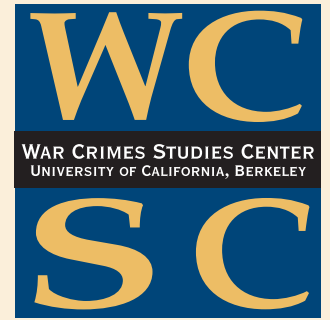


# INTERIM REPORT ON THE SPECIAL COURT FOR SIERRA LEONE



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## **Preface**

The creation of the Special Court for Sierra Leone was accompanied by high expectations for a new approach to international justice based upon cooperation between the United Nations and the government of the country where the crimes to be adjudicated had occurred. It was hoped that this model, which builds upon the cooperative efforts of international and Sierra Leonean participants, would provide accountability in a way that could contribute to the establishment of the rule of law, the development of domestic judicial institutions, and would serve the needs of the people of Sierra Leone in the aftermath of a prolonged and horrific civil war. The narrowly focused mandate, and temporal and budgetary limitations placed upon the Special Court also aimed at creating a trial process that would be expeditious and cost effective, while still meeting the highest international standards. If this could be achieved, it was felt, the Special Court could avoid the protracted proceedings and enormous expense of the International Criminal Tribunals for Rwanda and the Former Yugoslavia on the one hand, and the flaws of the underfunded and largely neglected trials before the "hybrid" tribunals in East Timor and Kosovo on the other.

Because of the importance of this mission with which the Special Court has been invested, the Berkeley War Crimes Studies Center established a permanent monitoring program in Freetown. It was our conviction that only an ongoing presence and attendance at trials, day in and day out, would enable us to report on and evaluate the work of the Special Court in a comprehensive manner. Our monitors, Radha Webley, Sara Kendall, and Michelle Staggs, have attended daily court sessions since early June 2004 when the first trial began. It was also part of our aim from the beginning to promote public awareness of the trials at the Special Court by issuing weekly reports on our website (<http://warcrimescenter.berkeley.edu>) so as to make accurate information available about what was actually happening in the trials. We also planned to issue periodic interim reports, as well as thematic reports on topics of particular interest and importance. This present report is our first interim report and covers the initial 10 months of the trials. The first thematic report, which deals with the issue of child soldiers as witnesses, is currently under preparation.

Apart from the commitment and dedication of the authors, Michelle Staggs and Sara Kendall, acknowledgments are also due to the International Center for Transitional Justice with whom we share information and cooperate on issues regarding the Special Court, to our partners at the Human Rights Center at UC Berkeley, and to the Wang Family Foundation for their ongoing support of this project.

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**From Mandate to Legacy:  
The Special Court for Sierra Leone as a Model for “Hybrid Justice”**  
Sara Kendall and Michelle Staggs

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## **I. INTRODUCTION**

The eleven year conflict in Sierra Leone, West Africa was marked by brutal acts against the country's population from multiple fronts: at least three factions engaged in atrocities against enemy combatants, suspected collaborators, and civilians. Among the conflict's most notorious features were widespread amputations, mutilations, acts of sexual violence, mass killing, abduction and forced recruitment into armed groups, the use of child combatants, and the exploitation of Sierra Leone's diamond reserves to finance the war effort. In the aftermath of the conflict there was a strong public desire to hold responsible parties accountable; however, it was clear that the country did not have the necessary judicial infrastructure to hold trials, and the ability of national courts to indict alleged perpetrators was further constrained by a blanket amnesty for crimes under the Lomé Peace Agreement of 1999.

The Special Court for Sierra Leone (SCSL) was established in 2002 by an agreement between the government of Sierra Leone and the United Nations Security Council following a request from Sierra Leonean president Ahmad Tejan Kabbah.<sup>1</sup> This inauguration by an agreement between a sovereign state and the United Nations has laid the groundwork for the Special Court's characterization as a "hybrid tribunal," and the court offers a different judicial model than the *ad hoc* tribunals established by the UN Security Council to try perpetrators of the conflicts in Rwanda and the former Yugoslavia. Proponents of the court hope that it will offer a more economical and expeditious approach to post-conflict justice as compared to the slow and expensive tribunals, and the court's location in the country where the conflict took place leaves it uniquely situated to remain in a responsive relationship to the people of Sierra Leone. However, the very elements which mark it as a novel development in post-conflict justice – its location, tight budget, and pressure to complete its mandate quickly – also challenge the court's ability to deliver its aspirations.

### **Background on the Special Court for Sierra Leone**

Composed of a combination of domestic and international employees, counsel, and judges, the Special Court is required by its mandate to try individuals who allegedly bore "the greatest responsibility" for atrocities committed during the conflict after the failed Abidjan Peace Accord of 1996.<sup>2</sup> The court operates autonomously outside of the Sierra Leone domestic legal system, and its Statute draws from international humanitarian law as well as a limited amount of domestic criminal law. In particular, the Statute permits the prosecution of crimes against humanity, violations of Article 3 common to the Geneva Conventions, and other serious violations of international humanitarian law. Within this third category the court is developing novel jurisprudence by explicitly criminalizing the use of child soldiers, and the Prosecutor is attempting to break new ground in international law by charging forced marriage as a crime against humanity.<sup>3</sup>

To date, the prosecution has indicted a total of thirteen individuals who were allegedly associated with three factions of the conflict: the Revolutionary United Front (RUF), an armed rebel group that invaded Sierra Leone from Liberia in 1991, the Armed Forces Revolutionary Council (AFRC), which overthrew the Kabbah government in a 1997 coup, and the Civil Defence Forces (CDF), a pro-Kabbah government militia drawn primarily from traditional hunting societies who were mobilized to fight against the RUF and AFRC rebels. Of the thirteen individuals, two of the

highest level RUF commanders have died, the whereabouts of alleged AFRC leader Johnny Paul Koroma is unknown, and former Liberian president and indictee Charles Taylor is presently being harbored by the Nigerian government. Members of the Office of the Prosecutor and the Registry are working to secure Taylor's transfer to the Special Court, a development which many commentators feel would serve the perceived legitimacy of the court in keeping with its mandate to try the highest level perpetrators of the conflict. At present, nine individuals are on trial, and they are housed on site at the court's detention facilities. These indictees are not on trial collectively as representatives from the three armed groups, but rather as individual participants in the conflict. However, this report adopts the common convention of referring to the CDF, RUF, and AFRC trials for ease of reference.

The Special Court for Sierra Leone has been operating with one trial chamber and one appellate chamber, and the court's much anticipated second trial chamber recently opened in early March of 2005. The trial chambers consist of two judges who are appointed by the UN and one who is nominated by the government of Sierra Leone.<sup>4</sup> The CDF and RUF trials began in June and July of 2004, respectively, and court time has been divided with one month on and one month off of each of these two cases. The AFRC case has started and is expected to run continuously in the second trial chamber, though this could change if Charles Taylor is brought to the court. Although construction of both trial chambers was complete at the beginning of the trials, the opening of the second trial chamber was postponed due to delays in the judicial appointment process.

The prosecution estimates that its phase of the CDF trial may conclude by August, with the possibility of completing the defence case before the close of 2005. The RUF trial is proceeding at a significantly slower rate, and it is unlikely that the prosecution will rest before the August recess. The AFRC trial will require calling back some of the witnesses from the RUF case, and it is unknown how long it will last, though at a recent status conference the prosecution seemed optimistic that it could conclude its portion of the case by the August recess. The Registrar estimated that the trial phase could be finished midway through 2006, followed by the appeals process;<sup>5</sup> the Prosecutor stated that the cases could possibly be completed at both the trial and appellate levels by December of 2006.<sup>6</sup>

### **Report objectives**

This report arises out of the work of a permanent international monitoring team from the UC Berkeley War Crimes Studies Center, which attends trial proceedings on a daily basis. The team has focused on the conduct of proceedings, treatment of witnesses, judicial management of cases, and substantive aspects of witness testimony from an independent monitoring perspective. This report is intended to summarize and complement weekly reports issued by the team and to provide an interim analysis of the accomplishments of and challenges facing the tribunal to date.<sup>7</sup>

In addition to drawing from staff interviews and daily observations of trial proceedings, this report addresses critical commentary from organizations such as the International Center for Transitional Justice and Human Rights Watch, who issued reports in March 2004 and September 2004 respectively, detailing the court's pre-trial development and offering recommendations as to how the court might function more effectively.<sup>8</sup> Unlike these two reports, however, this docu-

ment does not offer specific policy recommendations to the court *per se*, but instead presents information and critical observations to the court itself and to the international community.

There are three main themes which this report uses to frame its analysis of the Special Court: (i) the notion of the court as an institution that responds to the needs of the Sierra Leonean public, (ii) the novel steps taken by the court and its approach to an unprecedented mandate, and (iii) the extent to which the court operates as a transparent and accountable institution. In addition, the ways in which the court has balanced the concerns of cost effectiveness and sustainably impacting Sierra Leonean society are discussed throughout. As a hybrid institution, the Special Court has attempted to adopt what might be termed a hybrid approach to justice: that is, an approach that must continually balance adherence to international legal precedents, conventions and norms with a localised interpretation of how justice would best be served in Sierra Leone. The term “hybrid justice” does not imply that the court has compromised its adherence to minimum standards of international justice or fair trial rights, but rather should be viewed as highlighting the significance of the competing concerns the court seeks to address through its operations.

Transitional justice calls for a court to be flexible in its approach, informed by its local environment, sensitive to the need for political stability, and accounting for the tensions between cost-efficiency and conscience. In the case of the Special Court, “hybrid justice” seems a more appropriate term, as it highlights the composition of the court itself and emphasizes the dual impact of the steps the court is attempting to take: on the one hand, it seeks to positively affect the social and judicial circumstances within Sierra Leone, and on the other it seeks to create a model for future courts and tribunals that adopt a similarly mixed composition. In this respect, international actors and commentators in the field of transitional justice await the outcome of the court’s proceedings in order to evaluate whether it is able to set an effective paradigm for “hybrid justice.”

As the court is currently in its trial phase, with no judgments yet rendered, the following two sections of the report highlight the approaches taken by the prosecution and the defence towards fulfilling the court mandate. The prosecution is currently in the midst of bringing evidence at trial in support of two cases and has recently started trial on a third; accordingly, this report focuses on the indictments and cases *vis-à-vis* the prosecution, whereas the defence section emphasizes the gains and challenges faced in developing the novel Defence Office, which is intended to provide a structural counterbalance to the prosecution. It then turns to the court’s treatment of witnesses, which is followed by a section detailing trial management and public access to proceedings. The report concludes by considering the court’s efforts to build awareness of its activities and to create a lasting legacy in Sierra Leone.

## **II. THE OFFICE OF THE PROSECUTOR**

### **Structure and guiding principles of the OTP**

The Statute of the Special Court provides for an Office of the Prosecutor (OTP) which acts “independently as a separate organ of the Special Court.”<sup>9</sup> The physical layout of the court itself illustrates the autonomy of the prosecution: the containers housing the OTP have an additional security gate cordoning them off from the rest of the court complex. Interview policies of the prosecution make it difficult to access a plurality of views from within the OTP: from the outside it appears as a unified and autonomous entity with a shared set of objectives, and internal critiques or comments from OTP staff seem to be shielded from public scrutiny.<sup>10</sup> The Office of the Prosecutor functions autonomously with the assistance of its own evidence unit, criminal intelligence unit, legal operations section, witness management unit, and an investigations section comprised of international and national investigators.

By the authority of the court’s Statute, the Prosecutor is given the task of investigating and prosecuting “persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.”<sup>11</sup> Formerly of the United States Department of Defense, Prosecutor David Crane arrived in Sierra Leone in early August of 2002 as one of three appointees of the UN Secretary General working at the Special Court. The Prosecutor recently announced that he will be leaving his position at the end of his three year appointment in July 2005.<sup>12</sup> He is supported by a Deputy Prosecutor heading the appellate section of the OTP, a Chief of Prosecutions heading the prosecution section, and a Chief of Investigations. OTP trial attorneys and support are divided into two teams referred to as “Task Force One” for the RUF and AFRC trials and “Task Force Two” for the CDF trial, each with a lead counsel, and both teams answer to the Chief of Prosecutions.

The Prosecutor claimed that he adopted a multi-level approach in order to avoid imposing a removed international perspective on a complex internal conflict. In particular, this included political and diplomatic considerations as well as sensitivity to cultural factors that might affect the conduct of trial proceedings and the testimony of witnesses. Different perceptions of justice in the West African region may not translate easily into the paradigm of international justice, and the intricacies of the conflict and the court’s cultural context are not always clear to outsiders. The Prosecutor thus understands the hybrid structure of the court to mean “drawing upon the talent of the region” in addition to employing international staff, and he emphasized the importance of involving Sierra Leonean nationals as much as possible to aid the public perception and legacy of the court.<sup>13</sup> In light of his impending departure, the Prosecutor was particularly concerned with his legacy, and he emphasized the importance of the “town hall” meetings that he had conducted throughout the country during pre-investigation stages as a way of gathering feedback from the people of Sierra Leone before issuing indictments. The Prosecutor appears to place great emphasis on symbolic gestures, such as prominently featuring Sierra Leonean trial attorneys during opening statements; however, virtually all of the high-level management positions within the OTP are occupied by international staff.



## Interpretation of the mandate

Unlike the two UN tribunals in the Hague and Arusha, whose broad mandates require them to try “persons responsible” for crimes under international law, the Special Court for Sierra Leone is the first international tribunal to use “greatest responsibility” as its standard for prosecuting alleged perpetrators. Although this narrow standard was recommended in the initial UN Security Council resolution, a subsequent report issued by the UN Secretary-General suggested replacing the specific phrase with the more general term “persons most responsible.” According to the Secretary-General, this broader mandate would permit the prosecution of “others in command authority down the chain of command” who could be regarded as “‘most responsible’ judging by the severity of the crime or its massive scale.”<sup>14</sup> The Special Court’s Statute ultimately employed the language of the Security Council resolution, and the Prosecutor is thus bound to a more limited mandate than what was suggested by the Secretary-General. However, the mandate’s interpretation is still a matter of prosecutorial discretion, and it appears that the Prosecutor has adopted a fairly narrow interpretation of an already narrow mandate.

The Prosecutor referred to the mandate to try those bearing the greatest responsibility as a “political compromise”: he argued that a broader mandate would be untenable, as it could result in ten times as many potential indictees.<sup>15</sup> Another key aspect of the mandate is for it to be completed in a politically acceptable length of time, which the Prosecutor understood to mean a period of roughly five years. The Prosecutor expressed the additional need to consider the political dimension of indictments: indictments that could destabilize the region may not be brought by the prosecution in order to keep the court viable. Although he was not required to do so by the Statute, the Prosecutor employed an internal standard of “beyond reasonable doubt” before issuing indictments.

Critics of the Prosecutor’s approach to the mandate argue that it leaves a gap of impunity: with only thirteen indictees to date, there are a number of other individuals who have been named by civil society groups and who have come out in court testimony as being responsible for some of the more brutal dimensions of the conflict.<sup>16</sup> When these individuals remain either at large or absorbed into the court as insider witnesses, the public may wonder to what extent the court is actually addressing impunity in Sierra Leone. Indeed, this seems to be one of the difficulties faced by the Prosecutor: the political, temporal, and financial constraints he operates under, when coupled with his interpretation of the mandate, create a situation in which a number of high-level perpetrators will not be held legally accountable for breaches of international criminal law.

The Prosecutor has adopted a pragmatic and results-oriented approach to these constraints. He claims that approximately 90% of those who bear the greatest responsibility are accounted for: they are either deceased, indicted, in protective custody, or working for the prosecution as insider witnesses.<sup>17</sup> This way of framing the issue sets aside the matter of accountability in the interests of obtaining targeted results: in many instances there is only a fine line between indictees and insider witnesses, whose use the Prosecutor referred to as “dancing with the devil.”<sup>18</sup> Observers in the public gallery have heard testimony from insider witnesses who described ordering troops to commit acts that could be construed as crimes under international law, and the Sierra Leonean public may wonder why high level participants in the conflict are receiving material support from the court.<sup>19</sup> This tension in drawing the line between indictees and insider witnesses is a common dilemma faced by prosecutors in international criminal courts, and it is certainly not unique to this

context, as the use of such witnesses is critical for demonstrating command responsibility. However, *where* the prosecutor draws the line is a matter of prosecutorial discretion, and some of the insider witnesses who have testified before the first trial chamber might well have been indicted under a broader interpretation of the mandate.<sup>20</sup>

It does not seem likely that the prosecution would indict more than two additional individuals, though the court mandate itself would appear to allow it.<sup>21</sup> The Prosecutor's pragmatic approach is grounded in political considerations: completing the mandate within a politically acceptable amount of time, the "diplomatic and political blowback" from particular indictments, and refraining from issuing indictments that could threaten the continuation of the court. His interpretation of the mandate is premised upon an understanding of "greatest" that appears wedded to a hierarchical command structure – those at the very top – rather than targeting individuals who may bear the greatest responsibility for some of the conflict's most brutal atrocities below the top-level commanders. Such decisions fall within the discretion of the Prosecutor, though his approach has been criticized for discounting both the fluidity of the organizations involved in this complex conflict and the nuances of individual command relationships within them.

### **Indictments and prosecutorial discretion**

Despite the presence of two possible charges under Sierra Leonean criminal law in the Statute, the charges in the indictments are comprised entirely of crimes under international law. The Prosecutor noted that he chose not to use charges under Sierra Leonean law for both legal and tactical reasons: he described the use of counts under Sierra Leonean law as "a legal mine field" that could complicate the court's response to jurisdictional challenges.<sup>22</sup> When such challenges were raised by defence counsel during the pre-trial stage of proceedings, the prosecution argued that the Special Court is an international court, a view that was upheld in an Appeals Chamber ruling.<sup>23</sup> To the prosecution, then, it would seem that "hybridity" refers more to the mixture of national and international staff at the court rather than to the amalgamation of two legal systems.

