study on an area in which the Special Court did take a lot of initiative shows that expectations of legacy and impact must be realistic. Transformation of domestic institutions by external actors is unlikely in the best of scenarios. Additionally, even a few well-trained individuals cannot make a difference. Real impact in terms of legacy requires long-term planning and a sustained effort over and beyond the court’s lifespan.

D. Impact on Domestic Legal Capacity

Other interviews with Sierra Leonean staff members who have worked at professional levels in the SCSL indicate that lessons and techniques learned in the international setting cannot

¹⁴³ Among the reasons he left the OTP, Gbeki pointed to the difficulty he had to become a statement taker and analyst after he’d been the head of the CID. One of his colleagues had the same problem; he also was recruited and left at the same time.

¹⁴⁴ Interviews with four SLP members who work or have worked as SCSL staff, ICTJ, Freetown, March 7, 10, April 2, 3, 2008.

necessarily be put to use when these staff members return to the national system.¹⁴⁵ The isolation of these people, systemic inertia, and the potential resentment toward those who benefited from the experience (and pay) at the SCSL are among the factors that inhibit their ability.¹⁴⁶ For instance, Yada Williams, lead counsel in the Kondewa case before the Appeals Chamber, recognized that the rules at the SCSL are “far more advanced than at the national level.” He has lobbied the attorney general (also a former member of a defense team at the SCSL) and other Sierra Leonean lawyers to create a national law of principles such as disclosure of evidence and witness protection. But when asked about the impact of the SCSL, he said:

It’s sad. It was the initial idea but . . . nothing. There was a lot of arrogance at the beginning. Until recently lots of lawyers didn’t know anything about what was going on there. It is beginning to change because of recent moves by the court. But I don’t think it has impacted the Sierra Leone national system at all.¹⁴⁷

There is a high degree of separation between the SCSL and national legal institutions. Out of the 50 clerks working at the High Court and magistrate courts, none have worked with the SCSL. “The two institutions worked separately. Most SCSL court staff came from overseas. Very little local recruitment was made,” said the deputy registrar of the High Court.¹⁴⁸

In the last year, the SCSL has organized a number of seminars for the police and for the legal profession. Court officials describe a range of projects and initiatives that are part of the legacy program that aim to help national institutions. “We are now working very closely with the national judiciary and the Anti-Corruption Commission. All these issues will be addressed,” said the deputy registrar in a meeting with NGOs.¹⁴⁹ However useful these plans and moves may be, they come strikingly late and appear to be an afterthought rather than a carefully planned policy and priority. “I think the hybrid concept is excellent. But you don’t start legacy when you are about to end. It has to be from the start,” said Abdul Tejan-Cole, a former member of the OTP who now heads the Anti-Corruption Commission.¹⁵⁰

¹⁴⁵ Interview with a former court management support officer at the SCSL and current registrar at the Appeals Court in Freetown, March 3, 2008.

¹⁴⁶ One SLP recruit said that he was paid 30,000 Leones (\$10.20 at the exchange rate of Le 2,950 to \$1 USD) per month (plus housing and transport) when working at the SLP. His pay rose to 3.5 million Leones a month when he was recruited by the SCSL—almost 116 times more than his previous salary. It was reduced to 2.2 million later on and eventually back up a bit to 2.5 million. Another one said he would earn 350,000 Leones if he returned to the police, a substantial drop from the 3 million he earns at the SCSL. Conversely, all SLP staff hired by the SCSL say they resent the fact that they haven’t been promoted in the ranks of the SLP while working for the SCSL. “They are not valuing us. If I can leave, I’ll leave,” said one who has been at the SCSL since the investigations began. Interview with ICTJ, Freetown, April 2, 2008. The SLP staff believes it is up to the SCSL, as a supervisor, to make appraisals to the inspector general. This again illustrates the disconnect between the two institutions.

¹⁴⁷ Interview with Yada Williams, Freetown, March 4, 2008.

¹⁴⁸ Interview with Dauda H. Yoki, ICTJ, Freetown, March 6, 2008. The deputy registrar said he didn’t know how to apply for jobs at the SCSL. He also said he had the first two “legacy” meetings with SCSL staff in early 2008, which did not include “specific plans.”

¹⁴⁹ Binta Mansaray, meeting with civil society, Freetown, Feb. 22, 2008.

¹⁵⁰ Interview with ICTJ, Freetown, April 22, 2008.

The impact of the SCSL model on the national judiciary has been minimal. As Antonio Cassese wrote in 2006:

At this stage, I do not think that it is realistic to expect that the Court's legacy will directly: (a) ensure greater respect for the rule of law in Sierra Leone; (b) promote or inspire substantive law reforms; (c) improve the conditions of service and remuneration of judges in Sierra Leone; or (d) alleviate corruption allegedly existing in the judiciary. The Court may contribute to these goals, but they will only materialise as an indirect effect, in the long run, and thanks to other concomitant factors.¹⁵¹

While ideally a court's legacy strategy should be laid out at the beginning of the court's existence, that is precisely when the court staff is under the most severe pressure to make sure that the core mandate of the court is fulfilled. The focus in the first two years was to ensure that cases were brought to trial. Donors tend to be less than enthusiastic about what is perceived as a "side project" because they fear the court will become a development agency rather than a small, symbolic enterprise in criminal justice. This was an issue for the SCSL, which was funded by voluntary contributions and constantly had to chase sufficient funds to meet its budget.

In terms of impact of the Special Court's judgments, six years after the creation of the SCSL, Sierra Leone has not domesticated international humanitarian law. Justice Thompson said: "We may be assessing [this] too early. I have a feeling that if the reform contemplated became operational, then 70 percent of the judicial procedure and principles applicable at the SCSL will be transferred to the national system. It will take time."¹⁵² Some of the defense lawyers formed a new NGO, the Legal Reform Initiative, which worked on law reform in the areas of gender and the implementation of the Rome Statute of the ICC.¹⁵³ While originally the project envisaged it would form links with the Special Court, these did not materialize much beyond some staff members being given some leeway to participate in such initiatives.

This picture of the situation in Sierra Leone may exist in part because legacy was not formally included in the tribunal's mandate. The appointment of a legacy officer at the SCSL has come relatively late in its lifespan. A more structured approach to training for both international and national judges, lawyers, and other staff should involve the creation of a central focal point from the outset to coordinate efforts and promote continuity and legacy.¹⁵⁴ Improvements to the Special Court's relationship with the domestic legal sector should have been addressed early in the court's tenure. Without a demonstrable impact on the national legal capacity and national laws, a major rationale for conducting trials in-country is undermined. On the other hand, there may also be a need to define more clearly what is realistic to achieve through the model that was chosen in Sierra Leone.

¹⁵¹ Cassese Report, para. 279.