#### *Charles Taylor*

This decisive characterization of the court as an international tribunal was one of the bases upon which the Appeals Chamber dismissed Charles Taylor's challenge to the court's jurisdiction. Taylor's indictment was the first to be issued by the Prosecutor, and it was issued while he was still the president of the Republic of Liberia. If the court was thought to be operating with some relationship to the domestic legal system of Sierra Leone, it could be more difficult to argue its jurisdiction over Taylor.<sup>24</sup>

The Prosecutor seems highly optimistic that Taylor will eventually be turned over to the court. Because the court does not currently have UN Chapter VII powers to compel the cooperation of member states, this has required extensive diplomatic efforts on the part of the OTP and the Registry.<sup>25</sup> The Prosecutor believes that it is no longer a matter of *if* Taylor will be transferred to the court but rather a matter of *when*,<sup>26</sup> and the recent resolution by the European Parliament which calls on EU member states to build pressure for Taylor's transfer to the court appears to be a significant development.<sup>27</sup>

*Foday Sankoh, Sam Bockarie, and Johnnie Paul Koroma*

Foday Sankoh, the alleged leader of the RUF, passed away in custody at a Special Court detention facility while awaiting trial. The body of another alleged high-level RUF perpetrator, Sam “Mosquito” Bockarie, was identified by court personnel after he was apparently executed in Liberia. The whereabouts of alleged AFRC leader Johnny Paul Koroma are unknown to date, though if he were located and transferred to the court, he would also be tried separately as in the case of Taylor. The remaining indictees allegedly affiliated with the RUF and AFRC apparently occupied lower levels in their respective command structures than Sankoh, Bockarie, and Koroma, which has caused some concern that these individuals are being tried in lieu of those most responsible. However, with the exception of one AFRC indictee, all other individuals were indicted before death certificates were issued for Sankoh and Bockarie.<sup>28</sup> Under the principle of individual responsibility in international criminal law, these indictees are not on trial as representatives of armed factions, but rather for their own acts or omissions which meet the threshold level of responsibility established in the mandate.

*Cases currently at trial: RUF, AFRC and CDF*

Nine of the indicted individuals are now at trial and are currently housed in the Special Court detention center: Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa, allegedly of the CDF; Issa Sesay, Augustine Gbao, and Morris Kallon, allegedly of the RUF; and Alex Tamba Brima, Ibrahim Bazy Kamara, and Santigie Borbor Kanu, allegedly of the AFRC. The three cases that are currently being adjudicated are joint trials of accused individuals rather than trials of the three organizations.

*Alleging joint criminal enterprise: the RUF and the AFRC cases*

Originally the prosecution proposed conducting a joint trial of all six alleged RUF and AFRC accused, and they filed a motion asserting that the actions of the accused “formed part of a common scheme to gain effective control of the territory and population of Sierra Leone.”<sup>29</sup> As such, the prosecution argued that a substantial portion of the evidence to be heard in both cases would overlap. Drawing on jurisprudence of the ICTY and ICTR to establish the principles at stake in the question of joinder, the court refused the request for a combined trial of the six accused, and ruled instead to try them in two groups.<sup>30</sup>

Although the prosecution’s motion for joinder was denied, the charges of the separate RUF and AFRC indictments are nearly identical. Both originally charged eighteen counts of various crimes under international law, focusing in particular on crimes against humanity and war crimes, though the AFRC indictment has recently been amended to withdraw four counts pertaining to the abduction of UN troops. Both indictments refer to nearly identical periods of time and geographical locations. Sexual violence counts figure prominently in both the RUF and AFRC indictments, which were also successfully amended in both cases to include charges of forced marriage as a crime against humanity.<sup>31</sup>

The prosecution’s case presumes a joint criminal enterprise, “a common plan, purpose or design” to “gain and exercise political power and control over the territory of Sierra Leone” that was

allegedly shared by the RUF and the AFRC.<sup>32</sup> According to the consolidated indictments in both cases, the AFRC and the RUF came together after the presidential coup of May 1997 and “acted jointly thereafter.” In his opening statement in the RUF trial, the Prosecutor argued that “there is a key and important linkage and union between the RUF and the AFRC factually that began in the summer of 1997 lasting through the rest of the conflict. The RUF and AFRC in large measure became one and the same.”<sup>33</sup> If this linkage is sufficiently established in the evidence heard at trial, the joint criminal enterprise doctrine could prove particularly useful if Charles Taylor is transferred to the Special Court.

Demonstrating the existence of a joint criminal enterprise requires the prosecution to prove not only the substantive crimes but also a common plan or conspiracy between the alleged collaborators. “Crime base” witnesses are used to establish various acts alleged in the indictment at particular times and in particular geographical locations. Other witnesses are called to establish an alleged commander’s territorial control over an area. Examinations in chief of insider witnesses have focused on the composition of command structures and the nature of the relationship between the RUF and the AFRC. At the time of this report’s publication, the prosecution has called just over one fourth of the anticipated witnesses in the RUF trial and one seventh of anticipated witnesses in the AFRC trial.<sup>34</sup> According to the current “core” witness lists, it appears that 24 witnesses could be called to testify in both trials, which would amount to roughly one quarter to one third of the witnesses in both cases.

#### *Extending the reach of accountability: the CDF case*

The prosecution’s decision to indict alleged members of the pro-Kabbah CDF was more controversial than its indictment of alleged RUF and AFRC leaders, as the CDF was widely regarded by the Sierra Leonean public as a resistance force against the rebels. Indeed, President Kabbah’s original request to the United Nations specifically asked the UN to assist in establishing a court to try Foday Sankoh and other senior members of RUF. Although it is believed that the vast majority of the atrocities were committed by the RUF and AFRC rebels, six percent of the violations alleged by statement-makers before the Truth and Reconciliation Commission were attributed to the CDF.<sup>35</sup> First accused Sam Hinga Norman is seen by much of the Sierra Leonean public as having played a central role in restoring the Kabbah government to power through his work in mobilizing and coordinating traditional Kamajor hunting societies to fight rebel forces. Many of the court’s security concerns have centered on the perceived public reaction to Norman’s indictment and detention.<sup>36</sup> At the time of his indictment and arrest, Norman was the Interior Minister in the Kabbah administration with a strong base in the Mende tribal region, and from a domestic political perspective, the CDF indictments have generated a number of challenges to the way in which the court is perceived by the Sierra Leonean public. On the one hand it appears to mark the court’s independence from the Sierra Leonean government. On the other, it has been interpreted more cynically as a political plot within the ruling party to remove a potential opponent of the vice president from power.

The indictment of alleged members of the CDF highlights one of the court’s fundamental tensions: whether the court’s primary purpose is to serve the people of Sierra Leone in helping to restore peace and to foster respect for the rule of law, what might be termed its domestic socio-political role, or whether it is to pursue accountability according to its international mandate,

regardless of political and social consequences. Although these are not incompatible objectives in theory, the prosecution's decision to indict alleged members of the CDF was widely contested and has generated substantial criticism of the court within Sierra Leone. From an international legal perspective, however, the professed aims of the CDF to resist the rebel forces and to protect the democratically elected government do not exempt individual members from prosecution for war crimes committed in the process.

The consolidated indictment issued for the three alleged members of the CDF includes eight counts primarily consisting of crimes against humanity and war crimes. In particular, the accused are charged with unlawful killings, physical violence and mental suffering, looting and burning, terrorizing the civilian population and collective punishments, and recruiting child soldiers. To date, the prosecution's case has moved more rapidly than the RUF case, as the prosecution has called nearly three quarters of its anticipated core witnesses.<sup>37</sup>

### **Absence of sexual violence counts in the CDF case**

In general, the Special Court has placed significant emphasis on the role of sexual violence in the conflict through the contents of its Statute, the indictments issued by the prosecution, and in the evidence presented at trial. The Prosecutor is obliged under the court's Statute to give due consideration to employing staff with experience working on gender-related crimes,<sup>38</sup> and the prosecution has attempted to include counts of sexual violence in all of its indictments. Unlike the consolidated RUF and AFRC indictments, however, there are no counts of sexual violence in the CDF indictment.

Sexual violence was generally thought to be uncommon in the Civil Defence Force, and particularly within the Kamajor society, whose internal rules prohibit fighters from harming civilians and from having sexual intercourse before going to battle.<sup>39</sup> Researchers at Human Rights Watch were only able to document a few cases of sexual violence perpetrated by the CDF in a report published in January of 2003.<sup>40</sup> However, prosecution investigators eventually uncovered evidence in the summer of 2003 of sexual violence perpetrated by CDF forces after indictments had already been issued. This raised the question of whether to amend the indictment to include a new area of criminal allegations.

Unfortunately the prosecution's efforts to bring charges of sexual violence against the CDF indictees were precluded by problems of timing and by a crippling ruling that denied the proposed amendment. Although the prosecution had evidence of sexual violence charges eight months before they filed their motion to amend the consolidated CDF indictment, victims of sexual violence expressed reluctance to come forward to testify, and it took several months to confirm evidence and secure the participation of witnesses. Further delays were caused when the prosecution decided to wait for a ruling on combining the individual cases before filing their motion to amend.<sup>41</sup> Despite noting the "importance that gender crimes occupy in international criminal justice", the majority decision implied that granting leave to add sexual violence charges at that point in the pre-trial proceedings would amount to "creating exceptions" for gender offences, and it would prejudice the rights of the accused because the additions had not been made in a timely fashion.<sup>42</sup>

In a separate dissenting opinion, Judge Pierre Boutet stated that the majority opinion did not give “due consideration to the special features related to the proper exercise of discretion by the Prosecution and to the nature of the counts to be added to the consolidated indictment: gender-based crimes.”<sup>43</sup> He noted that “a special consideration should be brought to bear” when dealing with gender-based crimes, particularly in light of the reluctance of victims to come forward to report and testify.<sup>44</sup> The prosecution sought leave to appeal the decision, contending among other things that the high profile nature of gender-based crimes under international law constitutes an “exceptional circumstance” in order to meet the requisite legal standard for appeal.<sup>45</sup> However, this request was rejected by the trial chamber on the grounds that the threshold for exceptional circumstances had not been met, and the prosecution had exhibited a lack of diligence in carrying out their investigations for gender crimes.<sup>46</sup> Despite a decision in the ICTR permitting the amendment of an indictment to include charges of sexual violence five months into trial,<sup>47</sup> the chamber refused to grant leave to appeal although the case was still in its pre-trial stages.

The majority decision unfortunately excludes an important area of offences from the CDF trial. These counts would have included charges of rape, sexual slavery, other inhumane acts such as forced marriages, and outrages upon personal dignity.<sup>48</sup> The OTP may have improved its chances of securing leave to amend the indictment if it had not decided to wait until the chamber ruled on whether the cases against Norman, Fofana, and Kondewa could be combined into a joint trial.<sup>49</sup> However, in foregrounding the rights of the accused and the need to avoid additional delays, the majority decision did not consider that arrangements could have been made to hear witness testimony related to sexual violence later in the trial, which would have allowed the defence ample time to prepare for cross-examination.<sup>50</sup>

Although the decision precludes hearing witnesses who would have testified specifically in support of sexual violence counts, allegations of sexual violence have surfaced in other witness testimony. After one former child soldier testified that third accused Allieu Kondewa had wanted women to marry and Kamajors subsequently brought four captured women to his house,<sup>51</sup> a member of the bench stated that he was not inclined to admit evidence suggesting that women were forced into marriage because the court had already refused to consider forced marriage as an indictment count in the CDF case.<sup>52</sup> This preserves the authority of the bench at the cost of excluding testimony on sexual violence, which may have served other counts in the indictment, and it produces an area of silence within the CDF case surrounding what may have been some of the group’s more serious atrocities.

### **Novel developments: the use of child soldiers and forced marriage**

The jurisprudential innovations attempted within the Special Court will be watched closely by the international legal community. Child recruitment is a novel charge and an indictable offence under Article 4(c) of the court’s Statute, which gives the court power to prosecute individuals for “conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities.”<sup>53</sup> This is the first time that an international criminal court has attempted to prosecute individuals for the use of child soldiers, and as with many areas of developing international law, it was contested as a violation of the fundamental principle of *nulum crimen sine lege*, the principle of non-retroactivity, which requires that conduct was punish-

able at the time of its commission. The defence claimed that the crime of child recruitment was not part of customary international law during the period addressed in the indictment.<sup>54</sup> The court upheld its own jurisdiction over the crime, and the OTP brought charges in all three cases currently at trial.<sup>55</sup> Four alleged child soldiers have testified to date.<sup>56</sup>

The prosecution has pushed the borders of international law even further by adding counts of forced marriage as a crime against humanity to their indictments in the RUF and AFRC cases. In their motion to amend the indictments to add a count of forced marriage, the prosecution included an investigator's statement that the sexual violence crimes he had investigated were not merely sexual slavery, but were in fact forced marriage, otherwise referred to as the "bush wife" phenomenon, which requires creating a new legal category. The prosecution argued that the new count would be based on the same factual allegations made in the other sexual violence counts, and it would therefore not hinder the defence's preparation for trial. The defence challenged the addition on both jurisprudential and practical grounds, arguing that forced marriage did not amount to a crime against humanity and that adding the count would delay the start of trial.

In an effort to clarify what might have otherwise appeared to be an inconsistency with their ruling in the CDF trial, where they did not grant leave to the prosecution to add sexual violence counts to the indictment, the bench's majority opinion focused on whether the count was in fact new or whether it was a related offence to those already charged. The majority found that "the amendment sought is not a novelty that should necessitate fresh investigations as the defence contends,"<sup>57</sup> and the prosecution was granted leave to add a new count to both indictments.

### **Prosecutorial independence**

Article 15 of the Statute specifies that the Prosecutor "shall not seek or receive instructions from any government or from any other source."<sup>58</sup> There has been some speculation as to whether this has been true in practice, as the Prosecutor and the Chief of Investigations are both from the United States and were formerly affiliated with the US Department of Defence. Indeed, in its 2003 report the International Crisis Group noted that "while the subtle links alleged on several occasions by Prosecutor Crane between diamonds and al-Qaeda terrorist networks can be interpreted as an attempt to increase U.S. interest, they are also seen by many in Sierra Leone as examples of the Court being used to promote U.S. foreign policy interests."<sup>59</sup> The International Center for Transitional Justice pointed out that with his references to Libyan leader Gaddafi and al Qaeda, "some worried that the Prosecutor would place an emphasis and invest resources on issues not central to his mandate"; however, ICTJ noted that this concern "has not been borne out to date."<sup>60</sup> A motion filed by one of the defence teams raised and reiterated some of these concerns about the independence of some members of the Office of the Prosecutor.

Two insider witnesses in the RUF trial thus far have given information regarding links to US intelligence or state agencies. Liberian journalist and insider witness Hassan Bility stated under cross-examination that the Chief of Investigations raised questions regarding the supply of diamonds to al Qaeda during interviews conducted in November of 2003.<sup>61</sup> RUF insider witness Brigadier General John Tarnue, formerly of the Liberian military under Charles Taylor, testified under cross-examination that he was interviewed by the Chief of Investigations in the presence of United

States FBI agents in Ghana in 2002.<sup>62</sup> Building on Tarnue's testimony, the defence team of the first accused filed a motion requesting the OTP to disclose, among other things, the nature of the relationship between the Chief of Investigations and his team and United States security services. In particular, the motion alleges that Tarnue's testimony suggests a "symbiotic relationship" between the FBI and the OTP investigations wing.<sup>63</sup> The chamber has yet to rule on the motion, and this ruling could be particularly contentious given its political overtones and the ramifications it may have for how the court is perceived.

Although some critics have noted that the United States may be funding the court as it supports an alternative judicial model to the International Criminal Court, the Prosecutor felt sufficiently independent from the influence of the United States government to express his disappointment at the Bush administration's refusal to sign the Rome Statute of the ICC, and he further noted that the hybrid court model developed here could be used in conjunction with the ICC rather than strictly as an alternative.<sup>64</sup> As the largest donor to the court, the United States may have exerted some influence in the selection of the Prosecutor and the Chief of Investigations, though this kind of influence does not seem to be confined to the United States. Most of the higher management positions in the OTP are occupied by nationals from the US, the UK, Canada, and Australia, which seems to imply some correlation between donor states and management hires in the section.<sup>65</sup>



### III. DEFENCE

#### **Equality of Arms**

The court's own website defines equality of arms as "a reasonable equivalence in ability and resources of Prosecution and Defence."<sup>66</sup> In practice, these two branches of the court are quite different in terms of their administrative structures and available resources: unlike the independent OTP, the Defence Office falls under the umbrella of the Court Registry. Employees of the OTP are salaried employees of the Court, whereas defence teams are independent contractors who bill hourly, subject to the oversight of the Principal Defender. Although the Prosecutor stated that he does not believe the resource allocation between the prosecution and the defence is unfair,<sup>67</sup> some members of the defence have questioned whether the principle of "equality of arms" is being meaningfully upheld at the Special Court.

In light of the prosecution's burden of proof, it would be inappropriate to make direct comparisons in all instances to determine the adequacy of funds afforded the Defence Office and the individual defence teams. While the Special Court is not strictly bound by the precedents of the *ad hoc* tribunals, it frequently takes guidance from judgments and rulings from the ICTY and ICTR, and the ICTR has established that "equality of arms...does not necessarily amount to the material equality of possessing the same financial and/or personal resources"<sup>68</sup>. Even when applying the standard of "reasonable equivalence" adopted by the court, however, the Principal Defender and members of some defence teams were able to give examples of where they felt the defence was clearly prejudiced: areas of particular concern included disparities in logistical support, such as transport and office resources, as well as discrepancies in investigation and expert witness budgets.<sup>69</sup>

#### *Logistical Support*

While the Principal Defender noted that some conditions for defence counsels had improved fairly consistently during her time in office, the current conditions under which the Defence Office and the defence teams operated were still thought to be less than adequate. Some defence teams alleged that the office resources afforded to the defence were minimal when compared with the OTP, which in some cases hampered the ability of teams to effectively prepare for trial.<sup>70</sup> The Registrar has noted that the defence teams at the Special Court were perceived to be comparatively as well equipped or more equipped than their counterparts at the *ad hoc* tribunals. However, the court's own benchmark of "reasonable equivalence" is not based on an inter-tribunal comparison, but on how resources are shared within the institution of the court itself. Although many of the specific needs of the defence have been and are continuing to be addressed, there is a broader perception within the defence that the prosecution has access to substantially greater material advantages.

#### *Investigations*

The use of investigators in international tribunals forms a pivotal part of both the prosecution and the defence cases. Investigators from the OTP's investigations section have worked closely with the OTP's legal team to refine target lists, establish leads and uncover the background to crimes

committed during the Sierra Leonean conflict to provide the OTP with the information it needed to draft the first indictments and through the prosecutions phase.<sup>71</sup> Some of them will continue to assist the prosecution during the defence's case and the rebuttal case at the trial stage. Investigators from the defence teams are charged with following up on the veracity of the statements and testimony of OTP witnesses, establishing leads for potential defence witnesses, and recovering any evidence that may further support the relevant defence team's case. While it is fair to expect that the investigation resources allocated to the prosecution would exceed that of the defence, the discrepancies between the two budgets have been raised as an "equality of arms" concern by some members of the defence. The Defence Office has advocated for the addition of international investigators and lengthier contracts for national investigators.

According to information received from the Principal Defender, the Defence Office budget for investigations for fiscal year 2004/05 was less than half the amount allotted to the OTP for investigation-related travel alone.<sup>72</sup> However, the Registrar has commented that as prosecution cases draw to a close, more emphasis will be placed on the defence budget. The recently released budget for fiscal year 2005/6 reflects this shift: defence travel for investigations is approaching its equivalent in the OTP budget, and the investigations budget is more than double that of the previous year.<sup>73</sup> The Registrar seems to have adopted a pragmatic and malleable approach to defence budgeting given the constraints within which he is working, and in some instances the Principal Defender has been provided with the flexibility to shift funds from one area of the budget to another.

Although some members of the defence continue to express dissatisfaction with the way in which resources are allocated within the court, the Registry has attempted to remain in an ongoing responsive relationship to the needs of the defence. The existence of the Defence Office itself is a novel development, which, if managed effectively, could amount to a significant gain for the recognition of the rights of the accused in international criminal tribunals.

### **Establishment of the Defence Office**

The establishment of a Defence Office at the Special Court for Sierra Leone has been regarded as "one of the most significant innovations in international justice...and one that can provide a major contribution to ensuring the rights of the accused are upheld."<sup>74</sup> Indeed, the Defence Office has been described in the court's first annual report as adding a "fourth pillar" to the structure of international courts and a counterbalance to the OTP. In theory, the Defence Office stands alongside the Chambers, the Registry and the OTP as a permanent institution to ensure the rights of suspects and accused persons and to ensure that the Special Court is able to comply with the human rights principle that adversary trials "should manifest an 'equality of arms.'"<sup>75</sup>

In practice, the Defence Office has experienced some developmental problems as a nascent organ of the court. Interviews with the Principal Defender and members of the defence teams for both the CDF and RUF trials revealed key concerns with regards to the development of the office that fall into three broad categories: (i) the late appointment of a Principal Defender (ii) the lack of independence of the Defence Office as an organ of the court and (iii) internal management issues related to conflicting understandings about the role played by members of the Defence Office *vis-à-vis* the individual defence teams.

This section of the report seeks to review these key concerns and address the primary issues raised by them. It also looks at the structure of the Defence Office and the defence teams and the achievements that the office has been able to accomplish thus far. In this regard, the establishment and sustained progress of the office at the Special Court highlights the importance of ensuring that at all times, the right to a fair trial and the promotion of the rule of law in the country where the conflict occurred is balanced against any retrospective or punitive approach to international justice. The Defence Office at the Special Court marks an unprecedented step towards achieving this balance.

### **Structure of the Defence Office and the defence teams**

The opening of the Defence Office was initially proposed by members of No Peace Without Justice, an international organization which worked on mapping the conflict in Sierra Leone, and by the Registrar of the Special Court. Both were concerned by the marked absence in international tribunals of an office that dealt strictly with the needs and interests of the defence.<sup>76</sup> The appointed judges of the Special Court ratified the creation of the Defence Office at its first plenary meeting in December of 2002, and the office opened on 10 February 2003, exactly one month before five out of the thirteen indictees were arrested in Freetown during the OTP's "Operation Justice."<sup>77</sup>

The Defence Office currently comprises the Principal Defender, a recently appointed Deputy Principal Defender, duty counsels for each of the CDF<sup>78</sup>, RUF and AFRC cases,<sup>79</sup> one investigator, whose primary responsibility is to determine whether the accused are indigent, and a small core group of interns, administrative and financial support staff. The Principal Defender has advocated for the appointment of a full-time legal researcher, who is expected to begin work shortly.<sup>80</sup>

All of the nine indictees currently being held in custody are represented by their own defence team, which is composed of at least one contracting counsel,<sup>81</sup> a case manager, a legal assistant and an investigator. Defence teams can also appoint further investigators as well as experts approved by the Principal Defender. Contracting counsels are independent contractors who enter into a legal services contract with the Principal Defender, and who are responsible for supervising the provision of services of the defence team to the accused. The Principal Defender must approve the members of the defence team, and each team is required to comprise persons having experience in international criminal law, criminal trials and Sierra Leone criminal law,<sup>82</sup> which encourages a mixed composition within each team.

### **Appointment of the Principal Defender**

To manage the needs of the Defence Office, the court initially appointed a legal consultant to defence counsels for three months, followed by an Acting Principal Defender for several months. The first Principal Defender, Simone Monasebian, was appointed in March 2004, a year after the first indictees were arrested and approximately nineteen months after the Prosecutor arrived in Freetown to begin investigations. It is understood that the Principal Defender has recently decided that she will not be renewing her contract with the Special Court.

The Registrar has stated that in an ideal scenario, the Principal Defender would have been appointed towards the end of 2003, but the court has been forced to adopt a “just in time” policy given the constraints of its budget.<sup>83</sup> It was around this time that the court shifted the focus of its outreach programming from primarily serving the interests of the Prosecutor to that of the court as a whole.<sup>84</sup> As a result of her late appointment, the Principal Defender was unable to review the court’s initial outreach materials, which were intended to simplify the role and function of the Special Court for the general public. This meant that statements which could be construed as presuming the guilt of the accused or which may characterize how the accused will be treated by the court at sentencing were not vetted from the original materials.<sup>85</sup>

Since coming to office, the Principal Defender has reviewed the court’s outreach materials to ensure that they reflect a balanced view of how the Special Court will achieve its mandate to try those alleged to bear the greatest responsibility. In this regard, statements such as “people who caused so much suffering will be punished” have been omitted from materials to support the presumption of innocence and to avoid prejudging the outcome of the proceedings. Similarly, members of the Defence Office have contributed to shaping policies and guidelines for the court’s outreach activities as well as participating in outreach activities themselves.<sup>86</sup> In this sense, members of the Defence Office have been able to serve a pedagogical function regarding the rights of accused persons within the international tribunal context. In a country where the death penalty is still an acceptable form of punishment, this role can form a pivotal part of the court’s legal reform agenda. However, the tardiness of her appointment has meant that the Principal Defender has adopted a primarily reactive as opposed to proactive stance towards the court’s outreach programming, which she claims has hampered the Defence Office. Coordinating the shift in focus of the court’s outreach activities – from purely prosecutorial to part of the neutral functions of the Registry – with the appointment of the Principal Defender would have aided the timely development of the Defence Office.

### **The Defence Office as the “fourth pillar” of the court**

At present, the Defence Office technically falls within the Registry, meaning that the Principal Defender is appointed by and directly answerable to the Registrar. In his first annual report, the President of the Special Court noted that it was the Registrar’s intention that the office would “in the future, become as fully independent as the OTP,” and while the Defence Office is referenced as an organ of the court in the recent budget for fiscal year 2005/6, to date there have been no amendments to the authoritative documents governing the formal status of the organs.

The Principal Defender, the Registrar and the Prosecutor each agreed that the Defence Office should be independent.<sup>87</sup> A strong and independent Defence Office with a publicly present Principal Defender is likely to strengthen the ability of the court to fulfill its function as articulated under Security Council Resolution 1315, which affirmed the need “to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law.”<sup>88</sup>

The lack of independence of the Defence Office has compounded the difficulties already faced by the office, given the late appointment of the Principal Defender. Both the Principal Defender and some of the defence teams noted that the perception that the *sole* function of the trial is to

punish the perpetrators of war crimes and crimes against humanity is not uncommon.<sup>89</sup> The need for fairness when dealing with alleged perpetrators and equality of arms within the trial context were generally misunderstood by the Sierra Leonean public or misconstrued as being unnecessary to achieve a “desirable” outcome.<sup>90</sup>

Misconceptions about the need for a credible defence also exist in the international community. The Principal Defender noted that in some instances, potential defence witnesses were unaware of whom to contact about testifying for the accused or intimidated about the possibility of somehow being aligned with the defence. In one particular instance, a government official from the United Kingdom called a member of the prosecution to ask whether they should speak to the defence teams about testifying.<sup>91</sup> Furthermore, it was difficult to secure assistance from international law firms with extensive pro bono programs and from law schools abroad whose students could engage in research, given that there appeared to be wide-held misunderstandings about the rights of the accused, both at the Special Court and within the context of the international criminal trial.<sup>92</sup>

The immense tragedy felt in the aftermath of an eleven-year conflict through which the people of Sierra Leone experienced intense suffering has meant that the impulse to presume the guilt of the accused and to expect some form of retribution is palpable in the public arena. As such, strengthening the visibility of the Principal Defender and the Defence Office in terms of both the court’s outreach programs and its international audience is likely to assist both the office and individual defence teams to combat common misapprehensions about the role played by the defence. This in turn will fortify the right of the accused persons to a fair trial - as enshrined in Article 17 of the court’s Statute and the International Covenant on Civil and Political Rights – as it is likely to help ameliorate the concerns of potential defence witnesses and experts who would otherwise be intimidated from testifying.

A fundamental stumbling block to the achievement of this independence has been the fact that the Defence Office was not envisaged by the original agreement between the United Nations and the Government of Sierra Leone establishing the Special Court. As such, there is currently no mention of the Defence Office or the Principal Defender in the Agreement and only limited mention of it in the court’s Statute. The Principal Defender has drafted a proposal with amendments to the Agreement, the Statute and the Rules that would define the role of the Principal Defender and give the position equal standing in law to that of the Prosecutor, establish the Defence Office as a separate organ of the court, and afford privileges to defence witnesses currently afforded to those of the prosecution.<sup>93</sup> The changes requested have been accepted by the judges to the Special Court for Sierra Leone and the court’s external Management Committee<sup>94</sup>, and in principle it has approval from the government of Sierra Leone and the United Nations Legal Office in New York (UNLO). The UNLO has responded by raising a number of issues that need to be considered, which primarily relate to the practicalities of the appointment.<sup>95</sup> These issues are currently under review at the Defence Office. A timely response to UNLO is imperative if the issue is to maintain its relevance, given that the trials of all 9 accused are now underway and the CDF trial is likely to finish in less than a year’s time.

## **Management and co-ordination of defence teams**

Producing a functional fourth pillar of the court will require clarifying the nature of the relationship between the Defence Office and individual defence teams. Some members of the defence teams have expressed concerns about unproductive interactions with the Defence Office that did not serve the interests of their clients, and others were not sure as to the role played by the Defence Office and the support it was meant to be providing. One defence counsel stated that he believed members of the Defence Office had destabilized his relationship with his client by advising his client in a manner inconsistent with advice he had previously offered<sup>96</sup>. Another felt that the office failed to respect the right of autonomy afforded to his defence team under his legal services contract: he stated that in one instance in particular, the Principal Defender had approached a defence counsel in his team about matters relating to work allocation without first consulting the contracting counsel<sup>97</sup>. Research support on issues of common concern to the defence was also considered to be less than adequate by some defence counsels.<sup>98</sup> On the other hand, some defence teams (comprised primarily of local as opposed to international counsel) felt that the research function the office was intended to serve was more than adequately fulfilled by its staff. One counsel in particular sought to acknowledge the tireless efforts of the Principal Defender, whom he felt had worked assiduously to strengthen the rights of the accused and to ensure that local lawyers were given the benefit of working with international criminal lawyers at the court.<sup>99</sup>

While there are perceived tensions between the role of individual teams and the Defence Office, the Principal Defender has attempted to develop staffing arrangements within the office that may benefit individual defence teams. As a recent example in the CDF trial has shown, the appointment of duty counsels for each case may allow the Defence Office to provide coverage at trial for individual teams, in the event that a team member is unable to attend trial or continue to represent an accused.<sup>100</sup>

At least part of the confusion regarding the relationship between the Defence Office and individual teams appears to be a continuation of initial disagreements about the role of the office. The Registrar and the appointed President of the Special Court maintained different views as to whether the role should be considered primarily administrative or advocacy-based.<sup>101</sup> President Robertson envisaged the role of the Principal Defender as akin to a public defender or senior Queen's Counsel, primarily advocating the case of the accused persons as a whole. The Registrar saw clear conflicts of interest arising from this characterization of the office: the accused persons are ultimately individuals who each have a specific case to argue. He envisaged instead that the Principal Defender would act more as a "behind the scenes" administrator, who would mediate between the defence teams, organize and facilitate the drafting of legal research and motions common to the defence case, and who would have a more limited advocacy capacity within the court's outreach program.<sup>102</sup> Another way of framing the role of the Principal Defender could combine the two views, and would add in a role as mediator for conflicts within defence teams.

The tension left from the early disagreements about how best to characterize the role seems to play out in the complaints of some of the defence counsels. The role of the Principal Defender is at once tied to administration and advocacy, with little formal acknowledgment from the court about the mediation required to marry these two roles together.<sup>103</sup> Accused persons are simulta-

neously the clients of the individual defence counsels and the Defence Office as a whole, and ensuring the rights of the accused is clearly the objective of all members of the defence. However, effective two-way communication regarding how to best serve the interests of the defence as a whole is imperative, and the court should consider formally facilitating a more productive relationship between the Defence Office and individual teams: amendments to the Statute and the Rules that more directly characterize the relationship between the Defence Office and defence counsels vis-à-vis the accused may assist in this regard. Furthermore the relationship between the autonomy of individual teams and the authority of the Defence Office as a whole needs to be clearly considered and articulated, since the relationship does not follow the more hierarchical structure of the OTP.

By establishing an independent Defence Office, the Special Court for Sierra Leone would offer an innovative paradigm to be followed in future international criminal courts. Significant steps have already been taken by the Registrar and the Principal Defender, and current criticisms regarding the status of the defence at the Special Court appear to center more on structural complaints rather than inadequate resources. However, the objectives of the office and its relationship to independent defence teams must be concretized and clearly articulated for it to adequately meet the needs of the defence.

#### **IV. WITNESSES**

According to the Registrar, approximately one fifth of the total court budget is spent on a combination of witness protection and security expenses.<sup>104</sup> This significant cost reflects the unprecedented challenges faced in establishing an international court at the site of the conflict. Unlike the two *ad hoc* tribunals functioning outside of the territory where the atrocities took place, the Special Court is located in an easily accessible part of the capital city. Witness concerns at the Special Court are compounded by the fact that a large number of witnesses come to testify from small villages, and certain details they are asked in trial could reveal their identities to other members of their communities who may be observing the trial proceedings.<sup>105</sup> Protecting the identity of witnesses from public disclosure is a substantial responsibility for the tribunal, and it has thus far avoided any physical harm to witnesses. The opening of the second trial chamber and the additional set of witnesses to care for during the AFRC trial will stretch the resources of the Witness and Victims Support section, though the section has hired more staff and it anticipates that it will be able to manage the additional responsibility.

Witnesses at the Special Court are comprised of both victims and insiders, who may have been perpetrators in the conflict. This mixed composition makes it important to keep close track of the respective roles of witnesses within the conflict as they are brought through the trial process. In particular, victims and insiders must be kept separate at all times, including in transport situations and while waiting to testify at trial. Witnesses receive pre-trial support from the Witness Management Unit (WMU), which was established by the Chief of Investigations and contained within the structure of the OTP; once they are added to the confirmed list to appear at trial, they are turned over to Witness and Victim Support (WVS), which is a section of the Registry. According to the chief of the WVS section, witnesses are meant to experience a continuity of care from investigation and pre-trial stages through trial and post-trial. As witnesses for the defence do not have a parallel WMU structure providing pre-trial care to their witnesses, they are cared for exclusively by the WVS.

The material support provided to Special Court witnesses has been raised by the defence teams on numerous occasions at trial as an incentive for witnesses to cooperate with the objectives of the prosecution.<sup>106</sup> What the prosecution understands to be compensation for witness expenses has been construed as payment for witness testimony by the defence. While this manner of questioning had been extremely common in the beginning, it has lessened through the course of the trials, though insider witnesses are still vigorously cross-examined regarding the financial and material benefits they have received from the court. Defence witnesses will also have access to WVS resources provided thus far to prosecution witnesses, including medical care, transportation, housing while waiting to testify, and relocation costs when necessary.

#### **Witness and Victim Support**

The court's Statute provides for a victims and witnesses unit intended to provide "protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses."<sup>107</sup> Supporting the chief, the section consists of a deputy chief, a group of eleven



psychosocial support staff including one clinical psychologist and two counselors, and movement officers, security personnel, and support for a large witness housing complex. The section additionally maintains a series of “safe houses” for witnesses to supplement the large complex.

Although it is technically a section within the Registry, WVS has been physically housed within the OTP compound. As it seems likely that Trial Chamber I could begin hearing evidence for the CDF defence cases in September 2005, WVS has established a second facility for defence witnesses, who could not gain access to the unit’s main offices in the OTP compound. A number of safeguards have been put into place to minimize the risk to witnesses within and around the court complex. In their September 2004 report, Human Rights Watch recommended establishing a second court entrance for family members of the accused in order to avoid contact with prosecution witnesses, which implied that witnesses follow the same entry procedures as court visitors.<sup>108</sup> The chief of WVS stated that the court does not have access to the necessary security force to maintain two separate entrances; however, witnesses are brought directly through the front gate in secure vehicles, and they are not subject to any security delays or public contact. Section personnel radio ahead to security so that they are not held up at the gate, and the vehicles are driven directly into the court compound. However, this does not preclude locals in the area who have observed the functioning of the court from identifying which vehicles may be used for witness transport, which is a virtually unavoidable risk tied to the decision to locate the court in Freetown.

### *Psychosocial support*

Most of the witnesses testifying in court are alleged victims of the conflict, and they are called in to provide the majority of evidence that the trial chambers will rely upon in rendering their judgments. The Witness and Victims Support section works closely with witnesses before, during, and after testifying, and the section provides both medical and psychosocial support. Many of the witnesses have been severely traumatized, and the psychosocial staff is particularly concerned with the possible re-traumatization of witnesses through the process of testifying in court. Vulnerable witnesses include all witnesses who may be re-traumatized, not merely victims, and they are assessed based on a witness’s factual history as well as on his or her mental state. The court must be particularly mindful of the needs of special categories of witnesses, such as victims of gender-based violence and children. Members of the psychosocial support staff are usually present in the courtroom during the testimony of vulnerable witnesses, as being in the courtroom itself and undergoing cross-examination on testimony about painful events can be an overwhelming experience for many witnesses.<sup>109</sup>

The court psychologist expressed the importance of creating a respectful environment in which witnesses feel that they have some degree of control over what will happen to them. All witnesses are briefed by WVS staff before appearing at trial, which familiarizes witnesses with the environment of the court and its procedures as well as their rights, including what to do if they do not understand a question or if they need to seek clarification.