¹⁵² Interview with ICTJ, April 16, 2008.

¹⁵³ Perriello and Wierda, *supra* note 1, 39.

¹⁵⁴ Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States*, "Maximizing the legacy of hybrid courts," (2008), 28-34.

VI. Completing the Court's Work

According to current planning under the completion strategy, the last trial before the SCSL should be completed in 2009, and the Appeals Judgment by mid-2010 at the latest. The SCSL will be the first of the ad hoc war crimes tribunals to close its doors. What happens to international tribunals once they have completed their trials has been the subject of a growing number of commissions, reports, and conferences.¹⁵⁵ The work of a court does not end with the appeals judgment. Ongoing matters are usually referred to as “residual functions.” These include continuing witness protection, supervision and review of sentences, entertaining the possible review of cases in light of new evidence, maintaining the archives, and other such issues. These functions are expected for all the ad hoc tribunals, including the SCSL, ICTY, ICTR, ECCC, and the Special Tribunal for Lebanon.

The challenge residual issues pose can be overwhelming as well as difficult to predict. Residual functions were not contemplated in any detail when the ad hoc tribunals were first created. As one of the members of the SCSL Management Committee said, “We have been successful in establishing tribunals. We must be as successful in ending [them].”¹⁵⁶ The SCSL is likely to bring the first concrete lessons on this new stage in the development of international criminal justice.

The ICTY and ICTR, both subsidiary organs of the UN Security Council, have started to work on options for a “post-closure” mechanism or mechanisms. Contacts exist between the two international ad hoc tribunals and the SCSL. Yet, the SCSL plans to close down before its sister courts in The Hague and in Arusha, Tanzania. To some extent, the SCSL is left on its own to strategize and operate its residual functions because it rests upon a different legal basis. To this end, after the Special Court held a major conference on the issue in Freetown in early 2008, the SCSL hired an expert consultant to prepare a report on the options available to deal with residual functions. The consultant’s findings, contained in a lengthy report presented in January 2009, generally align with those of donors and other stakeholders such as the court’s staff and the Sierra Leone government; the consultant suggested that the Special Court be integrated into a larger joint mechanism for ad hoc tribunals because it will be harder to secure funding from voluntary contributions as years go by. “It is in the interest of the SCSL to quickly get attached to the two ad hoc tribunals because there is a risk of competition for funds, and the ad hoc tribunals are better equipped for this,” says a member of the commission charged with proposing strategies for the archives of the ICTR/Y.¹⁵⁷

While urging that work begin immediately on negotiating such a joint undertaking, the consultant’s report acknowledges that the legal, practical, and political challenges this poses

¹⁵⁵ In February 2007 the ICTJ and the University of Western Ontario held a meeting in New York on “Planning for Residual Issues for International and Hybrid Tribunals” for senior tribunal officials and interested diplomats. A conference devoted to the specific residual issues facing the SCSL was held in Freetown in February 2008. See also Gabriël Oosthuizen and Robert Schaeffer, “Complete Justice: Residual Functions and Potential Residual Mechanisms of the ICTY, ICTR and SCSL,” *Hague Justice Journal*, Vol. 3, No. 1 (2008), and Cecile Aptel, *Briefing Paper: Planning for Residual Issues and Mechanisms for International and Hybrid Criminal Tribunals*, ICTJ and University of Western Ontario, 2007.

¹⁵⁶ Conference on residual functions, Freetown, Feb. 20, 2008.

¹⁵⁷ Interview with ICTJ, Feb. 25, 2008.

make it necessary to begin work on a stand-alone residual SCSL to deal with residual functions.¹⁵⁸

Tension has already developed between the need to secure adequate staff and funding for exercising residual functions, many of which implicate fundamental human rights, and the need not to have a chilling effect on donors' willingness to establish such mechanisms in the future. "A very light-weight mechanism is what we need to show," said one of the members of the SCSL Management Committee.¹⁵⁹ Acknowledging this tension, the consultant's report also urges renegotiating the court's funding mechanisms and moving away from voluntary contributions, which could seriously undermine the ability of the residual SCSL to function.¹⁶⁰

The report suggests different options for the "post-closure" court mechanism, ranging from a self-contained mechanism based wholly in Freetown, to one whose administrative functions can be shared with another international tribunal and some of whose functions (archive maintenance, detention, or witness protection) could be delegated to other national or international authorities.¹⁶¹ According to the new president of Sierra Leone, Ernest Bai Koroma:

Legacy and residual issues are priorities . . . My government will prefer that arrangements are put in place to guarantee and ensure the funding of residual mechanisms. We will consider positively an arrangement whereby national and/or international body will work in conjunction with my government to address legacy and residual issues such as ensuring funding for residual mechanisms for the maintenance of the court site.¹⁶²

In addition to administrative staff, the consultant advocated for creating a core staff that could include a head of office/registrar, a prosecution legal/evidence officer, a witness protection officer, a witness supporting officer, and an information/archiving officer.¹⁶³ It is unclear how the hybrid dimension of the SCSL would be maintained in such a post-closure body, but hopefully maintaining this component will be a priority. If a national witness protection unit is established, for instance, the report acknowledges that an officer of the court would need to retain certain key functions for some time.¹⁶⁴

Another key residual function that should be continued is outreach. As the consultant's report acknowledges, "It is critical that the public are aware that not all SCSL activities will end. During the completion phase, it is vital that witnesses and victims (and those who may be in a position to threaten them in the future) are informed that there will be a system in place post

¹⁵⁸ Fidelma Donlon, *Report on the Residual Functions and Residual Institution Options of the Special Court for Sierra Leone*, Dec. 16, 2008, 54 (hereinafter Residual Issues Report).

¹⁵⁹ Conference on residual functions, Freetown, Feb. 21, 2008.

¹⁶⁰ Residual Issues Report, 54.

¹⁶¹ Residual Issues Report, 44.

¹⁶² Statement made at the conference on residual functions, Freetown, Feb. 20, 2008.

¹⁶³ Residual Issues Report, 42.

¹⁶⁴ Residual Issues Report, 3.

2010 to respond threats.”¹⁶⁵ The SCSL’s own best practices for witness protection stress that a steady supply of information on how to contact witness protection support staff and how to get clear information on what assistance that program provides is essential to effectively helping witnesses and victims.¹⁶⁶ The outreach section could give such information to any potential witnesses in future residual proceedings who are not yet involved with the Witness and Victims Section, as well as keep the Sierra Leonean public informed of and involved in decisions regarding the court’s ongoing functions.

A. What to Do with the Site?

The government of Sierra Leone cannot maintain the site of the SCSL in its current state. The cost of doing so is \$1,066,300 per year.¹⁶⁷ The government is incapable of covering such costs.