## Protective Measures

Given the location of the court in Sierra Leone, it is of great importance for the court to foster an atmosphere in which witnesses perceive that they will be safe and that their identities will not be disclosed without their permission. In the pre-trial stages the prosecution had argued that some of their witnesses might require greater protection than others. After the court ordered the prosecution to file a new motion for protective measures, it granted a number of protective measures for witnesses at the start of trials in early June of 2004.

The prosecution divides its witnesses into two groups: witnesses of fact, who are subdivided into three categories, and expert witnesses or witnesses who have waived their right to protection. Of the former, subcategory A witnesses are victims of sexual assault and gender crimes, who automatically receive voice distortion according to judicial order. Subcategory B child witnesses testify via closed circuit television. Subcategory C insider witnesses are also allowed to use voice distortion.<sup>110</sup> The trial chamber has decided that all witnesses shall testify from behind a partition by default, unless they request for the partition to be removed, claiming that “the security threats and risks of interference are real, generalized, and extend to all witnesses and persons who are suspected or perceived to be prepared to testify against the Accused.”<sup>111</sup> This decision for witnesses to testify from behind a screen by default has formed the basis of an ongoing point of contention within the court proceedings: defence teams and some of their clients have argued that the partition is unfair and unnecessary, as it shields witnesses from public scrutiny and detracts from the open nature of the trial.

The need for protective measures for witnesses must be continually balanced against the rights of the accused, which include the right to a public trial. The chamber has stated that its previous decisions on protective measures could be subject to variation, and counsel for the first accused in the CDF case brought an unsuccessful motion to modify the protective measures after their client protested that witnesses who had not suffered from sexual violence should testify in view of the public.<sup>112</sup> Even with these protective measures in place, most testimony takes place in open session, which permits members of the public gallery to attend the trials. Permission for closed session testimony was considered an “extraordinary measure” in a ruling by the first trial chamber.<sup>113</sup>

The Trial Chamber has ruled that a witness’s perception of his or her risk is not conclusive for granting protective measures, but is rather one of several factors to consider, balanced with concerns expressed by the WVS and OTP investigators and statements of witnesses alleging serious threats to them and their families.<sup>114</sup> Witnesses who have asked for protective measures to be lifted have prompted extensive discussion about the risks they are incurring, and the chief of WVS has been called in before to assess the witness’s “objective” risk. Thus far, two CDF witness and two RUF witnesses have agreed to testify openly.<sup>115</sup> There may be some tactical considerations on the part of witnesses when they decide to testify in public view, as the increased visibility and risk they assume may be used to secure additional or longer-term witness protection and support.

Although there have been a number of incidents at trial in which witness identities have been at risk of public disclosure, only one witness had his identity announced to the public in violation of

witness protection measures. Despite the court's efforts to keep the identity of the witness protected, including screening the witness and using voice distortion techniques, a local newspaper revealed the identity of an insider witness in a front page article.<sup>116</sup> A gender-based violence witness in the AFRC trial was recently called by name and threatened by attendees of the public gallery while in a court vehicle within the Special Court compound.<sup>117</sup> The circumstances surrounding the disclosure of the witness's name are not a matter of public record at this point; however, they do not seem to indicate insufficient protection and security on the part of the court. This incident highlighted some of the tensions between witness safety and public access to the proceedings, particularly when many of the current court attendees are family members of the accused, who may be able to identify some of the witnesses based on the substance of their testimony even if their faces are hidden and their voices are distorted.

According to the chief of the Witness and Victim Support section, the witness' perceptions of the risks they assume by agreeing to testify should receive as much consideration as assessing actual threats to witness security; this highlights the importance of psychosocial support in witness protection, as it helps provide the section with subjective feedback from the witnesses. The court could further document and gather feedback from witnesses about their perceptions of risk through the trial process, as this information would be a valuable resource in modifying the court's internal procedures and in aiding potential future courts in post-conflict locations.

### **Treatment of witnesses at trial**

The bench has the power to impose a cap on the number of witnesses that can be called by the prosecution, which it has not exercised thus far, though it has encouraged the prosecution to cut down their lists. There are also no constraints upon the length of time the defence can use to cross-examine witnesses. The chambers have heard testimony from a number of vulnerable witnesses thus far, including child soldiers, child witnesses under the age of eighteen, and victims of gender-based violence.

#### *Distressed witnesses*

On the whole, the judges of Trial Chamber I have been mindful of the need to halt proceedings when a witness is disturbed during the process of testifying. In most cases when a witness was clearly upset, the bench adjourned proceedings while a psychosocial support staff member assisted the witness. The judges occasionally ask witnesses how they are feeling during traumatic testimony, which the bench of the second trial chamber has also adopted during its first weeks of hearing testimony. When the bench is more interventionist in its approach, both in inquiring as to the mental state of vulnerable witnesses and in reminding defence counsel about repetitive questioning and witness harassment, the behavior of the bar appears to improve.

While the bench seems aware of the need to treat witnesses carefully, some comments from the bench and the bar do not contribute to a comfortable environment for witnesses. On one occasion a man who began crying while testifying about the killings of six men and the amputation of his hand was told by a judge to "hold yourself like a man" after psychosocial services had finished tending to him.<sup>118</sup> After a child witness explained during cross-examination why he believed that

members of the CDF were burning people, one judge commented that “it is good to have witnesses like this to break the monotony.”<sup>119</sup> The same witness was accused of “telling untruths” by a defence counsel, which appeared to distress the witness as he denied the accusation and reminded the chamber that his uncle had been killed. On a number of occasions members of the defence teams have accused witnesses of lying before the trial chamber, which sometimes takes the form of accusing a witness of delivering testimony that is “a figment of your imagination.”<sup>120</sup> These allegations are often made without any prior foundation as to what in particular has been fabricated, and they are made to both insider witnesses and victim witnesses alike, with limited intervention by the bench in Trial Chamber I. In contrast, the Presiding Judge of the second chamber has already established that directly accusing a witness of lying is not the terminology usually allowed in court.<sup>121</sup>

### *Injured witnesses*

Human Rights Watch noted with concern that during one of the first trial sessions the judges “requested that a witness whose arms were obviously amputated raise hands to demonstrate this.”<sup>122</sup> While the bench and the prosecution do not ask to see injuries in every instance when an amputee or scarred witness testifies, it has become a fairly common practice at the court. Since these witnesses are testifying from behind a partition, they are asked to stand in a stooped posture in order to show their injuries to the bench while remaining out of sight of the public gallery, an awkward position for the witness, who may then be further subjected to a close-range visual examination by defence counsel.<sup>123</sup> A judge in the second trial chamber recently made an effort to explain to the witness that the chamber was “not seeking to embarrass you at all,” but that the defence had been disputing that the witness was injured, which was why the bench permitted such an examination to take place. The judge added that he could not see the injury from where he was sitting, which would appear to justify a closer examination, as is not the case with amputees. The example from the second trial chamber, whereby the purpose of the examination is explained to the witness, appears to be a more appropriately sensitive approach.

### *Judicial guidelines*

The judges are guided by two rules governing how witnesses are questioned at trial. Under Rule 75(c) of the Rules of Procedure and Evidence they are instructed to “control the manner of questioning to avoid any harassment or intimidation”; Rule 90(f) further states that the Chamber “shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to: i. make the interrogation and presentation effective for the ascertainment of truth; and ii. avoid the wasting of time.” The second rule gives the bench direction to intervene when counsel of both sides engage in repetitive questioning. However, the Rules do not provide definitions or guidance as to what constitutes harassing or intimidating behavior, and the judges exercise their own discretion in determining when to intervene. Although there is some benefit to leaving these guidelines open to interpretation and context-based, it would aid in promoting consistency between the two trial chambers if an understanding is reached regarding what modes of behavior can be construed as witness harassment.

## **V. IN THE TRIAL CHAMBER**

The court was conceived with expeditiousness in mind: it was originally anticipated to function for approximately three years, and according to current projections it is expected to complete trials and appeals within a five year time frame. The Prosecutor emphasized that an important aspect of the court mandate includes completing it in a “politically acceptable” length of time, and the right for those who are accused “to be tried without undue delay” is enshrined in the court’s Statute.<sup>124</sup> From the administrative side, the Registrar is under a considerable degree of funding pressure in relying upon voluntary contributions and a UN subvention grant to meet the court’s operating costs. If it completes its work in line with current projections and at a reasonable overall cost, the Special Court will considerably increase its credibility as a new paradigm for post-conflict justice within the international legal community.

In light of these political, rights-based, and financial concerns, the chambers are encouraged to conduct proceedings as expeditiously as possible. Trial Chamber I is aware of these concerns, and the importance of expeditiousness is often mentioned during trial, but the performance of the chamber has yielded mixed results. This is in part due to the need to balance expeditiousness with protecting the rights of the accused, which includes permitting defence counsel ample time to conduct cross-examination.<sup>125</sup>

It is too early to make an informed assessment of the performance of Trial Chamber II, which has only completed a few weeks of trial at the time of this report’s publication.<sup>126</sup> The Registrar noted that 2004 was “a wasted opportunity” as far as the second trial chamber was concerned, and in order to expedite courtroom proceedings once the AFRC trial began, he requested to have judges with substantial courtroom experience appointed to the second trial chamber.<sup>127</sup>

### **Judicial Management of Trial Proceedings**

The role of the judges in managing the pace of trial proceedings is of critical importance to completing the trials in a reasonable period of time. The pace of trial has quickened in the first trial chamber since the beginning of the RUF and CDF trials, when questions related to legal representation of the accused and the admissibility of certain kinds of evidence had caused a number of procedural delays. This has improved over time, as the bench has increasingly developed its own procedural history from which it now draws when issues emerge repeatedly at trial. Some of the delays in the trial chamber are unavoidable, such as when a witness needs time to recover from particularly difficult testimony. However, a few ongoing delays have become cemented in the bench’s practices, such as extensive note-taking by the judges, which was fairly innocuous at the beginning but has grown increasingly more pronounced. Counsel now regularly pause their direct or cross examinations to wait until the judges have stopped writing. Because it has become standard to pause following a response from the witness, the overall pace of the trial is slowed. To date, the judges of the second trial chamber have been able to effectively take notes without delaying the trial proceedings, and some observers have commented that they do not understand why judges from the first trial chamber appear to copy lengthy quotations from witnesses or ask witnesses how to spell names multiple times when they have official transcripts at their disposal.

Long breaks and late start times have also become standard practice in Trial Chamber I. The 9:30 start time is not always adhered to, and the court usually starts ten to thirty minutes late. The bench is not accountable for some of the delays, such as occasions when it is unclear whether the accused will attend trial, technical problems with the courtroom equipment, or the late arrival of counsel. Trial Chamber I has increased the number of hours it spends in trial each week by reclaiming Fridays, which were previously reserved for motions and often unused, in order to hear witness testimony. However, even a full day of trial does not amount to more than six and one half hours of court proceedings: the chamber breaks for lunch for one and one half hours every day, and it regularly takes one morning and one afternoon break, which can total up to one hour when combined. The Presiding Judge often announces a break “for some minutes,” a vague indicator which has lasted for up to 40 minutes. The chamber generally decides not to take on an additional witness if there is half an hour or less of trial time remaining on a given day, and it has made the decision to wait until the following day to call a witness even with a full hour of potential trial time remaining. The Presiding Judge has invoked the need for “neatness of the court record” as the reason for adjourning early without taking a new witness; however, witness testimony is often interrupted during the course of a trial session, and it is not unusual for a witness to be heard on multiple days.

### *Courtroom demeanor*

The bench occasionally intervenes when either a prosecution or defence team member appears to be asking a witness unnecessary or repetitive questions, but this does not happen in all cases. The judges are more inclined to intervene when it appears that the behavior of counsel could be construed as harassment. One defence team member was recently reprimanded for repeated questioning and for appearing to laugh at a witness.<sup>128</sup> However, the judges have also intervened on behalf of counsel, and on one occasion a judge told a victim witness that “you have to be very respectful to learned counsel.”<sup>129</sup> One member of the bench attempted to determine whether the witness and counsel were referring to the same thing when they used the term “gut” and “guts” respectively: the judge noted that “guts” carries a colloquial meaning in American English that could be construed differently than the obvious referent of the term, which was quite clearly the entrails of the witness’s friend.<sup>130</sup> This semantic exchange seemed inappropriate in light of the graphic description of events that preceded it, and it serves as an extreme example of a tendency by the bench to pursue tangential or overly philosophical avenues of inquiry in the midst of witness testimony.

### **Attendance of the accused at trial**

The Special Court’s Statute provides that the accused shall have the right to be tried in his or her presence.<sup>131</sup> However, an accused individual can refuse to appear in court under Rule 60, which also provides that the trial shall continue in the accused’s absence if the Chamber is satisfied of the express or implied waiver of this right has been exercised. All six accused in the CDF and RUF trials have exercised this right of non-attendance at points during proceedings thus far, and for varying reasons. Two of the accused, Augustine Gbao and Chief Samuel Hinga Norman, have explicitly rejected the trial and continue to remain absent as a form of protest. In the RUF trial, Gbao sought to prohibit any participation he or his legal counsel may have in the proceedings

from the beginning of trial on the grounds that he did not accept the constitutional legitimacy of the court. Both the trial and appeal chambers have ruled that he should continue to be represented by his defence team, who is proceeding without instructions from their client.<sup>132</sup>

In the CDF trial, Samuel Hinga Norman launched what he termed a “judicial protest” in the beginning of the second trial session, where he drew attention to what he perceived to be procedural illegitimacies within the trial proceedings. He argued that he had not been properly served with and arraigned on the Amended and Consolidated Indictment under which the three accused for the CDF trial currently face charges.<sup>133</sup> He further requested that the Trial Chamber I reverse the order for protective measures allowing prosecution witnesses to be shielded from public view except for victims of sexual violence, a point which would effectively reveal all witnesses in his trial, as the CDF indictment does not include sexual violence counts. His defence counsel subsequently filed motions regarding both issues, and in both instances the chamber has rejected Norman’s requests.<sup>134</sup> Norman is currently appealing the chamber’s decision regarding the indictment and continues to refuse to attend proceedings until the trial chamber complies with both of his demands.

In what appeared to be a show of solidarity with Norman, the other two CDF accused refused to attend trial during the remainder of the second and all of the third CDF trial sessions last year. They have since returned to the trial proceedings. The two remaining indictees in the RUF case each refused to continue attending proceedings at the beginning of the January session of the RUF trial, but both returned to trial two weeks later.<sup>135</sup>

The absence of the accused at trial has the potential to have a marked impact on the defence of their case. This would appear to be particularly significant in the case of Hinga Norman, whose knowledge of the conflict and of the witnesses testifying against him enabled him to extensively cross-examine prosecution witnesses during his attendance at trial. In the RUF trial, Issa Sesay frequently passes notes to his counsel during the course of proceedings to assist with his defence. Counsel for Augustine Gbao persistently remind the court that they have no instructions from their client, which hampers their ability to cross-examine key witnesses who testify to events for which they have no insider knowledge.

The chamber has adopted both a cautious and flexible approach in its application of Rule 60 and appear to be at once sensitive to the rights of the accused encompassed within it and mindful of ensuring the smooth administration of justice. In this regard, the chamber opined that “it is a clear indication that it is not the policy of the criminal law to allow the absence of an accused person or his disruptive conduct to impede the administration of justice or frustrate the ends of justice. To allow such an eventuality to prevail is tantamount to judicial abdication of the principle of legality and a capitulation to a frustration of the ends of justice without justification.”<sup>136</sup> On a number of occasions the Chief of Detention has been asked to testify regarding the refusal of indictees to attend trial in order to confirm that they understand their rights in this regard and that they have explicitly waived their right to attendance. The Chief of Detention continues to regularly report on the grounds of the accused’s absence to ensure that the chamber is informed as to the status of the waiver being exercised. In the case of Gbao’s non-attendance, the chamber has sought to invoke Rule 60 despite Gbao’s outright refusal to accept the court’s legitimacy and boycott of

the proceedings. In this regard, the chamber has determined that “an accused cannot waive his right to a fair and expeditious trial whatever the circumstances,” a determination which was upheld on appeal.<sup>137</sup>

### **Public attendance and access to proceedings**

Trial attendance is generally quite high at the beginning of a new trial session, and it tends to drop through the course of the session, with sometimes as few as two individuals present in the public gallery. The presence or absence of the accused in the trial chamber significantly impacts trial attendance; many of the people seated in the public gallery are family members or supporters of the accused, and they often do not come to trial when the accused refuse to attend. During a mid-session low, one of the defence counsels commented that the interest of the public appeared to be waning; the Presiding Judge responded that it was probably because the members of the gallery suspected that the chamber would be going into closed session.<sup>138</sup>

There has been an ongoing discussion in Trial Chamber I about balancing the need for a public trial in open session with the need to protect witnesses from having their identities disclosed. In earlier sessions the defence expressed that the prosecution seemed to be making requests for closed sessions as a matter of course. The prosecution has countered that the court is responsible for assuring the safety of its witnesses, many of whom fear retaliation for their testimony. The OTP has since limited the number of applications for closed session, and the defence has opposed the applications less frequently. The bench has granted all requests for closed sessions to date, but sometimes with modifications geared toward hearing portions of the proceedings in open session.

In Trial Chamber I, the process of applying for, deliberating upon, and taking testimony in closed session bears directly on trial attendance. Under the prevailing system, applications for closed session are made in closed session; this means that the public gallery is adjourned for the course of the application, reconvened for the public decision, and then adjourned again, usually for the duration of the witness’s testimony. The chamber has been aware of the inconveniences this creates for members of the public, and it has considered alternate methods, though as yet they have not been implemented.<sup>139</sup> Another factor which may affect trial attendance is the visibility of proceedings, such as the presence or absence of the partition screening witnesses from public view. Trial is generally well attended when witnesses testify in the open and are visible from the public gallery. Attendance of trial may be increased by further efforts to publicize when witnesses are anticipated to testify openly, and the court could set up a more effective system of notifying the public when the trial session is closed to the public in order to prevent court visitors from needlessly going through the court sign-in process and security checks. This would require further coordination between the prosecution, who handles the order of witnesses, and court security at the front gate.<sup>140</sup> Anticipated ongoing testimony in closed session could also be announced to local press outlets by the Public Affairs Office, though this might prove too speculative a task for an official section of the court to undertake. Alternatively, local civil society groups could liaise between the court and the local press to notify the public about the anticipated accessibility of trial proceedings.