One of the difficulties with the court building is that it was built with little regard to the country’s ability to take care of it once the court closed. Nor was it built for the specific needs of the national judiciary.¹⁶⁸ As one Sierra Leonean lawyer said, “What the national system needs is 10 small courtrooms rather than two big ones.”¹⁶⁹ Throughout the court’s history, many options have come up. Justice Benjamin Itoe, who presided over a legacy committee at the court, said, “We recommend that it becomes the Kofi Annan Peace and Law Center. . . We’re looking at a branch of the ICC. We thought that this is very ideal.”¹⁷⁰ It is not clear whether these ideas are viable. Until April 2008, according to the registrar, the committee was contemplating “a multi-purpose site.”¹⁷¹

The SCSL commissioned a former U.S. ambassador to Sierra Leone to make proposals for the future use of the site. The court’s final report on these proposals puts forth a number of options, including a training and education facility, an archive/memorial, a judicial function, a detention facility, an office park for civil society groups, or a combination of these.¹⁷² However, the report acknowledges that any of these solutions would require financial contributions from external actors that may prove impossible to secure.¹⁷³

¹⁶⁵ Residual Issues Report, 52.

¹⁶⁶ SCSL, *Best Practice Recommendations for the Protection and Support of Witnesses, An Evaluation of the Witness and Victims Section* (2008).

¹⁶⁷ SCSL, *Site Project Report*, 2008 (hereinafter Site Project Report), 6. The report was based on research conducted by Joseph Melrose, former U.S. ambassador to Sierra Leone.

¹⁶⁸ For instance, the glass wall between the courtroom and the public gallery would be “incredibly difficult” to remove, according to the registry. It is too heavy and probably part of the structure itself.

¹⁶⁹ Interview with Yada Williams, Freetown, March 4, 2008.

¹⁷⁰ Conference on residual functions, Freetown, Feb. 21, 2008.

¹⁷¹ Interview with Herman von Hebel, Freetown, April 16, 2008.

¹⁷² Site Project Report, 8.

¹⁷³ Site Project Report, 19.

B. What to Do with the Archives?

The Special Court archives will be an important resource for future students, scholars, and others seeking to examine Sierra Leone's conflict. At the same time, the archives may retain a significant function when new evidence comes to light, or if cases are brought in the future. Careful regulation of access to the archives will be important to ensure appropriate confidentiality is preserved in relation to protected witnesses and to ensure the rights of detainees or future litigants. A solution to the question of what to do with the archives should address all of these sometimes competing priorities comprehensively.

For obvious reasons, custody of the archives appears to be a particularly important and sensitive topic to many Sierra Leoneans. "Ideally we will prefer the original archives to be preserved and kept in Sierra Leone," said President Koroma.¹⁷⁴ This is also an important aspect of the court's role in providing Sierra Leone with a historical record.

Part of the OTP archive may still constitute evidence, and therefore it would be protected and closed to the public. This material should be kept separately and under the responsibility of the OTP. It may not stay in Sierra Leone. The best option might be to organize two sets of archives, one of which would remain in the country.

But concerns remain for the preservation of the national archive. There is currently little indication of who would have custody over it and where it would be kept. One of the most urgent needs under discussion is the digitization and possible duplication of the archives (as of February 2009, 60 percent to 70 percent are said to be digitized).

Moreover, the precedent of the TRC archives is alarming. The TRC archives are kept at the Fourah Bay College, under the legal custody of the Human Rights Commission, but there is no public access to them. They have not been indexed, and no clear steps have been taken toward their preservation. Some think the Special Court's archives could be made public and accessible alongside the TRC archives, guaranteeing that both would be professionally maintained and available to the public. It would certainly be a positive result if the TRC archives, which are also of great importance to the country's history and memory, could benefit from the actions taken in regard to the Special Court archive.

C. What to Do with Convicted People?

As of January 2009, five people convicted are imprisoned in the SCSL's detention facility in Freetown. If the three accused in the RUF trial are convicted, there will be a total of eight prisoners for whom the question remains where they should serve their sentence. (If convicted, Taylor would serve his sentence in the United Kingdom, according to an agreement between that country and the SCSL.)

¹⁷⁴ Conference on residual functions, Freetown, Feb. 20, 2008.

Despite the fact that prisoners serving sentences in the relative comfort of prisons abroad may cause some discontent, the overwhelming view among Sierra Leoneans and at the SCSL is that all who are convicted should be transferred to another country to serve their sentences. Two main arguments support this: first, Sierra Leone does not provide prison facilities that are up to UN standards; second, security and political stability do not provide adequate guarantees against a jailbreak. A third argument is that it may be preferable to have prisoners serve their sentences in countries willing to cover the costs. The government of Sierra Leone has also stated that it is “not in a position and is not willing to take custody of persons convicted.”¹⁷⁵

Random interviews among Sierra Leoneans, including members of the government, indicate wide support for transferring the convicts. Some say they favor this because Sierra Leone has a history of coups and political turmoil, and people usually are freed from prison during such events. Keeping the convicts in the notoriously overcrowded Pademba Road prison in Freetown is too risky. “There will come a time when history will repeat itself. Peace over legacy is my position!” said one of the Sierra Leonean staff at OTP.¹⁷⁶ However, the need to transfer convicts highlights the fact that despite the court’s presence for seven years, it has not served as an incentive to improve national prison standards.

Bearing in mind that current prison sentences for the AFRC convicts go up to 50 years, the SCSL faces an important challenge finding countries ready to assist. So far this has proved very difficult, in part because many European countries have maximum prison terms that are far shorter than these sentences. The court has negotiated enforcement of sentence agreements with Austria and Sweden (and the United Kingdom if Taylor is convicted) that have not been made public, but allegedly include taking only one convict. Other countries, such as the United States, have declined. SCSL officials regularly refer to countries in the region, including Benin, Mali, and Swaziland, that have entered agreements on the enforcement of sentences with the ICTR. However, years after such agreements have been concluded, only Mali has taken any ICTR convicts (15), while Benin and Swaziland never took any.¹⁷⁷ The prospect of such countries accepting further responsibility is therefore very unclear. It would also require the UN, the SCSL, or donor states to foot the bill.¹⁷⁸ It is disappointing to see so few countries meet their international justice obligations in this respect.

There are also difficult issues around prisoners serving their sentences far away from their families and relatives in countries that can be extremely foreign to their culture. It seems that the ICTY has been better at arranging such visits for prisoners serving their sentences in European countries than the ICTR.¹⁷⁹ Africa poses specific challenges in terms of the right to have relatives visit because travel costs are always impossible to cover. The SCSL faces the

¹⁷⁵ Residual Issues Report, 30.

¹⁷⁶ Interview with ICTJ, April 2, 2008.

¹⁷⁷ Nine ICTR convicts were sent to serve their sentences in Mali in December 2008. These transfers took 10 years to materialize after the Mali government signed an agreement with the ICTR.

¹⁷⁸ With European countries, the registrar says that part of the agreement is that they pay for the prisoner.

¹⁷⁹ The ICTY has also systematically granted early release after two-thirds of the sentence was served, whereas the ICTR has applied full enforcement, raising concerns about a lack of consistency between the two UN tribunals (and between European convicts and African convicts).

same problem for its own prisoners. As the report on residual functions acknowledges, detention without access to family visits may violate important human rights.¹⁸⁰

D. What about Johnny-Paul Koroma?

The SCSL has only one fugitive left: Johnny-Paul Koroma, the former head of the AFRC. Koroma's whereabouts have been unknown since January 2003 when he went into hiding after allegedly participating in a raid on an armory in Freetown. His arrest and trial would obviously change the future structure of the court.

Compared with the ICTY and ICTR, the SCSL is facing a rather favorable scenario with only one indictee still at large whom the OTP thinks is probably dead.¹⁸¹ The prosecutor had hoped to make a final decision on the death of Koroma and withdraw the indictment, or submit a reduced, fact-specific indictment that would remain pending beyond the closure of the SCSL. However, recent exhumations based on witness testimony about the location of Koroma's body have been unsuccessful, making it less likely that his death can be confirmed before the end of trials.¹⁸²

If he were captured, the question remains as to who would try him - a national court (Sierra Leonean or otherwise), or a reincarnation of the SCSL?¹⁸³ The first option raises a number of legal problems within Sierra Leone such as the application of the 1999 general amnesty contained in the Lomé peace accord.¹⁸⁴ In any event, it seems unlikely that Sierra Leone would do so, and the second option may also be problematic.¹⁸⁵ The Office of the Prosecutor has also

¹⁸⁰ Residual Issues Report, 32.

¹⁸¹ Two ICTY indictees were arrested in mid-2008, including Radovan Karadzic. The Karadzic arrest immediately and profoundly affected the ICTY's completion strategy. That tribunal could be working for a few more years because of these two trials. In addition, it still has two more fugitives at large, including Ratko Mladic. The ICTR currently has 13 fugitives.

¹⁸² ICTJ telephone interview with OTP staff, Feb. 26, 2009.

¹⁸³ All the disadvantages regarding the relocation of Taylor's trial to The Hague could recur if Koroma's trial was held outside Sierra Leone.

¹⁸⁴ Among other difficulties, the principal defender said in an interview with ICTJ in 2008, international humanitarian law has not been domesticated. The existence of the amnesty may not be fatal, however. According to the Cassese Report, "Contrary to what has been claimed by various commentators, in my opinion Sierra Leonean courts are not barred by Article IX (3) of the Lomé Agreement of 1999 from trying lesser defendants who allegedly committed war crimes and other offences against international humanitarian law (see Annex E). As there is no legislation in Sierra Leone concerning international crimes, courts could try persons accused of offences committed during the war such as treason (a statutory offence), murder (a common law offence), wounding and causing grievous bodily harm (a statutory offence), rape (both a common law and statutory offence), larceny (a statutory crime), kidnapping (a common law crime), malicious damage to property (a statutory offence), or arson. Hence, the Court's Prosecutor should hand over to the Sierra Leonean Director of Public Prosecution copies of all the evidence he may have collected against middle-level defendants or against the so-called notorious criminals who may have committed crimes between March 1991 and December 2000, or at least between 8 July 1999 and December 2000," (paras 284-85). Additionally, the SCSL's Rules of Procedure and Evidence were recently amended to include a Rule 11*bis* similar to those of the ICTY and ICTR that allows a defendant to be transferred to domestic jurisdiction in certain cases. However, use of this provision would still require a judicial determination by SCSL judges.

¹⁸⁵ At a press conference, prosecutor Stephen Rapp said the country should be willing and have the capacity to try Koroma. Freetown, Feb. 22, 2008. According to current estimates, trying Koroma before a scaled-down SCSL in

recently approached several countries in Europe and Africa about the possibility of transfer, but has yet to reach an agreement.¹⁸⁶ In any case, the issue needs a formal resolution.

The complexities of the Special Court's completion strategy also apply to UN ad hoc tribunals and are a sign of some of the difficult decisions to come. It is a shame that in comparison with the other tribunals, the Special Court's needs in terms of completion strategy are at risk of being neglected even though it will be the first tribunal to cross some of these hurdles. The court also needs more than voluntary contributions to sustain its minimal future operations responsibly.

VI. Conclusion

The Special Court for Sierra Leone was designed with a number of advantages over international courts that preceded it, including its in-country presence, the incorporation of national as well as international staff, a reasonably secure environment, and good state cooperation. Many of the fundamentals were in place for it to achieve its key tasks: fair, efficient trials of a select number of people; trials that were publicized and understood by the broader public; and trials that would have an impact that would last beyond the existence of the court itself.

Complex trials of war crimes and crimes against humanity remain an enormously ambitious task in and of themselves. It would be too much to expect that all these tasks could be completed in an optimal manner. Sierra Leone, one of the world's poorest countries, is a difficult environment in which to operate. At the time of writing, the court has successfully rendered three complex judgments in the AFRC, CDF, and RUF trials, and is making good headway in the Taylor trial, a proceeding that is of immense importance to international justice and to affected communities in the region. The outreach program has been very proactive and is a notable success.

In our 2006 report, we argued that "internationally, the Court's credibility hinges on its ability to complete its core mission in a focused and efficient manner."¹⁸⁷ Instead, the judicial process slowed from its inception, and the cost-per-defendant ratio is not a significant improvement on the record of the ad hoc tribunals. However, the court's narrower mandate has helped limit the overall costs.

While the court has managed to avoid many of the massive problems facing the national legal system, the benefits that its presence has yielded for the national legal system have been very few. This missed opportunity is the result in part of insufficiently carrying out a comprehensive strategy from the outset. Legacy does not seem to have ever been a full priority. Sierra Leoneans were not included sufficiently in the work of the court, which continued to rely heavily on internationals. The moving of Taylor's trial to The Hague also diluted the potential benefits of the court's hybrid nature, most notably its impact in West Africa. This is a pity

Freetown would cost around \$20 million (U.S.), while a similar trial in The Hague would cost roughly \$16 million. Residual Issues Report, Annex XI, 85-95.

¹⁸⁶ ICTJ telephone interview with OTP staff, Feb. 26, 2009.

¹⁸⁷ Perriello and Wierda, *supra* note 1, 43.

considering the expense of that trial. The difficulties in adequately broadcasting it regionally were foreseeable, given the context.