## Disclosure of evidence at trial

Among the ongoing issues raised at trial is the extent to which the prosecution is meeting its disclosure obligations, as well as the matter of determining what constitutes a witness statement. Both of these issues bear a particular relationship to the cultural context in which the court is functioning: when and how evidence is obtained from witnesses sometimes does not readily conform to international trial standards, which the Prosecutor noted when describing some of the challenges faced by his team.<sup>141</sup> In some instances, witnesses have made additional allegations during meetings with members of the OTP that were not included in previous statements disclosed to the defence, and when such information is disclosed shortly before the witness appears to testify in court, it can inconvenience defence efforts to prepare for cross-examination.

Disclosure obligations are governed by Rule 66 of the Special Court Rules.<sup>142</sup> The timing of the disclosure is imperative from a defence perspective, as it should ensure adequate time for the preparation of the accused's defence. Timing is further governed by the disclosure obligations under Rule 67(D), which provides for continuous disclosure of additional evidence that comes to hand as the trial continues. The form that disclosure takes is also significant to the defence: what constitutes a "witness statement" for the purposes of the trial can vastly affect counsel's ability to effectively cross-examine witnesses, as the defence frequently draws from prior inconsistencies in witness statements to challenge the credibility of a witness's testimony.

The process of collating statements given by witnesses is undertaken by investigators who conduct interviews nationwide. The task of establishing whether or not a witness has made a statement is more difficult than it would first appear. As the majority of Sierra Leoneans do not speak English, investigators are usually tasked with interviewing witnesses with the assistance of an interpreter, who translates the relevant witness's response from one of Sierra Leone's many tribal dialects into English. Oftentimes witnesses are illiterate or are unable to read English. To further complicate matters, in several instances witnesses have denied ever attending the relevant interview or have argued that their statements were not recorded correctly. On several occasions, therefore, the task of impeaching a witness's testimony has become fraught with the exigencies of determining how best to identify the statement in the first place.

What constitutes a witness statement was considered by Trial Chamber I in the initial stages of trial. The issue arose in the CDF case after the first prosecution witness testified concerning facts that were not disclosed in his written statement. After extensively referring to judgments from the *ad hoc* tribunals, the chamber determined that "a statement can be 'anything that comes from the mouth of the witness' regardless of the format. By parity of reasoning, the fact that a statement does not contain a signature, or is not witnessed does not detract from its substantive validity."<sup>143</sup>

Trial Chamber I maintains that "the principle of orality" should govern their determinations, and it places paramount importance on the testimony heard by witnesses at trial. The chamber must constantly balance the need for identifying a witness's statement against the need for efficiency within the trial context. In practice, this has meant that the task of determining whether or not a witness actually made the statement has become increasingly less important than the inconsistencies alleged.<sup>144</sup> This continues to be point of tension in the court, as some witnesses have main-

tained that they did not attend interviews or make statements that the prosecution subsequently disclosed to the defence.

### **Translation in the trial chamber**

The eleven permanent translators and interpreters working in the Special Court trial chambers are trained in simultaneous and consecutive translation.<sup>145</sup> This mixed method of translation has considerably expedited the translation process, and barring any technical problems with the transmission, the public gallery hears a seamless translation of the witness's testimony into English. Court translators and interpreters are bound to follow a code of ethics which specifies that they must "convey the entire message, including vulgar or derogatory remarks, insults, mistakes, untruths and any non-verbal clues, such as the tone of voice and emotions of the speaker, which may facilitate the understanding of their listeners or readers."<sup>146</sup> Ongoing efforts are being made by the head of the translation unit to improve the grammatical structure and pronunciation of the English translation. The present staff covers the most frequently used languages in court, and the unit head has also attempted to hire and train female translators and interpreters, some of whom will cover additional languages. She has additionally instituted some reforms in the diction used by translators; for example, the Krio phrases "forced mommy and daddy business" and "mommy and daddy business by force" used in translations from English to Krio have been replaced by the term "rape," pronounced in the Krio accent, to highlight the gravity of the act and to distance it from any possible associations with consensual intercourse.

With the exception of a few isolated incidents, the translation unit seems to be well equipped and functioning smoothly. The main translation issues appear to stem from technical problems, such as missing segments of testimony when two individuals are speaking at the same time. A number of witnesses understand English but prefer to testify in another language; these witnesses frequently respond to questions from counsel before they have been translated, which can lead to a gap in the court record, and the translators must intervene and instruct the witness to wait for the translation. During one unfortunate incident in the first trial chamber, a mistranslation of a word from a tribal language into English ultimately upset the witness, who felt that he was being falsely accused of inconsistently stating his profession.<sup>147</sup> One of the accused in the second trial chamber has objected that interpreters were assisting the witness by adding a few words to the witness's testimony in the course of their translation from Krio to English, and the translators were reminded that they were bound by their code of ethics to interpret literally.<sup>148</sup> The trial chambers have been mindful of the need to ensure that the accused individuals receive a translation of the proceedings in their native languages, and judges occasionally interrupt in order to remind parties to speak at a rate at which the translators and stenographers can accurately record trial proceedings.

## VI. PUBLIC AWARENESS AND LEGACY

Within the limits of its lifespan and budgetary constraints, the court's hybrid nature and location in Freetown has meant that it must adopt a responsive relationship toward the people of Sierra Leone. The need to ensure that the Special Court serves a longer-term function for both the Sierra Leonean public and the country's legal and judicial sectors is felt strongly throughout the organs of the court, and several branches of the court have worked on developing a number of initiatives to inform the public about its work.

The Special Court has established an Outreach section to create a link between the court and the people of Sierra Leone. Given the court's location within Sierra Leone, it has a significant advantage over the *ad hoc* tribunals regarding potential outreach initiatives and obtaining feedback about the court from the Sierra Leonean community. The court's Press and Public Affairs Office engages with the local press to clarify the work of the court across the country, and it serves as a liaison for international media, researchers, academics, and other organisations. It is hoped that the work undertaken by both the Outreach section and the Press and Public Affairs Office will encourage sustained efforts in judicial and legal reform in Sierra Leone.

Members of the Registry are actively engaged in preparing and undertaking a completion strategy in which legacy features prominently.<sup>149</sup> Part of this legacy has already begun to take shape through the court's hiring policies, which attempt to ensure that Sierra Leoneans in the justice and security sectors are considered for available posts in order to draw from local expertise. Ways in which the physical contribution of a courthouse and detention facilities can be used are also being explored, as the court site will eventually be turned over to the government of Sierra Leone when the trials conclude. The court is additionally concerned with gathering and consolidating its knowledge for future use by the international community. The Registrar is working on developing a "Best Practice Manual" with registrars from the other three international tribunals, which aims to assist future tribunals in determining how best to structure their budgets and logistical operations.<sup>150</sup>

The Outreach section and the Press and Public Affairs Office at the Special Court are intended to have a symbiotic relationship within the institution. While the Outreach section concentrates its energies on initiatives that are designed to engage the imagination of civil society groups and the Sierra Leonean public, the Press and Public Affairs Office deals with media and public relations surrounding the court, both on a national and an international level. While there is some cross-over between these two sections, their functions are defined separately. This section of the report discusses the most recent initiatives of the Outreach section and the Press and Public Affairs Office.

### **Outreach**

The Outreach section has undertaken a wide range of initiatives to create awareness and access to the Special Court, to provide forums for discussion about the meaning of the court's mandate, and to stimulate further activity for reform within Sierra Leone.<sup>151</sup> The section was originally housed at the OTP, but it was relocated to the Registry in January 2003.<sup>152</sup> Since that time the section has

coordinated activities for both the prosecution and the defence as well as undertaking a separate, distinct and neutral role to link the people of Sierra Leone with the Special Court. The section is comprised of an Outreach Coordinator who heads the section and four additional staff members who are based in Freetown, as well as five district officers based throughout the provinces.

In 2004, the section undertook a number of activities to fulfill its mission to “promote understanding of the Special Court and respect for human rights and the rule of law in Sierra Leone.”<sup>153</sup> In particular, it conducted training sessions for members of the local justice system, the Republic of Sierra Leone Armed Forces, and the Sierra Leone Police to inform them about ways in which the operations of the court could benefit the local administration of justice.<sup>154</sup> The section has also conducted an extensive program of activities with schools and colleges nationwide,<sup>155</sup> as well as a range of programs for the disabled, which has included the production of over 300 court documents in brail with the section’s partner, the Blind Youth Movement, for the Sierra Leonean Blind School.<sup>156</sup>

A main initiative undertaken by the Outreach section in the last six months has involved conducting a series of Victims Commemoration Conferences at the regional and national level with civil society activists and other interested parties. The conferences were held regionally in the southern, eastern, and northern provinces in November and December of 2004 and culminated in the national conference in the capitol at the beginning of March 2005. The regional Victims Commemoration Conferences were organized by the Inter-Religious Council, the Forum for African Women Educationalists and the International Center for Transitional Justice<sup>157</sup>.

The purpose of the Victims Commemoration Conferences was to provide delegates from the governmental, justice and reform sectors at the village<sup>158</sup>, national<sup>159</sup> and international<sup>160</sup> level, with a forum for formulating strategies to address the concerns of victims of the conflict, and to build further on proposed national and international responses to these concerns. They were also intended to address some of the criticisms of civil society activists regarding the limited mandate of the court and its relevance to the Sierra Leonean public. The conferences centered around the theme of Truth, Justice and Reconciliation and delegates engaged in focused discussions surrounding various topics including the perception of justice as presented by the Special Court; the perceptions of justice and accountability in Sierra Leone; the perceived legacy of the Special Court and the Truth and Reconciliation Commission; and how communities and civil society actors throughout Sierra Leone can complement the work of the Special Court and the Truth and Reconciliation Commission<sup>161</sup>.

The conferences appeared to contribute to the ongoing dialogue between the court and the public, and feedback about the work of the Outreach section from civil society representatives has continued to be primarily positive. Delegates of the national conference held in Freetown have adopted an “action plan” which primarily proposes activities to be undertaken by those delegates and their counterparts in a variety of governmental, non-governmental and international agencies for the implementation of initiatives that center on rehabilitation and reparation for victims,<sup>162</sup> reconciliation,<sup>163</sup> and the continued progress and legacy of the Special Court. In particular, delegates expressed their continued frustration at the limited life span of the court, the limited interpretation of its mandate, and the fact that there are still indictees at large (namely, Charles Taylor

and Johnny Paul Koroma) who are yet to be brought to justice. Various initiatives are being undertaken to ameliorate these frustrations: this includes continuing to lobby the Security Council and other international organizations to request that the court be given Chapter VII powers to compel the release of Taylor<sup>164</sup> and that the impunity gap left by the limits of the court's temporal and political constraints is bridged through alternative means.<sup>165</sup>

The head of the Outreach section has stated that during the forthcoming months and throughout most of 2005-2006 as the trials draw to a close, the section will be focusing on strengthening the existing programs it has undertaken and increasing public attendance of the trial proceedings.<sup>166</sup> She noted, however, that the fact that proceedings were not conducted in Krio meant that many Sierra Leoneans were unable to understand the proceedings, and hence were unlikely to attend. The Outreach section will continue to raise this issue within the court as the trials progress.

### **Public Affairs**

The Press and Public Affairs Office has been producing video summaries of trial proceedings for outreach efforts in the provinces, and these are additionally accessible on line on the court's website. Videos are screened by the court's outreach program across Sierra Leone's 14 provinces on mobile video units. They are produced bi-monthly in English and Krio, and two interpreters were recently hired to translate previous and future summaries into Mende, Temne, Limba and Mandingo. To supplement these summaries, the section has recently appointed an independent journalist to undertake a feasibility study regarding the possibility of broadcasting proceedings at the Special Court via radio.<sup>167</sup> It is anticipated that the radio broadcast would serve two functions: on the one hand, it would provide access to the proceedings of the court to a larger audience and would become a public record. On the other, it would raise awareness and stimulate discussion about national judicial issues to energize further reform projects in the judicial sector. Broadcasts would include commentary about the proceedings from various monitoring and civil society groups on a weekly basis to further facilitate understanding and discussion about what is occurring at trial. It has been suggested that the broadcasts should take place in Krio, Sierra Leone's *lingua franca*, to avoid linguistic marginalization, which was highlighted by the Truth and Reconciliation Commission as a potentially destabilizing factor within Sierra Leone.<sup>168</sup>

The Outreach section and the Press and Public Affairs Office largely require further funding and support in order to sustain these efforts. The court's Management Committee has generally been reluctant to provide funds for these areas, although following a recent visit to the court in March 2005, members of the Committee expressed their support of the Outreach section's activities and it is hoped that this will signal a shift in attitude towards funding. Regardless of whether it does, the head of the Outreach section is optimistic about funding, as the court's outreach activities were adequately supported during 2004 by the European Commission and the Open Society Initiative - West Africa and the ongoing support of these organizations is anticipated, though not guaranteed<sup>169</sup>. Additionally, the Registrar has recently appointed an independent fundraiser and consultant to assist the court in general fundraising efforts for court operations, which would include seeking further support for outreach-related initiatives.<sup>170</sup>

## **Completion Strategy**

The Special Court is also actively engaged in developing and sustaining its completion strategy, which is divided into three stages: completion, post-completion and legacy. The completion phase of the strategy looks at ensuring the court is meeting its deadlines and keeping within the targeted time-frame for the end of proceedings. The court has appointed a Judicial Services Coordination Committee, comprised of members of all the sections participating in trial proceedings to ensure that the administrative issues relating to the trial can be handled effectively outside trial time. Court management and chambers also extensively monitor and analyze the use of trial time. Aspects including the number of hours spent during court on a particular witness and the number of adjournments taken by the Chamber are recorded and then assessed to provide some feedback to the court as to how trial time can be used more efficiently. This is intended to enable the judges to make informed decisions about how to conduct the proceedings<sup>171</sup>.

The post-completion phase attempts to determine what issues may arise regarding the review of proceedings and sentences (namely, pardon, commutations and early release) once the appeals stage is over and the court has closed. It also attempts to determine where the accused will serve their sentences if they are found guilty. The Special Court signed its first agreement on the enforcement of sentences on 15 October 2004, which will allow some of those who may be convicted to serve their sentences outside Sierra Leone.<sup>172</sup> Under Article 23 of the Statute, pardon or commutation of sentencing is only allowed if the President of the Special Court, in consultation with the judges, determines that such pardon or commutation should be allowed<sup>173</sup>. As such, the court will need to ensure that it appoints a nominal president to determine these issues, or that its current president is willing to take on this role, once proceedings have ceased.

The “legacy” stage of the completion strategy takes on the most psychological weight at the court, and has been discussed extensively in the Legacy section of this report which follows. However, in a pragmatic sense, the court is considering ways in which the court’s facilities can best be used after the trials have concluded. One idea that has been suggested involves using the facility as a regional court house for the International Criminal Court. Further suggestions have included using it as a conference location for Economic Community of West African States<sup>174</sup>. Given the expense of maintaining the facilities at the Special Court, the continued support of the region or the international community is likely to be imperative for the continued upkeep of its facilities.

## **Legacy**

The notion of the legacy of the Special Court is pervasive throughout the court itself and within the civil society community surrounding it.<sup>175</sup> In determining what form its legacy should take, the court appears to be addressing a tripartite agenda that comprises working towards ending impunity, promoting reform and the rule of law, and setting an example from which future tribunals can benefit. It is also anticipated that these efforts will encourage further international aid projects in Sierra Leone.

The Prosecutor’s limited interpretation of its mandate to try “those who bear the greatest responsibility” has meant that only a small number of alleged perpetrators are being tried at the Special

Court. The pragmatic approach adopted towards prosecutions and the fact that prosecutorial strategy is wedded to the command structure within the CDF, RUF and AFRC militia groups has been criticized by civil society groups, who hoped that the court's mandate would be interpreted more widely. Many Sierra Leoneans have expressed frustrations regarding the fact that lower level commanders who were actually committing the atrocities are not being tried by the Special Court.

At present, a number of members of the RUF splinter group known as the "West Side Boys" and some former members of the RUF are standing or awaiting trial in the local justice system, but the charges brought against these individuals are almost exclusively for treason.<sup>176</sup> The provisions of Article IX(3) of the Lomé Peace Agreement (1999) are likely to prohibit the prosecution in the local courts of alleged crimes committed by ex-combatants before July 1999. Under that provision, the Government of Sierra Leone undertook to ensure that members of the alleged combat groups would not be subject to official or judicial action for anything done by them "in pursuit of their objectives as members of these organizations."<sup>177</sup>

Difficulties of addressing impunity through the use of the national courts are compounded by deficiencies in the legal system and a lack of public funds for legal representation, which are likely to deter victims from bringing actions against alleged perpetrators. The archaisms contained in the current Statutes have been criticized by commentators as falling well below international human rights standards.<sup>178</sup> One local lawyer currently working at the Special Court did note that the rulings of the first trial chamber were currently being used by lawyers in the national courts.<sup>179</sup> In this regard at least, the court may be able to have some impact on the jurisprudence of domestic criminal law.

Yet unlike the *ad hoc* tribunals of the ICTR and the ICTY, whose mandates did not conceive of their contributions towards a national reform agenda, the Special Court has the chance to make an impact on judicial and legal reform in Sierra Leone that goes beyond its efforts to combat impunity. Given the limited mandate of the Special Court and the budgetary constraints faced by it, its role in achieving the aims of the reform agenda are more facilitative than actual: it is hoped that the Special Court will be able to generate a spirit of activism within the country that will focus the efforts of other institutions and organizations towards these ends. While the Special Court may be able to have a significant temporary impact in this regard, it recognizes its limits as an isolated institution to effect substantial ongoing reform.