Overall, the Special Court for Sierra Leone remains one of the most important attempts to reshape international justice. There are many valuable lessons to be culled from its experience that will be of direct relevance for future efforts that draw upon the Special Court model. More immediately for those it was set up to serve, however, if the Special Court is to achieve more of its potential, it deserves the international community's full political and financial support as it completes its important work and enters the final phases of operation.

Annex I: The AFRC Trial

The Armed Forces Revolutionary Council (AFRC) trial, though harrowing in its details, was fairly straightforward in legal and political terms. The appeal proceedings, however, elaborated on some important legal questions.

The accused, Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu, were senior members of the particularly brutal military junta that seized power from the elected government in a coup d'état on May 25, 1997, and joined forces with the RUF. The West African forces of ECOMOG removed the AFRC from power in February 1998, but the group perpetrated further attacks in the following years, including the infamous attack on Freetown in January 1999. Brima was the overall commander of the AFRC forces, Kamara was deputy commander, and Kanu was chief of staff. The AFRC's leader, Johnny-Paul Koroma, has also been indicted by the court, but is missing and widely presumed to be dead. Brima, Kamara, and Kanu were arrested in 2003 and accused of 14 counts of crimes against humanity, war crimes, and other serious violations of international humanitarian law. Although the men originally were indicted separately, their cases were joined in January 2004.¹⁸⁸

The trial started two years later, on March 7, 2005, before Trial Chamber II.¹⁸⁹ Presentation of evidence lasted 20 months, and the deliberations lasted another six months. The Trial Chamber issued its decision on June 20, 2007. The AFRC trial was the shortest trial before the SCSL. All three men were guilty of some of the most "heinous, brutal, and atrocious crimes ever recorded in human history," the judges said, noting that:

Innocent civilians—babies, children, men and women of all ages—were murdered by being shot, hacked to death, burned alive, beaten to death. Women and young girls were gang raped to death. Some had their genitals mutilated by the insertion of foreign objects. Sons were forced to rape mothers; brothers were forced to rape sisters. Pregnant women were killed by having their stomachs slit open and the foetus removed merely to settle a bet amongst the troops as to the gender of the foetus. Men were disembowelled and their intestines stretched across a road to form a barrier. Human heads were placed on sticks on either side of the road to mark such barriers. Hacking off the limbs of innocent civilians was commonplace.¹⁹⁰

¹⁸⁸ The original indictments of six individuals were joined as two groups of three defendants which became the AFRC and RUF cases: Prosecutor v. Issa Hassan Sesay, Case No. SCSL-2003-05-PT, Alex Tamba Brima, Case No. SCSL-2003-06-PT, Morris Kallon, Case No. SCSL-2003-07-PT, Augustine Gbao, Case No. SCSL-2003-09-PT, Brima Bazzy Kamara, Case No. SCSL-2003-10-PT, and Santigie Borbor Kanu, Case No. SCSL-2003-11-PT, Decision and Order on Prosecution Motions for Joinder, Jan. 27, 2004.

¹⁸⁹ Trial Chamber II is composed of Justices Julia Sebutinde (Uganda), Richard Lussick (Samoa), and Teresa Doherty (Northern Ireland). In the trial of Charles Taylor, it includes an alternate judge, El Hadji Malick Sow (Senegal).

¹⁹⁰ Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu, Case No. SCSL-04-16-T, Sentencing Judgment, July 19, 2007, (hereinafter AFRC Sentencing Judgment), para. 34.

The men were convicted of six counts of war crimes (terrorism, collective punishment, murder, mutilation, pillage, and outrages upon personal dignity), four counts of crimes against humanity (extermination, murder, rape, and enslavement), and a single count of other serious violations of international humanitarian law (conscripting children). Brima and Kanu were sentenced to 50 years in prison; Kamara received a sentence of 45 years.¹⁹¹

Both the prosecution and defense appealed the judgment. Nonetheless, on Feb. 22, 2008, exactly 10 years after the AFRC was removed from power and embarked on its campaign of mass-scale atrocities, the Appeals Chamber unanimously affirmed the convictions and the sentences.¹⁹²

The Appeals Chamber denied Kanu's appeal for lack of jurisdiction on the basis that he was not one of those who bore "the greatest responsibility" under Article 1(1) of the statute. In dismissing this, the Appeals Chamber clarified that the standard of "those bearing the greatest responsibility" constitutes guidance for the prosecutor in the exercise of his discretion and is not, as previously found by Trial Chamber I in the CDF case,¹⁹³ a jurisdictional requirement to be adjudicated at the time of judgment. The Appeals Chamber flatly rejected the possibility "that after a long and expensive trial the Trial Chamber could conclude that although the commission of serious crimes has been established beyond reasonable doubt against the accused, the indictment ought to be struck out on the ground that it has not been proved that the accused was not [sic] one of those who bore the greatest responsibility."¹⁹⁴ This finding may prove significant for other tribunals whose mandate is limited in similar ways to that of the SCSL.

One notable issue was the Trial Chamber's treatment of charges pertaining to sexual violence and forced marriage. According to the chamber, count seven of the indictment, which charged "sexual slavery or any other form of sexual violence," violated the rule against duplicity since the defendants did not have notice of which crime (sexual slavery or sexual violence) they were being charged with. That count was therefore dismissed.¹⁹⁵ Count eight of the indictment, which charged forced marriage (or the taking of so-called "bush wives")¹⁹⁶ as an "other inhumane act," was also dismissed because as the chamber found no evidence on which to distinguish this crime from the crime of sexual violence. A majority of the Trial Chamber found that "not one of the victims of sexual slavery gave evidence that the mere fact that a rebel had declared her to be his wife had caused her any particular trauma, whether physical or mental. Moreover, in the opinion of the Trial Chamber, had there been such evidence, it would not by itself have amounted to a crime against humanity, since it would not have been of similar gravity" to the other crimes against humanity enumerated in the statute. The Trial

¹⁹¹ AFRC Sentencing Judgment, 36.

¹⁹² The Appeals Chamber was composed of Justices George Gelaga King (Sierra Leone), Emmanuel Ayoola (Nigeria), Renate Winter (Austria), A. Raja N. Fernando (Sri Lanka), and Jon M. Kamanda (Sierra Leone).

¹⁹³ Prosecutor v. Samuel Hinga Norman, Allieu Kondewa, and Moinina Fofana, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana, March 3, 2004.

¹⁹⁴ AFRC Appeals Judgment, para. 283.

¹⁹⁵ Trial Chamber II, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu, Case No. SCSL-04-16-T, Judgment, June 20, 2007, paras. 92-95 (hereinafter AFRC Trial Judgment).

¹⁹⁶ These are women kidnapped and given as "wives" to rebel commanders.

Chamber found that the evidence of forced marriage was completely subsumed by the crime of sexual slavery. However, as count seven had been dismissed for duplicity, the evidence of forced marriage would, “in the interests of justice,” be considered under count nine of the indictment, which charged “outrages upon personal dignity.”¹⁹⁷

The Trial Chamber also declined to consider the allegations of joint criminal enterprise (JCE) as a form of liability because it was defectively described in the indictment. The judges ruled that the prosecution could not plead two forms of JCE—that the crimes were part of the JCE or that they were reasonably foreseeable consequences of it—simultaneously. “If the charged crimes are allegedly within the common purpose,” the judges wrote, “they can logically no longer be a reasonably foreseeable consequence of the same purpose and vice versa.” Consequently, the form of the indictment impaired the defense’s ability to know the material facts of the JCE that was alleged to exist.¹⁹⁸ The chamber further reasoned that the alleged goal of the enterprise (“gaining and exercising political power and control over the territory of Sierra Leone”) did not constitute a crime and that a properly pleaded JCE should include an “inherently criminal” aim.¹⁹⁹

Finally, the Trial Chamber further asserted that since the aim of the joint enterprise did not appear criminal at its inception, the prosecutor should be required to plead a new and specific criminal purpose if it came up later time.²⁰⁰

The Appeals Chamber disagreed with the trial judges on these two issues in important ways. It affirmed the Trial Chamber’s conclusion that count seven, which charged “sexual slavery and any other form of sexual violence, a crime against humanity punishable under Article 2(g) of the statute,” violated the rule against duplicity because it charged two crimes under the same count. However, the Appeals Chamber found that the Trial Chamber should have made a finding on the crime of sexual slavery and struck out the reference to “any other form of sexual violence.” Nonetheless, the Appeals Chamber found that there had been no miscarriage of justice because the evidence of sexual slavery had been relied on for the conviction under count nine for outrages upon personal dignity as a war crime.

The Appeals Chamber further found that the Trial Chamber erred in finding that the crime of forced marriage was subsumed under the crime of sexual slavery. The Appeals Chamber found that forced marriage is a compelled conjugal association resulting in great suffering or injury that is not necessarily a crime of sexual violence. As a result, it held that the crime cannot be subsumed into the separate crime of sexual slavery. In its opinion, the Appeals Chamber relied in part upon the expert testimony of Zainab Bangura,²⁰¹ who explained the special harms “bush wives” suffered during the Sierra Leone conflict. A victim of forced marriage suffered “psychological manipulations of her feelings,” she said. “[S]he was expected to show undying loyalty to her husband for his protection and reward him with love and affection.”²⁰² Such

¹⁹⁷ AFRC Trial Judgment, paras. 710-14.

¹⁹⁸ AFRC Trial Judgment, para. 71.

¹⁹⁹ AFRC Trial Judgment, para. 68.

²⁰⁰ AFRC Trial Judgment, para. 80.

²⁰¹ Bangura is Sierra Leone’s foreign affairs minister. Previously she was a prominent activist on issues of human rights and governance in the nation.

²⁰² AFRC Appeals Judgment, para. 192.

dynamics, frequently accompanied by horrendous physical and sexual abuse, gave the crime of forced marriage a character distinct from sexual slavery during the conflict and thus warranted a separate status as a crime against humanity under the category of “inhumane acts.” These conclusions represent both important affirmations of legal recognition of women’s experiences during the conflict, as well as the value of including civil society voices as experts on such specialized topics.

The Appeals Chamber also disagreed with the Trial Chamber’s findings regarding JCE, stating that pleading alternate forms of liability “is now a well-established practice in the international criminal tribunals.”²⁰³ It rejected the Trial Chamber’s reasoning and held in favor of the prosecution, concluding that “although the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute.”²⁰⁴ Consequently, the prosecution was not required to plead a separate JCE at a later date. This would seem consistent with the ICTY approach that the common purpose at the heart of a JCE does not need to be criminal; but if it is implemented through the commission of crimes, this may be sufficient to amount to JCE liability.

Following the appeal, prosecutor Stephen Rapp said, “This judgment leaves the way open for convictions.”²⁰⁵ Indeed, Trial Chamber 1 in the RUF generally followed the Appeals Chamber’s findings regarding forced marriage and JCE.²⁰⁶ Its finding on the JCE may have some important bearing on Taylor’s case.

The AFRC appeals judgment is also noteworthy for several other reasons. It upheld the crimes of recruitment of child soldiers, terrorism, and sexual slavery, all of which are likely to be directly relevant to cases before other international courts. It recognized forced marriage as a distinct crime against humanity, which was a particularly important finding in the context of Sierra Leone and for the inclusion of gender-sensitive perspectives in international criminal law. Although the Appeals Chamber found that the Trial Chamber had committed a number of legal errors, it repeatedly declined to add to the convictions entered at first instance. Nonetheless, the sentences the chamber affirmed are lengthy compared with the sentences usually given by ICTY or ICTR.

This approach was based on several reasons, including in particular the indisputable gravity of the crimes. Both Brima and Kanu attempted to assert their participation in various peace efforts, including the Commission for the Consolidation of Peace, as mitigating factors, which the Trial Chamber rejected.²⁰⁷ Kanu argued at sentencing that he “had a relatively low position throughout the conflict” and that this merited mitigation of his sentence.²⁰⁸ The Trial Chamber rejected this, stating that “the fact that there were two persons superior to him does not lessen

²⁰³ AFRC Appeals Judgment, para. 85.

²⁰⁴ AFRC Appeals Judgment, para. 84.

²⁰⁵ Press conference, Freetown, Feb. 22, 2008.

²⁰⁶ See Annex III.

²⁰⁷ AFRC Sentencing Judgment, paras. 65 and 101.

²⁰⁸ AFRC Sentencing Judgment, para. 115.

his culpability for crimes committed.”²⁰⁹ Perhaps more importantly, and common to all three defendants, the sentencing judgment noted a uniform and nearly total lack of remorse.²¹⁰

²⁰⁹ AFRC Sentencing Judgment, para. 116.

²¹⁰ AFRC Sentencing Judgment, paras. 67, 91, and 139.

Annex II: The CDF Trial

The CDF trial is described in some detail in this report and will continue to be the most controversial of the Special Court trials. The three accused, Sam Hinga Norman, Allieu Fofana, and Moinina Kondewa, were arrested in 2003. Norman was interior minister then, and until Taylor's arrest, he was the most senior official to face trial before the Special Court. The trial started in June 2004 before Trial Chamber I.²¹¹ The three leaders of the CDF stood trial on eight counts of war crimes, crimes against humanity, and other serious violations of international humanitarian law.²¹² As was the case with the RUF and AFRC indictments, the three CDF cases were joined together for a single trial.²¹³ The presentation of evidence lasted two and a half years and the deliberations another eight months. Norman died in prison in February 2007 while awaiting judgment. The Trial Chamber issued its decision on Aug. 2, 2007.