The court seems best situated to facilitate domestic reform through skills transference to local lawyers, police officers and judges who currently work at the court. More than half of all Special Court staff at present is Sierra Leonean or are part of the Sierra Leonean diaspora abroad.<sup>180</sup> Members of the court have noted, however, that there is a lack of Sierra Leonean representation at the senior management level, with only two national candidates appointed as department heads. The Registrar has stated that the Special Court has not adopted any form of quota system based on nationality and will only recruit personnel based on the merit of the individual candidates.<sup>181</sup> However, the court has implemented a hiring policy in which any Sierra Leonean candidate who applies for a position must be short-listed for interview to ensure that qualified national candidates will be given due consideration for posts. Senior staff could be further encouraged to consider promoting qualified Sierra Leonean employees to more senior positions as these posi-

tions become available. At this point in the court's lifespan, it is often unnecessary to bring in further international hires when qualified Sierra Leoneans are available to fill international posts that they have been building their knowledge of during the course of court operations. This would also help to bridge the perceived divide between nationals and internationals at the court, which appears to be grounded to some extent to the disparity in pay between national and international posts.

Yet in a more promising sense, as has been evidenced through its outreach and public affairs initiatives, the court has shown itself to be aware and responsive to the needs and interests of the Sierra Leonean community it serves. In this sense, it has set an example for future "hybrid" tribunals to engage with those external to the institutions themselves. While critics of the court are likely to argue that the court has not gone far enough, it seems to have gone a significant step further than its predecessors at the ICTY and ICTR.



## VII. CONCLUSION

The recent opening of Trial Chamber II marked an historic landmark in the life of the Special Court. Nine months after Trial Chamber I had opened and over three years since the court itself was inaugurated, the long-anticipated combined trial of the three alleged AFRC accused commenced with the opening statement of the Prosecutor, who addressed a public gallery filled to capacity with a predominantly Sierra Leonean audience.

Symbolic acts are not lost on the Prosecutor, who took the opportunity to draw attention to the hybrid nature of the court and the mixed composition of its staff by asking a Sierra Leonean member of his team to read the second half of the statement. The Prosecutor alleged that the opening statement was not intended for the judges or the court itself, but rather for the people of Sierra Leone.<sup>182</sup> Indeed, the highly emotive language of his statement referred primarily to the circumstances of victims. In the second half of the opening statement, trial counsel evoked this sentiment most strongly in her concluding remarks by stating that “the Prosecution asks simply that justice be done. We ask for justice for the victims. It has been said that the dead cannot cry for justice. But it is indeed the duty of those of us alive to do so for them. Today in this courtroom, we cry out loud for justice. We ask for justice for the families of the victims. And we ask for justice for the people of Sierra Leone.”<sup>183</sup>

Opening statements are carefully constructed rhetorical devices, and embedded within this expression is an appropriate metaphor for the exigencies faced by the Special Court itself. From mandate to legacy, the Special Court has been tasked with remaining in a responsive relationship to the victims of Sierra Leone’s eleven year conflict. Yet in its “cry for justice” for the people of Sierra Leone, the prosecution seeks a remedy for victims that is both swift and limited: swift, in the sense that the trials operate under several political and temporal constraints, making allegiance to a palatable time-frame imperative; and limited, in the sense that the mandate to try those alleged “to bear the greatest responsibility” has been interpreted with a conservative number of indictees in mind.

Embedded in this call is the plea “simply that justice be done,” yet determining what form such justice can and should take is no simple task. For the prosecution, doing justice may mean securing the conviction of the indicted individuals. For the defence, justice will only be done if the principle of “equality of arms” is adequately adhered to and the court is consistently mindful of the rights of the accused during the course of proceedings. “Doing justice” at the Special Court requires a constant balancing act between the competing concerns of expediency and efficiency with the need to create a sustainable, lasting and positive impact in Sierra Leone.

For these reasons, the court can be seen as acting not only structurally as a hybrid mechanism, but also as an institution that delivers its own “hybrid” form of transitional justice. While the court has rejected any interpretation of its mandate that may challenge its independence from the national jurisdiction of Sierra Leone, it is nonetheless mindful of the domestic context in which it operates. As stated in the introduction, this report understands “hybrid justice” to refer to an approach that continually balances adherence to international legal precedents, conventions, and norms with a localized interpretation of how justice would best be served in Sierra Leone.<sup>184</sup>

While unprecedented steps have been taken at the court within the context of international law, those steps can re-orient international legal discourse to serve the needs of justice within Sierra Leone. For instance, the Appeal Chamber's decision to uphold the court's jurisdiction over the recruitment of child soldiers, an unprecedented charge, brings international law into a responsive relationship with the contingencies of internal conflicts.

Throughout its examination of the prosecution, the defence, the trial proceedings, the treatment of witnesses and the legacy and outreach programs undertaken by the court, this report has framed its discussion of the Special Court through three main themes: (i) the notion of the court as an institution that responds to the post-conflict context in Sierra Leone; (ii) the novel steps taken by the court and its approach to an unprecedented mandate; and (iii) the extent to which the court operates as a transparent and accountable institution. These themes have, in turn, informed this report's vision of the form that "hybrid" justice is taking at the Special Court, and how this institution and the justice it seeks to deliver could form the basis of a model that future tribunals could use or measure themselves against. On this basis, the key conclusions reached are as follows:

### **Responding to the post-conflict context in Sierra Leone**

The court is not housed on neutral territory, as is the case with the *ad hoc* tribunals, but rather sits within the country of the victims' suffering. Furthermore, it has a mixed composition, employing members of the population who were directly affected by the conflict. This places the court in a unique position to involve and acquire feedback from the Sierra Leonean public; however, its geographical location in Freetown also poses more heightened security concerns to those involved in the trial process, including victims of the conflict who come forward to testify.

#### *Witnesses at the Special Court*

A primary way in which the court has been responsive to the needs of victims of the conflict in Sierra Leone has been through its management and protection of witnesses, many of whom are victims. Given its location in the country where the conflict occurred, the court must be continually sensitive to the added responsibility it assumes with witness protection and care. Through a combination of security resources, including a novel psychosocial support section for witnesses, the court attempts to ensure that all witnesses who come forth to testify feel that they are safe and protected.

The court has clearly articulated the importance of its witness protection measures, and benches in both trial chambers thus far have adopted a primarily cautious, concerned, and prudent approach in their treatment of witnesses in the trial chamber. However, further care can be taken by the bench to ensure that courtroom commentary does not digress so as to make particularly sensitive witnesses feel uncomfortable during the course of trial proceedings. Developing guidelines for what constitutes harassment or intimidation of witnesses in the courtroom context would help facilitate a more even treatment of witnesses between trial chambers, which could be aided by legal and psychosocial input and by acquiring more feedback from the witnesses themselves.

## *Outreach and Legacy*

The court's Outreach section has undertaken an extensive program of activities to engage various sectors of Sierra Leonean society with the work of the Special Court. The section has adopted a responsive, two-way approach to the public: on the one hand, it sees itself as disseminating information about the trials, the court and human rights principles to them; on the other, it uses the responses of the public to assist it in determining the kinds of programs it undertakes and the objectives those programs should pursue. The work of the Outreach section is generally regarded highly by both local and international civil society activists. While the section is likely to be able to rely on funding from private donors during the forthcoming year, funding constraints for outreach activities could circumscribe the court's efforts to push this agenda further than facilitation as the trials progress, an issue which the court's external Management Committee should bear in mind.

Local and international commentators await the outcome of the court's outreach activities, as it is hoped that the court will leave a legacy that sustains the momentum that it has gathered surrounding judicial and legal reform. The court has primarily adopted a facilitative approach to its legacy, with the Victims Commemoration Conferences held by the court as a recent example of this, yet it hopes this facilitation will enable other actors to continue to push for further steps in furthering the rule of law in Sierra Leone. External activities have been coupled with a pragmatic approach to the court's internal personnel and hiring policies, which attempt to increase the level of Sierra Leonean staff by ensuring that Sierra Leoneans are short listed for international posts. However, hiring panels could be required to have a Sierra Leonean member, and hiring panels should be encouraged to seriously consider promoting qualified national applicants into international posts as these posts become available.

### **Unprecedented steps taken by the court**

This report also considered the extent to which the court demonstrates institutional adaptability and the Chambers show jurisprudential innovation when responding to the mandate and the novel circumstances of the conflict in Sierra Leone. It has considered the prosecution's interpretation of its mandate in light of the court's ambitions within Sierra Leone as well as its work in relation to the fields of international criminal law and transitional justice, the novel charges brought in the indictments and under the Statute, and the establishment of the fourth pillar at the court in the form of the Defence Office.

### *The mandate*

The Prosecutor is restricted by his mandate, and in planning for future tribunals the advantages of a broader mandate should be considered, such as the mandate suggested by the UN Secretary-General to try those "most responsible." As was previously noted, the prosecution has narrowly interpreted the court's already narrow mandate "to try those who allegedly bear the greatest responsibility." Even considering the political, temporal, and financial constraints under which the Prosecutor has been operating, the decision to indict a low number of individuals leaves a large impunity gap in Sierra Leone.

For now it appears that no more than two further individuals may be indicted, and the focus therefore must shift to how to best utilize information regarding other alleged perpetrators. The prosecution has publicized the fact that it cooperates with other states and organizations to bring individuals to trial who were associated with the conflict, but who did not meet the threshold of bearing the “greatest responsibility” according to the Prosecutor’s interpretation.<sup>185</sup> Any information that can be shared with national courts and police to be used for internal legal reform or prosecutions should be provided to the respective authorities. Furthermore, while the prosecution is understandably reluctant to offer internal criticism to the public when it is at trial, it could undertake a more candid and transparent critique of its own methods and prosecutorial philosophies at the close of trials if it seeks to contribute to the growing body of knowledge surrounding post-conflict approaches to justice and accountability.

### *Novel charges*

This report has also considered to what extent “hybrid” interpretations of international transitional justice are taken by the Chambers in response to novel concepts. In particular, it considered the Appeals Chamber’s response to challenges regarding the recruitment of child soldiers and the charges of forced marriage brought by the Prosecutor.

The approach adopted by the Appeals Chamber showed responsiveness to the novel circumstances of the conflict in Sierra Leone: the bench was willing to stretch the fundamental principle of non-retroactivity in order to address a feature of the conflict in Sierra Leone which was not yet clearly criminalized under international law. Critics of the position have argued that indictees are being charged for counts that were not considered to be criminal acts at the time of their commission. However, in light of the alleged extent of child recruitment by all factions, the judgment showed sensitivity to the particular context of this conflict and the extent of its impact on the people of Sierra Leone. The prosecution’s efforts to frame the novel charge of forced marriage as a crime against humanity foregrounds the extensive role of sexual violence in the conflict.

### *Establishing the Defence Office*

The establishment of a Defence Office at the Special Court - as a “fourth pillar” in the service of justice - is generally applauded as an innovative development that has emerged from this hybrid model of transitional justice. Future tribunals are likely to benefit from adopting this paradigm, since it demonstrates that the court is mindful of “equality of arms” concerns such as defence management and the rights of the accused. At the Special Court itself, the Defence Office has an important outreach function in promoting and developing understandings of the right to a fair trial and the rights of the accused generally within Sierra Leonean society. However, in order to achieve a real and lasting impact in its outreach activities and to ensure that individual defence teams are given adequate support, the Defence Office should be recognized as an independent organ of the court. Sustained attention to defence budgets is also required to ensure the office has adequate resources. Furthermore, the role of the office *vis-à-vis* defence teams should be defined more clearly. The Defence Office is currently defined in the Rules as the “Office established by the Registrar for the purpose of *ensuring the rights of suspects and accused* in accordance with the Statute and Rules of Procedure and Evidence,” creating a direct relationship between the

Defence Office and the indictees.<sup>186</sup> A first step in this direction would be to redefine the objectives of the office as “ensuring the rights of *the Defence*”, given that the term “Defence” as defined in the Rules includes the accused *and* their counsel, which would highlight the advocacy role that should be assumed by the Defence Office on behalf of the defence teams. The Rules and defence team contracts could be further amended to help clarify the terms of this relationship.

### **Transparency and accountability at the Special Court**

As one of the judges from the first trial chamber has expressed, “justice is not a cloistered mistress, but is administered in public”<sup>187</sup>: justice must be transparent, accessible, and open to scrutiny, which extends beyond the courtroom and public gallery to the nation and the international community. The court has assumed a large and complex task with limited resources at its disposal.

This report has attempted to assess the measures that the Special Court has taken to ensure that both the proceedings at trial and the way in which the court operates are transparent to the public. It has further considered the way in which it has balanced both its socio-political concern to foster respect for the rule of law in Sierra Leone against fulfilling the mandate required by its international legal role. In this sense, the court holds itself accountable to both the domestic and international contexts within which it operates. It has focused on issues relating to prosecutorial independence, the disclosure of evidence and the extent to which proceedings have taken place in open sessions. It has additionally sought to canvass some of the challenges that the court has faced to its constitutionality and its jurisdiction as an international court, although this report fundamentally accepts the legitimacy of the Special Court as a “hybrid” tribunal operating within an international legal context. Overall, this report has found the Special Court to be making extensive efforts to conduct proceedings openly, and in particular to resist closed sessions, bearing in mind the rights of the accused and its obligation to the Sierra Leonean public.

#### *Public Access*

Encouraging public attendance of trial proceedings is an important part of the court’s responsibility to the Sierra Leonean public, and the court should continue to prioritize ongoing efforts in this regard. Proceedings at the Special Court are usually open to the public and are always translated into English. However, unlike the *ad hoc* tribunals, where proceedings are broadcast in multiple languages, the Special Court is largely inaccessible to the non-English speaking public. Although the court has considered distributing headsets for use in the public gallery that would allow attendees to listen to the proceedings in Krio, Sierra Leone’s *lingua franca*, these have not been made available as yet. The court does broadcast excerpts of the trial across Sierra Leone on mobile video units in Krio, and a plan for direct radio broadcasts of the proceedings is currently under consideration. This would likely increase the relevance of the trials to the public at large, though these broadcasts may need to employ summary rather than direct transmission to make them more accessible to the general public. The court’s Outreach section is also considering producing audio summaries to complement the audio-visual summaries currently produced by the court.<sup>188</sup> The court should continue to take ongoing measures to make itself more accessible to the public through outreach programs, informing the public whether it is in closed or open session to what-

ever extent it can, and by continuing to explore other avenues for bringing the trial proceedings to Sierra Leoneans who live outside of Freetown or who do not speak English or Krio.

### *Expedience and accountability*

Furthermore, this report has looked at the extent to which the imperative to be expedient and to act in an efficient manner, particularly in light of the expectations of the court's external Management Committee, has been balanced against sensitivities to social and political concerns. The importance of efficiency at trial and in the operations of the court has been expressed by all of its organs, including the trial chambers. However, efficiency has been invoked as a constraining factor in Trial Chamber I's consideration of sexual violence charges in the CDF case, whose majority decision denying leave to add gender-based crimes to the indictment was largely due to concerns with timeliness and the prospect of "undue delay," despite the fact that the decision itself admitted "the importance that these crimes occupy in international criminal justice"<sup>189</sup>. Given the significance of this category of criminal offences within the conflict as well as the attention it has received within the broader context of international legal discourse, the chamber's decision was disappointing. It appears that the chamber could have adopted more flexible approaches to hearing witness testimony related to these offences without compromising the rights of the accused.

### *A model for "hybrid justice"?*

To ask "simply that justice be done" in the case of the Special Court would overlook the substantial difficulties faced by the court to both achieve its mandate and to deliver a meaningful outcome for its post-conflict context. This report has instead looked at how justice is both envisaged and brought into institutional form at the Special Court; relatedly, it considers the extent to which the court's management of the diametric extremes of cost-efficiency and lasting legacy has both posed challenges to it and has placed it in a unique position to offer a hybrid form of justice. This "hybrid justice" could set it apart from its predecessors at the *ad hoc* tribunals by being both swift in its delivery and responsive in its approach. If the court attempts to answer its mandate with an ongoing awareness of its unique proximity to the affected population, tempered by mindfulness of what can be accomplished within its own constraints, it could remain in a responsive stance toward the broader interests it is meant to serve rather than congealing into an inward-looking institutional structure. At the opening of the second trial chamber, Presiding Judge Doherty stated that "the mission of this court and the process we are about to continue today is to contribute to the peace and reconciliation within Sierra Leone"<sup>190</sup>: such broad ambitions require the court to continually look forward and outward, toward its legacy and its social context, to complement the inherently retrospective view that justice takes in the courtroom.

## **VIII. FOOTNOTES**

<sup>1</sup> On 12 June 2000 President Kabbah wrote to the United Nations requesting its support in creating a court to try perpetrators of the conflict in Sierra Leone. On 14 August 2000 the UN Security Council passed Resolution 1315 requesting the Secretary-General to explore options for establishing the court, which was founded when the UN Security Council signed a bilateral agreement with the Sierra Leonean government on 16 January 2002.

<sup>2</sup> Hostilities commenced in 1991 and continued until 2002, with a short cessation around the time of the 1999 Peace Accord signed in Lomé, Togo. Numbers vary, but it is estimated that tens of thousands of civilians were killed and at least a quarter of the population was displaced during the course of the hostilities.

<sup>3</sup> Under Article 4 of the Statute, the Special Court has the power to prosecute individuals for “conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.” Forced marriage has been charged as an “inhumane act” under Article 2(i) of the Statute.

<sup>4</sup> Government nominees are not required to be citizens of Sierra Leone. The bench in Trial Chamber I consists of judges from Sierra Leone, Cameroon, and Canada. Trial Chamber II consists of judges from Northern Ireland, Uganda, and Australia.

<sup>5</sup> Interview with Registrar Robin Vincent, Freetown, 17 February 2005.

<sup>6</sup> Interview with Prosecutor David Crane, Freetown, 10 March 2005.

<sup>7</sup> Weekly reports are available on line through the War Crimes Studies Center website (<http://ist-socrates.berkeley.edu/~warcrime/>), and through a link on the website of the Special Court.

<sup>8</sup> Human Rights Watch primarily discussed the court’s need to secure additional funding. More specific criticisms included “an inappropriately narrow interpretation of the Special Court’s mandate to prosecute those ‘bearing the greatest responsibility;’ inadequate logistical support and lump sum payment structure for defense counsel; inadequate witness protection; and the lack of establishment of the second Trial Chamber.” (*Bringing Justice: the Special Court for Sierra Leone*, Human Rights Watch Vol. 16, No. 8(A), September 2004, p. 4). ICTJ commented that a large portion of court posts were occupied by U.S. nationals, and it further noted that there has been speculation as to whether the United States would use the court to pursue its own regional strategies or as a means of justifying its refusal to sign the Statute of the International Criminal Court. (“The Special Court for Sierra Leone: The First Eighteen Months,” March 2004, p. 7).