The judges found that the CDF forces committed widespread crimes in 1997 and 1998, targeting "collaborators" suspected of supporting the RUF/AFRC in particular. Civilians, captured enemy combatants, and Sierra Leone police officers were killed or injured. Many of these victims were mutilated. Private property was destroyed and looted.

Fofana, the CDF "Director of War," and Kondewa, the CDF "High Priest," were convicted of murder, cruel treatment, pillage, and collective punishments as war crimes. They were also found to have aided and abetted murder, cruel treatment, and collective punishments, and also convicted as superiors for failing to prevent murder, cruel treatment, pillage, and collective punishments committed by their subordinates. In addition the trial judges found that Kondewa personally committed the crimes of murder and enlisting child soldiers.

Both accused were acquitted of two counts of crimes against humanity because the Trial Chamber found that the widespread attack was directed against the rebels controlling the town and not directed primarily against the civilian population. They were also acquitted of committing acts of terrorism. On Oct. 9, 2007, the majority of the Trial Chamber sentenced Fofana to six years in prison and Kondewa to eight years, in stark contrast to the high sentences given in the AFRC case.²¹⁴ The comparatively low sentences can be in part explained by the fact that the CDF committed fewer crimes, and those they did commit were less severe. However, the Trial Chamber also considered several mitigating circumstances, including the defendants' lack of formal education and training, lack of prior convictions, and

²¹¹ Trial Chamber I is composed of Justices Pierre G. Boutet (Canada), Benjamin Mutanga Itoe (Cameroon), and Rosolu John Bankole Thompson (Sierra Leone).

²¹² Prosecutor v. Samuel Hinga Norman, Allieu Kondewa, and Moinina Fofana, Case No. SSL-03-14-I, Consolidated Indictment, Feb. 5, 2004. As in all other cases before the SCSL, no crimes under Sierra Leonean law were charged in the indictment.

²¹³ Prosecutor v. Samuel Hinga Norman, Case No. SCSL-2003-08-PT, Allieu Kondewa, Case No. SCSL-2003-12-PT, and Moinina Fofana, Case No. SCSL-2003-011-PT, Decision and Order on Prosecution Motions for Joinder, Jan. 27, 2004.

²¹⁴ Prosecutor v. Moinina Fofana and Allieu Kondewa, SCSL-04-14-14-T, Trial Chamber I, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, Oct. 9, 2007 (hereinafter CDF Sentencing Judgment).

subsequent efforts to foster peace.²¹⁵ The last of these factors had not been accepted as a mitigating circumstance in the AFRC case. Following his dissent, Justice Thompson did not participate in the sentencing.

The Appeals Chamber issued its judgment on May 28, 2008. It overturned some of the Trial Chamber's earlier findings, including certain convictions that were not supported by sufficient evidence and Kondewa's conviction for enlisting child soldiers.²¹⁶ The Appeals Chamber accordingly entered convictions for crimes against humanity of murder and other inhumane acts.²¹⁷ With King and Kamanda dissenting, the Appeals Chamber increased Fofana's sentence to a total of 15 years and Kondewa's to a total of 20 years.

The chamber also addressed controversies on the admissibility of evidence pertaining to sexual violence that surfaced during the trial. Prior to the start of the CDF trial, in February 2004 the prosecution had sought leave to amend the indictment to include charges based on new evidence of sexual violence and gender-based crimes.²¹⁸ The Trial Chamber denied this as well as any appeal from their decision.²¹⁹ At trial however, the prosecution sought to introduce some evidence of sexual violence under counts three and four of the indictment (other inhumane acts and violence to life, health, and physical or mental well-being, in particular cruel treatment).

A majority of the Trial Chamber had ruled such evidence inadmissible on the grounds that it would prejudice the rights of defendants to be informed of the nature of the case against them, or alternately, because it would require a lengthy delay that violated the right to a fair, expeditious trial.²²⁰ Some observers noted that the trial judges were very strict to exclude all such evidence, even when it may have been relevant to other charges.²²¹

The Appeals Chamber declined to consider whether the Trial Chamber erred in denying the prosecution leave to amend the indictment prior to the start of the trial in order to add the charges of sexual violence. The prosecutor acknowledged that seeking further trial proceedings at this stage "would not be practicable."²²² However, the Appeals Chamber, with King dissenting, did say that the Trial Chamber erred in denying the admissibility of evidence of sexual violence on the basis that it was not specifically alleged in the indictment. The Appeals Chamber held that sexual violence may constitute "other inhumane acts" or "cruel treatment" under the third and fourth counts of the indictment. The inclusion of this evidence would not have violated the defendants' rights, since they were notified of the allegations based on the

²¹⁵ CDF Sentencing Judgment, paras. 66-68.

²¹⁶ CDF Appeals Judgment, 189-94.

²¹⁷ As opposed to the AFRC judgment in which the Appeals Chamber declined to enter new convictions despite legal findings, the CDF's Appeals Chamber did change the sentences.

²¹⁸ Prosecutor v. Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, May 20, 2004, para. 6.

²¹⁹ CDF Appeals Judgment, paras. 411-13.

²²⁰ CDF Appeals Judgment, paras. 428-33.

²²¹ Sara Kendall and Michelle Staggs, *Silencing Sexual Violence: Recent Developments in the CDF Case at the Special Court for Sierra Leone*, U.C. Berkeley War Crimes Studies Center, 2005.

²²² CDF Appeals Judgment, para. 425. In view of this, the majority of the Appeals Chamber, Winter dissenting, wrote that consideration of this issue "would be an academic exercise" and therefore outside the scope of appellate review as set out in the SCSL Statute, para. 427.

Annex III: The RUF Trial

Issa Hassan Sesay, Morris Kallon, and Augustine Gbao of the Revolutionary United Front were arrested on March 10, 2003, following their indictment a few days earlier. The RUF trial, as it came to be known, began on July 5, 2004, before Trial Chamber I and concluded on June 24, 2008.²²³ Judgment was delivered on Feb. 25, 2009. The full judgment was released on March 2, 2009.²²⁴ On April 8, 2009, sentencing took place.²²⁵ Issa Sesay was sentenced to 693 years for 16 counts of war crimes and crimes against humanity.²²⁶ Because these counts are served concurrently, he will spend a maximum of 52 years in prison, the highest sentence ever handed down by the Special Court for Sierra Leone. Morris Kallon was sentenced to a total of 340 years, but will serve a maximum of 40 years. Augustine Gbao was sentenced to 25 years.