<sup>9</sup> Statute of the Special Court for Sierra Leone, Article 15.

<sup>10</sup> While this report was able to consider a plurality of perspectives from within the Defence Office and the individual defence teams, the views of the prosecution were only officially accessible through the Prosecutor himself. Internal policies prevent OTP staff from speaking publicly about their work without permission.

<sup>11</sup> Article 15 (1).

<sup>12</sup> 28 February 2005 Press Release, “Special Court Prosecutor to Step Down,” released by the Office of the Prosecutor and available online at [www.sc-sl.org](http://www.sc-sl.org).

<sup>13</sup> Interview with Special Court Prosecutor David Crane, Freetown, 10 March 2005.

<sup>14</sup> Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone (4 October 2000), Document S/2000/915, paragraph 30.

<sup>15</sup> Interview, 10 March 2005.

<sup>16</sup> For instance, from the AFRC, commanders “Savage” and Staf Alhaji were known to be particularly brutal, as were RUF commanders “Tactical” and “Superman” and CDF commander Musa Junisa. As would be expected, defence counsel have attempted to highlight the responsibility of insider witnesses and other individuals for some of the crimes alleged in the indictments against their clients, and during the third session of the CDF trial, one defence counsel went as far as suggesting the name of an individual who had not been indicted.

<sup>17</sup> Interview, 10 March 2005.

<sup>18</sup> *Ibid.*

<sup>19</sup> According to the FY 2005-06 draft budget, support for externally relocated witnesses is estimated at \$295,000. The majority of these few witnesses are insiders, who have received a substantial amount of material and financial support from the court.

<sup>20</sup> Three examples from the trial proceedings thus far are Brigadier General John Tarnue of Liberia, and George Johnson (a.k.a. “Junior Lion”) of the AFRC splinter group “West Side Boys,” both of whom testified in the RUF trial, as well as Albert Nallo, National Deputy Director of Operations for the CDF, who recently testified in the CDF trial. At least one of the indictees may have been considered as a possible insider witness.

<sup>21</sup> Human Rights Watch noted that the existing mandate could be interpreted to include “regional or mid-level commanders who stood out above similarly ranking colleagues for the exceedingly brutal nature of the crimes they committed” (*Bringing Justice: the Special Court for Sierra Leone*, p.5). While it is highly unlikely that the Prosecutor would consider a broader interpretation of the mandate at this stage in the proceedings, the Registrar has indicated that two remaining indictments are possible, a point which is reiterated in the FY 2005-06 Draft Budget.

<sup>22</sup> Interview with the Prosecutor, 10 March 2005.

<sup>23</sup> The Chamber held that the court was “an international tribunal exercising its jurisdiction in an entirely international sphere and not within the system of the national courts of Sierra Leone.” *Decision on Constitutionality and Lack of Jurisdiction*, SCSL-04-14 (CDF case), 13 March 2004, paragraph 80. Related decisions appeared in the RUF and AFRC cases.

<sup>24</sup> This characterization of the court does not depend on whether the Prosecutor draws strictly from international law in his indictments. In her *amicus curiae* submission at the invitation of the court, Professor Diane Orentlicher stated that “although a court of mixed composition applying an amalgam of international and national law, the Special Court has the hallmarks of an international tribunal.” *Submission of the Amicus Curiae on Head of State Immunity* in Prosecutor v. Charles Ghankay Taylor, SCSL-2003-01, p.19.

<sup>25</sup> During the recent Victims Commemoration Conferences facilitated by the court’s Outreach section, civil society actors undertook to continue lobbying the Security Council to grant these powers to the court. See the section of this report entitled “VI. Public awareness and Legacy – A. Outreach.”

<sup>26</sup> Interview, 10 March 2005.

<sup>27</sup> Human Rights Watch update, “EU: Press Nigeria to Hand Over Charles Taylor,” 24 February 2005. Available online at <http://www.hrw.org>.

<sup>28</sup> Santigie Borbor Kanu, allegedly of the AFRC, was indicted on 15 September 2003. According to an OTP press release, Bockarie died in Liberia in May of 2003, though his death was not confirmed by court representatives until several months later; Sankoh died in Freetown on 29 July 2003.

<sup>29</sup> Described in the *Decision and Order on Prosecution Motion for Joinder*, 28 January 2004.

<sup>30</sup> The chamber stated that justifying joinder would have required already proving that there was a common scheme or plan, and that the accused had committed crimes during the course of it. *Decision and Order on Prosecution Motion for Joinder*, 28 January 2004.

<sup>31</sup> *Decision on Prosecution Request for Leave to Amend the Indictment*, SCSL-04-16 (AFRC), 6 May 2004.

<sup>32</sup> 13 May 2004 Consolidated Indictment, paragraph 36.

<sup>33</sup> 5 July 2004 Transcript of Proceedings, page 25, lines 26-28. This allegation was subsequently revised in a motion by the prosecution seeking leave to amend the AFRC indictment, in which the prosecution contended that “new evidence obtained by the Prosecution and disclosed to the defence has led the Prosecution to the view that the joint criminal enterprise cannot be proved beyond reasonable doubt after January 2000”, *Prosecution Application to Further Amend the Amended Consolidated Indictment by Withdrawing Counts 15 – 18*, SCSL-04-16 (AFRC), 7 February 2005.

<sup>34</sup> In the RUF case, 26 out of 98 anticipated witnesses have been called to date, and 9 out of 63 anticipated witnesses have been called in the AFRC case. Anticipated witnesses are based on revised lists filed by the prosecution on 10 February (RUF) and 21 February (AFRC), and these lists are continually subject to change. The prosecution has divided its potential witnesses into lists of “core” and “backup” witnesses; the above-mentioned numbers only include “core” witnesses.

<sup>35</sup> Sierra Leone Truth and Reconciliation Commission Final Report, Volume 2, Chapter 2 (Findings), Paragraph 110. Available online at <http://ictj.org/downloads/SL.TR.C.V2.2.Findings.pdf>.

<sup>36</sup> Indeed, the court’s decision to deny Truth and Reconciliation requests for hearing testimony from Norman was based in large part on the perceived risk of mobilizing pro-Norman forces.

<sup>37</sup> 61 witnesses have been called as of the time of this report’s publication; the number of “core” witnesses anticipat-



ed by the prosecution was updated at the CDF status conference of 8 February 2005.

<sup>38</sup> Statute of the Special Court, Article 15 (4).

<sup>39</sup> Witness TF2-008 (who testified on 16 November 2004) and Witness TF2-190 (who testified on 10 February 2004) have given evidence suggesting that these were widely known Kamajor laws; however, the former also testified to the breakdown of order within the Kamajors as they moved from a hunting society to a combat force, and traditional initiation procedures controlling admittance into the society were allegedly relaxed.

<sup>40</sup> “‘We’ll kill you if you cry’: *Sexual Violence in the Sierra Leone Conflict*, Human Rights Watch Vol. 15, No. 1(A), January 2003, Section V. However, HRW noted that this low number may have been due to the fact that it focused most of its efforts on investigating rebel abuses.

<sup>41</sup> As the prosecution had already filed a motion to join the cases between the three CDF accused shortly before they had confirmed the sexual violence counts, they chose to wait for the court’s decision on the motion in order to avoid filing separate motions to amend the indictment of each individual accused. This meant that the prosecution waited until early February 2004 to file a motion that would otherwise have been filed in early November of 2003. The chamber did not rule on the motion until May of 2004, mere weeks before the start of the CDF trial.

<sup>42</sup> *Decision on Prosecution Request for Leave to Amend the Indictment*, SCSL-04-14 (CDF), 20 May 2004.

<sup>43</sup> *Dissenting Opinion of Judge Pierre Boutet on the Decision on Prosecution Request for Leave to Amend the Indictment*, 20 May 2004, para. 8.

<sup>44</sup> *Id.*, para. 26.

<sup>45</sup> *Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution’s Request for Leave to Amend the Indictment*, SCSL-04-14 (CDF), 4 June 2004.

<sup>46</sup> *Majority Decision on the Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution’s Request for Leave to Amend the Indictment*, SCSL-04-14 (CDF), 2 August 2004.

<sup>47</sup> *Prosecutor vs. Akayesu*, ICTR-946-4-T, Judgment of 2 September 1998.

<sup>48</sup> *Decision on Prosecution Request for Leave to Amend the Indictment*, SCSL-04-14 (CDF), 20 May 2004, para. 6.

<sup>49</sup> The prosecution stated in their submissions that they would have been prepared to seek leave to amend in November 2003. However, they may not have anticipated the length of time it would take the chamber to deliberate on the joinder motion, which was not decided until late January of 2004.

<sup>50</sup> The defence argued that granting the amendment would have occasioned further motions and would have delayed the start of trial while they conducted detailed investigations of these new counts.

<sup>51</sup> Testimony of Witness TF2-021 (CDF), 2 November 2004.

<sup>52</sup> At the time the testimony was given, the defence objected that the court should not hear evidence regarding forced marriage or sexual violence because it would fall outside the scope of the indictment. The prosecution argued that the evidence could support other counts of the indictment, such as physical violence and mental suffering or terrorizing the civilian population and collective punishments.

<sup>53</sup> Statute of the Special Court for Sierra Leone, Article 4(c).

<sup>54</sup> *Defence Preliminary Motion Based on Lack of Jurisdiction: Child Recruitment*, SCSL-04-14 (CDF), filed 26 June 2003 by counsel for the first accused.

<sup>55</sup> *Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, SCSL-04-14 (CDF Appeals Chamber), 31 May 2004. The prosecution maintained that the prohibition on child recruitment had crystallized as customary international law before the beginning of the court’s temporal jurisdiction in November of 1996, which was supported in a Trial Chamber ruling and upheld by the Appellate Chamber.

<sup>56</sup> In the CDF trial, Witness TF2-140 (13 September 2004) testified that initiates were as young as 10 years old, and he explained that virgins were perceived to be more immune in war and were therefore desirable initiates. The witness stated that he was initiated into the Kamajor society by third accused Allieu Kondewa, and he was under the command of first accused Sam Hinga Norman. Witness TF2-021 (2 November 2004) claimed that he participated in cannibalism with a Kamajor sub-group. Both this witness and Witness TF2-004 (week of 8 November 2004) stated that they were first conscripted by the RUF or “junta” forces, and then subsequently initiated into the Kamajors, which means in effect that they fought on both sides of the conflict.

<sup>57</sup> *Decision on Prosecution Request for Leave to Amend the Indictment*, SCSL-04-15 (RUF), 6 May 2004, para. 51.

- <sup>58</sup> Statute of the Special Court for Sierra Leone, Article 15(1).
- <sup>59</sup> International Crisis Group, “The Special Court for Sierra Leone: Promises and Pitfalls of a “New Model,”” *Africa Briefing*, 4 August 2003, p. 1.
- <sup>60</sup> International Center for Transitional Justice, “The Special Court for Sierra Leone: the First Eighteen Months,” *Case Study Series*, March 2004, p. 8.
- <sup>61</sup> Testimony of Witness TF1-355 (RUF), 28 October 2004.
- <sup>62</sup> Testimony of Witness John Tarnue (RUF), 12 October 2004.
- <sup>63</sup> *Motion Seeking Disclosure of the Relationship between the United States of America’s Government and/or Administration and/or Intelligence and/or Security Services and the Investigation Department of the Office of the Prosecutor*, SCSL-2004-15 (RUF), 1 November 2004. In their response, the prosecution rejected the assertion that they were not acting independently, and they stated that “the Office of the Prosecutor has, as it is permitted to do, sought information from and the assistance of, other entities in pursuing investigations.” (*Prosecution Response*, 16 November 2004). The defence replied that they were merely seeking information about the “nature of the cooperation” between the Chief of Investigations and the FBI in order to assess the witness’s motivations to give evidence (*Defence Reply*, 22 November 2004).
- <sup>64</sup> Interview with Prosecutor, 10 March 2005.
- <sup>65</sup> However, Australia does not provide a significant portion of the budget contributions as compared with these other states. The Registrar has stated that nobody has been appointed to a post in the court because of nationality; unlike UN organizations, the Special Court does not have geographical quotas. He further explained that the Prosecutor’s first seven hires were American citizens, but this was presumably due to the Prosecutor’s need to assemble a team as quickly as possible. Interview with the Registrar, 17 February 2004.
- <sup>66</sup> <http://scsl-server/sc-sl/new/defence.html>.
- <sup>67</sup> Interview, 10 March 2005.
- <sup>68</sup> *Prosecutor v Kayishema and Ruzindana* (Appeals Chamber), June 1, 2001 para.63-71. (Hereafter, “*Kayishema*”). The Appeals Chamber quoted the ICTY Appeals Chamber in *Prosecutor v Tadic* (Appeals Chamber), July 15, 1999 at para. 48 which held that ‘equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case’, but noted further that the rights of the accused and the equality of the parties should not be interpreted to mean that the defense is entitled to the same resources as the prosecution.
- <sup>69</sup> Interviews with the Principal Defender (17 February 2005), members of the CDF defence teams – Norman (16 February 2005), Fofanah (16 February 2005) and Kondewa (17 February 2005) - and members of the RUF defence teams – Sesay (17 February 2005) and Kallon (17 February 2005).
- <sup>70</sup> Interviews with members of the defence teams (RUF and CDF) on 17 February 2005. After months of requests by defence teams, including direct requests to the bench during court proceedings, the Defence Office has been provided with its own photocopier. However, the current situation in which one photocopier is shared between nine defense teams has meant that teams were sometimes unable to produce multiple copies of documents showing evidentiary discrepancies in time for trial. The use of printers and office supplies generally were also in relatively short supply, according to statements made by team members. Furthermore, members of the defence have complained that they share one vehicle between roughly 45 personnel, whereas the OTP is supplied with a number of vehicles despite its similar size.
- <sup>71</sup> Since its inception in August 2002, the OTP has employed a large number of full-time international and national investigators. This has included employing a senior investigator at a higher rank than the highest post in the Defence Office.
- <sup>72</sup> OTP 2004/05 final budget, received from the Principal Defender following an interview on 17 February 2005. The Defence Office received US\$54,000 for the salaries of 9 national investigators, which amounted to US\$6000 per team for investigations, as well as a travel allowance of Le 75,000 for a maximum of 20 working days per month (approximately US \$600 per month).
- <sup>73</sup> The Defence Office will receive an investigations travel provision for US\$88,600 as compared to \$100,000 for the OTP. The budget for Defence Office Investigators for fiscal year 2005/6 is US\$124,200. Special Court for Sierra Leone Budget 2005-2006, draft version, available online at [sc-sl.org](http://sc-sl.org).
- <sup>74</sup> Human Rights Watch report *Bringing Justice*, page 22.

<sup>75</sup> See “First Annual Report of the President of the Special Court for Sierra Leone” March, 2004 at page 16. Available online at [www.sc-sl.org/specialcourtannualreport2002-2003.pdf](http://www.sc-sl.org/specialcourtannualreport2002-2003.pdf).

<sup>76</sup> Interview with previous duty counsel for CDF trial on 21 February 2005. While other international tribunals have administrative bodies that co-ordinate defence counsels, none have a permanent institution within the court that has been established to “ensure the rights of suspects and the accused” as set out in Rule 45 of the Special Court’s Rules.

<sup>77</sup> See ‘The Special Court for Sierra Leone: Promises and Pitfalls of a “New Model”’ ICG Africa Briefing Freetown/Brussels, 4 August 2003 at page 4.

<sup>78</sup> The duty counsel for the CDF trial was recently assigned to work exclusively on the case of Chief Sam Hinga Norman, following the resignation of one of his international contracting counsel. The Deputy Principal Defender has therefore been reassigned to the role of duty counsel for the CDF trial.

<sup>79</sup> Duty counsels are charged with both a monitoring and an assistance role *vis-à-vis* defence counsel: on the one hand, they review the number of hours spent by individual counsels in court and assess the effectiveness of defence counsels’ performance, reporting back to the Principal Defender with regards to any shortcomings they may find. On the other, they provide research to individual teams as well as to the defence teams as a whole. They also provide administrative support to the Principal Defender (Interview with previous CDF duty counsel on 21 February 2005).

<sup>80</sup> Interview with the Principal Defender, 17 February 2005.

<sup>81</sup> Contracting Counsels must have the requisite experience and qualifications required for the position identified under Rule 45(C) of the Rules, which states that the Principal Defender must maintain a list of criminal defence counsel who speak fluent English, are admitted to practice law in any State, have at least 7 years’ relevant experience, and have indicated their willingness and full-time availability to be assigned by the Special Court to suspects or accused.

<sup>82</sup> Paragraph 21 of the contract specifications for the Legal Services Contract for defence counsels.

<sup>83</sup> Interview with the Registrar, 11 March 2005.

<sup>84</sup> The court’s Outreach Coordinator was originally a member of the OTP. Interview with the Registrar, 11 March 2005.

<sup>85</sup> Interview with the Principal Defender, 17 February 2005.

<sup>86</sup> Interview with the Principal Defender on 17 February 2005 and review of internal memoranda.

<sup>87</sup> Interview with the Principal Defender, 17 February 2005. Interview with the Registrar, 11 March 2005. Interview with the Prosecutor, 10 March 2005.

<sup>88</sup> Security Council Resolution 1315 (2000).

<sup>89</sup> Interview with the Principal Defender, 17 February 2005. Interviews with members of the defence teams (RUF), 17 February 2005.

<sup>90</sup> In his report to the Security Council on the establishment of the Special Court, the Secretary General of the United Nations noted: “For a nation which has attested to atrocities that only few societies have witnessed, it will require a great deal of persuasion to convince it that the exclusion of the death penalty and its replacement by imprisonment is not an “acquittal” of the accused, but an imposition of a more humane punishment.” Report of the Secretary-General, 4 October 2000 (Document S/2000/915), page 2.

<sup>91</sup> Interview with the Principal Defender, 17 February 2005.

<sup>92</sup> Interview with the Principal Defender, 17 February 2005. The Principal Defender stated that she has been able to attract assistance despite her late appointment.

<sup>93</sup> Interview with the Principal Defender on 17 February 2005 and internal memoranda regarding proposed changes to the Agreement, the Statute and the Rules.