Delays often plagued the trial. In sum, over 170 witnesses were called, in more or less equal numbers, by the prosecution (85)²²⁷ and the defense (59 by Sesay, 22 by Kallon, and 8 by Gbao)²²⁸ over 308 days of trial.²²⁹ The 18-count indictment charged the defendants with war crimes, crimes against humanity, and other serious violations of international humanitarian law. On Feb. 25, 2009, the court delivered its judgment, almost exactly eight months after the end of the trial. This constituted a very lengthy delay.

The court found Sesay and Kallon guilty of 16 out of 18 counts.²³⁰ The court, Justice Boutet dissenting, found Gbao guilty of 14 out of 18 counts. The conviction of the three RUF defendants is significant, given that it was for the purpose of prosecuting the crimes committed by the RUF that President Kabbah first requested the establishment of the Special Court. The announcement of the judgment nonetheless attracted scant media attention internationally.

²²³ Trial Chamber I is composed of Justices Pierre G. Boutet (Canada), Benjamin Mutanga Itoe (Cameroon), and Rosolu John Bankole Thompson (Sierra Leone). Justice Robertson was disqualified from the case by other judges of the Appeals Chamber pursuant to Rule 15(B) of the Rules.

²²⁴ Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao, SCSL-04-15-T, Trial Chamber I, Judgment, March 2, 2009 (hereinafter Judgment). Justice Thompson filed a concurring opinion. Separate Concurring Opinion of Justice Bankole Thompson Filed Pursuant To Article 18 of the Statute, (hereinafter Concurring Opinion of Justice Bankole Thompson), 697-732. Justice Boutet filed a partially dissenting opinion. Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao, SCSL-04-15-T, Trial Chamber I, Judgment, March 2, 2009, Partially Dissenting Opinion of Justice Pierre G. Boutet, 688-96 (hereinafter Dissenting Opinion of Justice Boutet).

²²⁵ Marlise Simons, "Long Sentences for Atrocities in Sierra Leone," *New York Times*, April 8, 2009.

²²⁶ Rod MacJohnson, "Sierra Leone Rebels Sentenced up to 52 Years," *Agence France Presse*, April 8, 2009.

²²⁷ Judgment, Annex B, para. 32.

²²⁸ Judgment, Annex B, paras. 33-35

²²⁹ Judgment, Annex B, paras. 32-36. The prosecution case lasted 182 trial days; the defense case lasted 126 trial days.

²³⁰ Judgment, 677-84. Sesay and Kallon were found not guilty of Count 16 (Murder, a Crime Against Humanity, punishable under Article 2(a) of the Statute) and Count 18 (Taking of hostages, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(c) of the Statute).

The court found that the three defendants formed a JCE, alongside members of the AFRC, whose purpose was “to take any action necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular, the diamond mining areas.”²³¹ The court found that the crimes committed were intended to be within the common purpose. The court found evidence regarding involvement in the JCE and intent that crimes be committed in regard to Sesay and Kallon. Regarding Gbao, the court found that he participated in the JCE by holding a revolutionary ideology that established a criminal nexus with the crimes and “played a key and central role in pursuing the objectives of the RUF and that it was a motivating and propelling dynamic behind the commission and perpetration of the several crimes charged in the Indictment and in respect of which the Accused stand indicted.”²³² The court found “convincing evidence to warrant the inference that without the ideology there would have been no joint criminal enterprise.”²³³ Justice Boutet dissented from this view and did not find that Gbao participated in the enterprise.²³⁴ The court held that the joint criminal enterprise came to an end in April 1998, due to deteriorating relations between the RUF and AFRC.²³⁵

The accused were found guilty of numerous serious crimes including killings, sexual slavery, forced marriage, mutilations, and, with the exception of Gbao, recruiting child soldiers. The three were also found guilty of the crime against humanity of terrorism.²³⁶

As with the AFRC Appeals judgment, the court found the three RUF defendants guilty of forced marriage as an “other inhumane act,” a crime against humanity distinct from sexual slavery, for which the defendants were also found guilty.²³⁷ The RUF judgment also allowed the pleading of alternative JCE categories.²³⁸

The court found that Sesay and Kallon were guilty of the murder of UNAMSIL peacekeepers (Gbao was found guilty only of aiding and abetting attacks on peacekeepers). However, the court held that the prosecution failed to establish that these murders took place as part of a widespread, systematic attack against a civilian

²³¹ Judgment, para. 1985.

²³² Judgment, para. 2031.

²³³ Judgment, para. 2032.

²³⁴ Dissenting Opinion of Justice Boutet, 688-96. Justice Boutet found that Gbao did not participate in the JCE, based on due process grounds and insufficient evidence. The dissent states, “It would not be in accordance with Gbao’s right to a fair trial to centre his liability on a concept of joint criminal enterprise based upon an interpretation of the evidence that was not advanced by the Prosecution as part of their pleadings... it is my view that Gbao did not have the opportunity to defend himself against the allegation that his commitment to the RUF ideology and his role in propagating that ideology constituted, in the circumstances, a significant contribution by Gbao to the joint criminal enterprise.” Dissenting Opinion of Justice Boutet, para. 6. Justice Boutet also stated, “There is insufficient evidence as to any acts or actions by Gbao in his role as OSC [Overall Security Commander] during that period of time that could amount to a significant contribution to the joint criminal enterprise.” Dissenting Opinion of Justice Boutet, para. 8.

²³⁵ Judgment, paras. 2073-76.

²³⁶ Judgment, 677-87.

²³⁷ Judgment, 678.

²³⁸ Judgment, para. 389.

population. In relation to the specific counts, the two were therefore found guilty of murder as a war crime (count 17), rather than a crime against humanity (count 16).²³⁹

The court found the three defendants not guilty of kidnapping UNAMSIL peacekeepers for lack of proof that they had communicated threats to a third party in order to compel that third party's behavior in exchange for the peacekeepers' safety.²⁴⁰

Significantly and contrary to popular perception, the court also found that the RUF had not participated in the 1999 siege of Freetown.²⁴¹ Although deceased RUF leader Sam Bockarie had made promises to send RUF troops to assist the AFRC in this siege, the distrust between the two groups led to no RUF support materializing. Numerous victims' accounts of RUF fighters being involved in the siege were due to the civilians' inability to distinguish between AFRC and RUF fighters.²⁴²

²³⁹ Judgment, 677-87. Sesay and Kallon were found not guilty of count 16 (Murder, a Crime Against Humanity, punishable under Article 2(a) of the Statute) and guilty of count 17 (Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Art. 3 Common to the Geneva Convention and of Additional Protocol and of Additional Protocol II).

²⁴⁰ Judgment, 680, 684, 687.

²⁴¹ Judgment, para. 893.

²⁴² Judgment, para. 1512-14.



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