<sup>94</sup> Article 7 of the Agreement between the Government of Sierra Leone and the United Nations called for “interested States to establish a management committee to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States.” The management committee consists of important contributors to the Special Court and the Government of Sierra Leone and the Secretary-General also participate in the management committee.

<sup>95</sup> Interview with the Registrar, 12 March 2005.

<sup>96</sup> Interview with defence teams (RUF, CDF), 17 February 2005. The Principal Defender maintains that she was not

provided with adequate information about this complaint and therefore was unable to comment directly on this incident.

<sup>97</sup> Paragraph 21 of the Contract Specifications for the standard legal services contract for defence teams states that “Responsibility for selecting members of the Defence Team, including Investigators and Experts, for managing their contribution to the work of the Defence Team and for payment of these individuals lies with Contracting Counsel”. The Principal Defender does not have details about this incident and was therefore unable to comment.

<sup>98</sup> Interviews with defence teams (CDF, RUF), 17 February 2005. The Principle Defender has recently hired a deputy to assist further in this area, and has also obtained assistance from outside groups and a full time researcher.

<sup>99</sup> Interview with defence team member (RUF), 17 February 2005.

<sup>100</sup> CDF duty counsel was recently assigned as a trial counsel on Hinga Norman’s defence team. While this counsel still remains an employee of the Defence Office, he is now solely working on Norman’s case.

<sup>101</sup> Interview with the Registrar, 12 March 2005. The Court’s President was of the opinion that the *raison d’etre* of the Principal Defender would be to co-ordinate a unified and consolidated defence case that he or she would champion both within the court and in the public arena.

<sup>102</sup> Interview with the Registrar, 12 March 2005.

<sup>103</sup> “Defence Office” is defined in the Rules as “Office established by the Registrar for the purpose of *ensuring the rights of suspects and accused* in accordance with the Statute and Rules of Procedure and Evidence” [emphasis added], hence creating a direct relationship between the Defence Office and the indictees. A more constructive definition would appear to be “Office established by the Registrar for the purpose of ensuring the rights of *the Defence*”, given this would characterize the role of the Defence Office as acting on behalf of both the accused *and* their legal representation.

<sup>104</sup> Interview of the Registrar, Freetown, 17 February 2004.

<sup>105</sup> In the second week of the second CDF trial session, Witness TF2-151 expressed concern that disclosing names and addresses during his testimony would enable people from his town to identify him.

<sup>106</sup> RUF defence counsel raised this point formally in a motion, in which they asserted that “Witnesses in a criminal case give evidence for many reasons – truth is but one of these motivations. Why do the Prosecution seek to keep hidden from view the *possible* motivations of their witnesses and the nature of the assistance that might have encouraged them to implicate the accused?” *Defence Reply to Prosecution Response to Motion Seeking Disclosure of the Relationship between the United States of America’s Government and/or Administration and/or Intelligence and/or Security Services and the Investigation Department of the Office of the Prosecutor*, SCSL-04-15 (RUF), 22 November 2004.

<sup>107</sup> Article 16, para. 4 of the Statute of the Special Court for Sierra Leone.

<sup>108</sup> Human Rights Watch report *Bringing Justice*, p. 30.

<sup>109</sup> Interview with Court Psychologist, Freetown, 13 March 2005.

<sup>110</sup> *Decision on Prosecution Motion for Modification of Protective Measures*, SCSL-04-14 (CDF), 8 June 2004.

<sup>111</sup> Ruling on Motion for Modification of Protective Measures for Witnesses, SCSL-04-14 (CDF), 18 November 2004, p. 11.

<sup>112</sup> Trial proceedings of 20 September 2004. Norman’s letter of “judicial protest,” read in court that day, is further discussed in the section entitled “Attendance of the accused.”

<sup>113</sup> *Order on an Application by the Prosecution to Hold a Closed Session Hearing for Witnesses TF2-082 and TF2-032*, SCSL-04-14 (CDF), 13 September 2004.

<sup>114</sup> In contrast, Judge Richard May and Marieke Wierde write that in the other *ad hoc* tribunals, the only standard is the witness’s own sense of fear: “Trial Chambers apply a subjective standard and do not require witnesses to prove that this fear is legitimate.” *International Criminal Evidence*, (New York: Transnational Publishers, 2002), p. 180.

<sup>115</sup> For the CDF: Bobor Tucker, commander of the “Death Squad” in and around the CDF “Base Zero”, and Albert Nallo, National Deputy Director of Operations for the CDF. For the RUF: Brigadier General John Tarnue of Liberia, and George Johnson (aka “Junior Lion”) of the AFRC splinter group “West Side Boys.”

<sup>116</sup> After this disclosure the witness subsequently decided to testify in public. 18 October 2004 testimony of Witness TF1-167, George Johnson (aka “Junior Lion”) of the West Side Boys.

<sup>117</sup> Testimony of Witness TF1-023 (AFRC), 10 March 2005. The witness addressed the court on the morning after

the incident, and she stated that the women called her name and shouted a phrase in Krio, which was translated into English as “we are now at daggers drawn.”

<sup>118</sup> Testimony of Witness TF1-119 (RUF), week of 17 October 2004.

<sup>119</sup> Testimony of Witness TF2-067 (CDF), week of 30 November 2004. When the witness was asked how he knew that the scent he detected was the smell of a burning human being, a number of members of the chamber and the gallery broke into laughter at the witness’s elaborate description. Counsel for the first accused commented that the witness had given a “very wise statement about burning,” and he further asked how the witness knew so much about burning at such a young age.

<sup>120</sup> This style of questioning is more common among some of the Sierra Leonean defence counsel, who sometimes directly accuse witnesses of lying under oath. Indeed, one defence counsel went so far as to state to a witness that “I am putting it to you that the prophet will judge you tomorrow” (cross-examination of Witness TF2-040, 21 September 2004).

<sup>121</sup> Testimony of Witness TF1-024 (AFRC), 7 March 2005. When another defence team member stated to the same witness that “the truth of the matter is this: you aren’t here to tell the truth at all,” the Presiding Judge objected that it was an improper question.

<sup>122</sup> Human Rights Watch report *Bringing Justice*, p. 17.

<sup>123</sup> Recent instances of this took place on 11 and 14 February 2005 with witnesses TF2-015 and TF2-035.

<sup>124</sup> Statute of the Special Court for Sierra Leone, Article 17(4)(c).

<sup>125</sup> In the 1 October 2004 Status Conference for trial session 2 of the RUF, the chamber stated that it will not impose time limitations on cross-examinations, as is the practice in the other tribunals. However, the chamber also expressed that examination in chief and cross-examination have sometimes been “overly lengthy and repetitious.”

<sup>126</sup> Efficiency was the primary theme at the pre-trial Status Conference run by Presiding Judge Teresa Doherty on 28 February 2005. Thus far, the chamber has adhered to its schedule of starting fifteen minutes earlier than Trial Chamber I.

<sup>127</sup> Interview with the Registrar, 17 February 2005.

<sup>128</sup> Testimony of Witness TF2-006 (CDF), 9 February 2005.

<sup>129</sup> Testimony of Witness TF2-088 (CDF), 29 November 2004. The witness had given highly emotional testimony during his examination in chief regarding the death of one of his sons the previous day, and during cross-examination, counsel for the third accused focused on questioning the witness about the character of his two sons. During the course of the exchange, the witness accused counsel of lying. The judge intervened, stating that the witness that he had “absolutely no right” to make such allegations.

<sup>130</sup> Testimony of Witness TF2-152 (RUF).

<sup>131</sup> Statute of the Special Court for Sierra Leone, Article 17(5)(d).

<sup>132</sup> See *Decision on appeal against decision on withdrawal of counsel*, SCSL-04-15 (Appeals Chamber), 23 November 2004, at para 48.

<sup>133</sup> Norman sought service and arraignment on this indictment, which if granted could have the effect of quashing the current charges against him. The first trial chamber subsequently ruled that the amended indictment had not been properly served on Norman and that sections of that indictment that formed the basis of new allegations against the accused should be stayed. However, the majority decision rejected the argument that Norman should be re-arraigned and served with a new indictment, and the prosecution was directed to either expunge the relevant portions or seek amendment of the indictment. See *Decision on the First Accused’s motion for service and arraignment on the consolidated indictment*, SCSL-04-14 (CDF) 29 November 2004.

<sup>134</sup> See *Ruling on motion for modification of protective measures for witnesses*, SCSL-04-15 (RUF), 18 November 2004, and *Decision on the First Accused’s motion for service and arraignment on the consolidated indictment*, SCSL-04-14 (CDF), 29 November 2004.

<sup>135</sup> Sesay also attempted to make an oral statement to the court. Unlike Norman’s judicial protest against what he perceived as procedural unfairness or Gbao’s blatant rejection of the legitimacy of the court itself, Sesay’s statement sought to highlight the blanket amnesty of the Lomé Peace Agreement (1999) afforded to ex-combatants for crimes committed in pursuit of their objectives as members of the RUF, CDF, SLA and AFRC between 1991 and July 1999. As soon as Sesay mentioned the Lomé provisions, he was told that the court would not listen to political statements.

<sup>136</sup> *Ruling on the issue of the third accused, Augustine Gbao, to attend hearing of the Special Court for Sierra Leone on 7 July 2004 and succeeding days* SCSL-04-15-T-194 (RUF), 12 July 2004, at para. 8.

<sup>137</sup> *Decision on application to withdraw counsel*, SCSL-04-15 (RUF), 7 July 2004, at para 16, and *Decision on appeal against decision on withdrawal of counsel*, SCSL-04-15 (Appeals Chamber), 23 November 2004, at para.46.

<sup>138</sup> Ruling on application for closed session for Witness TF2-017, 19 November 2004.

<sup>139</sup> In a 7 February 2005 status conference at the beginning of the fourth session of the CDF case, Judge Boutet announced that the closed session procedure would be modified slightly to allow the applications to be made in public whenever possible.

<sup>140</sup> The head of the Outreach section has noted that security personnel at the main gate are informed when closed sessions are announced, and public visitors are informed upon their arrival at the court compound. Due to the unpredictability of closed session, however, informing the public continues to present a challenge.

<sup>141</sup> Interview with the Prosecutor, 10 March 2005. Many of the witnesses have had little exposure to the trial process and its underlying premises about the importance of concrete dates, times, and specific details. Some witnesses have failed to mention entire events until they are preparing to testify.

<sup>142</sup> Rule 66(A)(ii) provides that the prosecution is required “to continuously disclose copies of statements of all additional witnesses not later than 60 days before the date for trial or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause (sic.) being shown by the Prosecution.” Special Court Rules of Procedure and Evidence (last amended May 29 2004).

<sup>143</sup> *Decision on cross examination*, SCSL-04-14 (CDF), 16 July 2004.

<sup>144</sup> Recently during the CDF trial, when a witness was asked to confirm the presence of his own thumb print on a statement, he argued there was no way of determining that this document evidenced statements made by him from an interview he had attended, given it looked like a number of other documents which he had witnessed. After the prosecution confirmed that the interview had indeed taken place, one of the judges stated that the Chamber would assume that the prosecution was acting in good faith in its production of the statement and disclosure of it to the defence.

<sup>145</sup> According to the head of the translation unit, simultaneous translation is used for all dialogues within court other than directly with the witness, whereas consecutive translation is mostly used for witness interpreting. Simultaneous interpretation is provided at almost the same time while the source person is speaking, while during consecutive interpretation the interpreter is waiting for the source person to finish his or her sentence(s) of a speech passage.

<sup>146</sup> Code of Ethics for Interpreters and Translators Employed by the Special Court for Sierra Leone,” Article 7(B). Adopted 25 May 2004.

<sup>147</sup> Testimony of Witness TF2-006 on 9 February 2005. The translator subsequently explained that he had incorrectly translated the Limba word for “farmer” as “herbalist,” as they are almost phonetically identical in their original language.

<sup>148</sup> Testimony of Witness TF1-024 on 7 March 2005.

<sup>149</sup> Interview with Legal Officer to the Deputy Registrar, 18 February 2005.

<sup>150</sup> Interview with the Registrar, 17 February 2005.

<sup>151</sup> For a complementary explanation of the activities undertaken by the Outreach section prior to September 2004, see Human Rights Watch report *Bringing Justice* at page 32.

<sup>152</sup> Interview with the head of the Outreach section, 8 April 2005.

<sup>153</sup> The section produced a mission statement in June-July 2003. The mission statement outlined the section’s mandate, as fostering an environment of two-way communication between Sierra Leoneans and the Special Court. Interview with the head of the Outreach section, 8 April 2005.

<sup>154</sup> The Outreach section’s “Judiciary Training” was conducted from June to August 2004. The training targeted customary law practitioners – court chairpersons, court clerks, lay magistrates, paramount chiefs, section chiefs, town and village chiefs and other traditional leaders. The Outreach section has also partnered with the civil society group Forum of Conscience, the Military Training Unit and the Ministry of Defence to hold “training of trainers” workshops for military officers, and it has conducted nationwide training sessions with senior officials, regional commissioners and local unit commanders of the Sierra Leone Police to educate law enforcement officers on the role and

function of the Special Court and human rights.

<sup>155</sup> This included assisting in the establishment of “Accountability Now Clubs” (ANCs) at tertiary institutions throughout the country. ANCs are designed to create awareness about justice and accountability through a wide range of activities which will include holding workshops, seminars, symposiums, debates and drama performances at their institution. ANCs are run by student-elected committees who are charged with the task of drafting the relevant club’s constitution, and leaders receive training conducted by the Outreach section of the Special Court. (*Outreach Activities Report*, at p.7).

<sup>156</sup> Interview with the Head of the Outreach section, 8 April 2005.

<sup>157</sup> Interview with the Head of the Outreach section, 8 April 2005 and review of internal memoranda.

<sup>158</sup> Over 500 delegates from various districts and villages attended the conferences, including paramount chiefs and their constituents. Interview with the head of the Outreach section, 8 April 2005 and review of internal memoranda.

<sup>159</sup> This included members of the Sierra Leone Police and the Republic of Sierra Leone Armed Forces. Interview with the head of the Outreach section and review of internal memoranda, 8 April 2005.

<sup>160</sup> Members of the International Center for Transitional Justice came from New York to deliver a paper at the conference. Several international organizations with a presence in Sierra Leone also attended the conference, including representatives from the UN mission.

<sup>161</sup> Interview with the head of the Outreach section, 8 April 2005 and review of internal memoranda.

<sup>162</sup> This includes encouraging communities throughout Sierra Leone to actively engage in projects identified by victims within the local community and for civil society groups within Sierra Leone to monitor the progress of these projects. The delegates also proposed that the Government of Sierra Leone establish a trust fund for victims and civil society groups were encouraged to lobby for funds for such a project. Interview with the head of the Outreach section, 8 April 2005 and review of internal memoranda.

<sup>163</sup> This includes proposing the establishment of reconciliation panels involving paramount chiefs, religious leaders, the military and the police to settle disputes between victims and perpetrators within local communities, to promote understanding and prevent revenge. Interview with the head of the Outreach section, 8 April 2005 and review of internal memoranda.

<sup>164</sup> Failing the granting of Chapter VII powers and assuming Taylor does not surrender to the court, delegates have asked that a mechanism for dealing with his trial be included in the court’s post-completion strategy.

<sup>165</sup> Interview with the Head of the Outreach section, 8 April 2005 and review of internal memoranda.

<sup>166</sup> *Id.* This will include inviting vocational institutes and schools to attend the proceedings to ensure ongoing attendance at the trials.

<sup>167</sup> There would be a 48-hour delay from the proceedings to broadcast to allow for redaction.

<sup>168</sup> Interviews with the Chief of Press and Public Affairs Office and the independent journalist, 12 March 2005.

<sup>169</sup> Interview with head of Outreach section, 8 April 2005.

<sup>170</sup> Interview with the Registrar, 17 February 2005.

<sup>171</sup> Interview with the Special Assistant to the Deputy Registrar, 18 February 2005.

<sup>172</sup> See the twenty-fourth report of the Secretary-General on the United Nations Mission in Sierra Leone (S/2004/965), 14 December 2004, at page 7.

<sup>173</sup> Article 23 states: “If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.”

<sup>174</sup> Interview with the Special Assistant to the Deputy Registrar, 18 February 2005.

<sup>175</sup> For an earlier discussion about the importance of legacy, see “The ‘legacy’ of the Special Court for Sierra Leone”, Discussion Paper, 29 September 2003 produced by the International Center for Transitional Justice and the United Nations Development Programme’s Bureau for Conflict Prevention and Recovery (UNDP-BCPR).

<sup>176</sup> See the twenty-fourth report of the Secretary-General on the United Nations Mission in Sierra Leone (S/2004/965), at page 1. 14 December 2004.

- <sup>177</sup> Article IX(3) of the Lomé Peace Agreement (1999).
- <sup>178</sup> Much of the domestic criminal law of Sierra Leone is based on old English statutes, such as the Larceny Act 1916, many of which have since been reformed in the United Kingdom.
- <sup>179</sup> Interview with defence team (RUF), 17 January 2005.
- <sup>180</sup> Interview with the Registrar, 17 January 2005.
- <sup>181</sup> Interview with the Registrar, 17 January 2005.
- <sup>182</sup> Interview with Prosecutor, 11 March 2005.
- <sup>183</sup> Opening statement of the prosecutor in the trial of the alleged AFRC accused (Brima, Kamara, Kanu), 7 March 2005. Available online at [www.sc-sl.org](http://www.sc-sl.org).
- <sup>184</sup> Furthermore, as stated in the introduction, this term does not suggest any criticism of the court with regards to its adherence to minimum standards of international justice and fair trial rights.
- <sup>185</sup> In a recent press release from the Office of the Prosecutor on 22 March 2005, the office stated that an associate of Charles Taylor had been arrested after investigators from the OTP provided “extensive assistance” to Dutch authorities. “Prosecutor Welcomes Arrest of Taylor Associate” is accessible online at [www.sc-sl.org](http://www.sc-sl.org).
- <sup>186</sup> Rule 2 of the Rules of Procedure and Evidence, emphasis added.
- <sup>187</sup> Justice Bankole Thompson, at the opening of the third RUF trial session, 10 January 2005.
- <sup>188</sup> Interview with head of Outreach section, 8 March 2005.
- <sup>189</sup> *Decision on Prosecution Request for Leave to Amend Indictment*, SCSL-04-14 (CDF), 20 May 2004.
- <sup>190</sup> Trial Chamber II (AFRC trial), 7 March 2005.