

Fordham International Law Journal

Volume 28, Issue 3

2004

Article 4

The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals

James Cockayne*

*

Copyright ©2004 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals

James Cockayne

Abstract

This Article looks in detail at whether the Special Court is, at present, succeeding or failing, drawing lessons along the way both for the system of international criminal justice generally, and more specifically for U.N. enforcement of the law of war. In Section II, this Article suggests a method for measuring success and failure in an international criminal tribunal. It suggests that there are a number of identifiable performance standards which should guide our assessment, each linked to a stakeholder group: the international community, the affected population, and the defendants. In Sections III-V, this Article assesses the Special Court's early performance from the perspective of each of these stakeholder groups, against these performance standards. In Section VI, it assesses the implications of these trends, suggests ways that negative consequences might be avoided or at least minimized, and points to longer-term implications, particularly for the U.N. involvement in the enforcement of the law of war. This Article concludes that a hybrid tribunal, like the Special Court, engages with a range of dynamics affecting the humanitarian community and complex peace operations that the ad hoc tribunals have avoided, but which produce unexpected effects in the context of criminal justice. Those dynamics are not presently taken into account either in the design and resourcing of the Special Court, or in stakeholders' expectations of what it can achieve. Careful consideration of these challenges is required lest "hybrid" tribunals upend the maxim "no peace without justice," preventing peace by pursuing justice.

THE FRAYING SHOESTRING: RETHINKING HYBRID WAR CRIMES TRIBUNALS

James Cockayne*

INTRODUCTION

The young system of international criminal justice has reached a turning point. After a full decade of experimentation with *ad hoc* tribunals, national-international hybrids, universal jurisdiction, and permanent international criminal courts, practitioners and commentators are in a mood of reflection.¹ Practitioners tend to assess the last decade positively, recognizing the limitations of U.N. experiments in enforcing the laws of war through penal sanctions, while drawing lessons they claim will improve enforcement in the future.² In contrast, observers external to the field — including, crucially, the diplomats and government officials who hold the purse-strings — are often less positive.³ The incredible costs and operational challenges of the *ad hoc* tribunals have tried the patience of many States, particularly those in the North.⁴ Where “never again” was once the

* Graduate Scholar, Institute for International Law and Justice (“IILJ”), New York University; Intern, Defence Office, Special Court for Sierra Leone June-August 2004. This Paper was made possible by the support of a Human Rights Fellowship from the NYU Center for Human Rights and Global Justice (“CHRGJ”). I thank the following for invaluable commentary on earlier drafts: Allison Cooper, Justice Richard Goldstone, John Wesley Hall, Wayne Jordash, Phoebe Knowles, Simone Monasebian, Kaoru Okuizumi, Caitlin Reiger, Rupert Skilbeck, James G. Stewart, Giorgia Tortora, Quincy Whitaker, and Marieke Wierda. The views in this Article, like the errors, are mine alone.

1. See Jonathan I. Charney, *The Impact of the International Legal System on the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT’L L. & POL. 697, 697-98 (1999).

2. For examples of these assessments, see Symposium, *The ICTY 10 Years On: The View from the Inside*, 2(2) J. INT’L CRIM. JUST. 353, 353-597 (2004); see also Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2(2) J. INT’L CRIM. JUST. 541 (2004).

3. See Zacklin, *supra* note 2, *passim*.

4. *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, U.N. SCOR, 59th Sess., 5052d mtg., U.N. Doc. S/2004/616 (2004), available at <http://www.un.org/Docs/sc/sgrep04.html> [hereinafter *Rule of Law*]. The *Rule of Law* summarizes these costs:

The two *ad hoc* tribunals have grown into large institutions, with more than 2,000 posts between them and a combined annual budget exceeding a quarter of a billion dollars — equivalent to more than 15 per cent of the Organization’s total regular budget. Although trying complex legal cases of this nature would be expensive for any legal system and the tribunals’ impact and performance cannot be measured in financial numbers alone, the stark differen-

catch-cry of anti-impunity activists, now it has become the under-the-breath muttering of Permanent Representatives on their way to approving another tribunal budget at U.N. Headquarters in New York. The *ad hoc* tribunals have been told to cut costs, streamline case management and devise “completion strategies” — a very different kind of “rush to judgment.”⁵ When it receives new requests for assistance to fight impunity, the international community turns increasingly to hybrid models — like the Special Court for Sierra Leone (“Special Court”) — as a low-cost, quick turn-around alternative.⁶ This is what one commentator has described as “shoestring” justice.⁷

Because the various U.N. experiments in enforcing the laws of war have all involved the United Nations in direct management of prosecutions of international crimes, these experiments

tial between cost and number of cases processed does raise important questions.

Id. ¶ 42.

5. See Theodor Meron, *Procedural Evolution in the ICTY*, 2(2) J. INT’L CRIM. JUST. 520 (2004); see also Stéphane Bourgon, *Procedural Problems Hindering Expeditious and Fair Justice*, 2(2) J. INT’L CRIM. JUST. 526 (2004); Mirko Klarin, *The Tribunal’s Four Battles*, 2(2) J. INT’L CRIM. JUST. 546 (2004).

6. President Ahmad Tejan Kabbah of Sierra Leone wrote to U.N. Secretary-General Kofi Annan on June 12, 2000, requesting that the United Nations establish a court to try those who had committed atrocities in the ten-year civil war. On August 14, 2000, the Security Council, in Resolution 1315 (2000), requested Annan to negotiate to establish such a court. See S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., U.N. Doc. S/RES/1315 (2000). An Agreement between the United Nations and Sierra Leone establishing a Special Court for Sierra Leone (“Special Court”) was signed in Freetown on January 16, 2002. See, e.g., Press Release, Government of Sierra Leone and United Nations Sign Agreement Establishing the Special Court for Sierra Leone (Jan. 16, 2002), at <http://www.specialcourt.org/documents/PlanningMission/PressReleases/16JAN02.html>. The Special Court exists outside both the Sierra Leonean judicial structure, and the existing *ad hoc* tribunals’ structure, but is guided in different ways by legal norms drawn from both jurisdictions. It is staffed by both national and international staff. See *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, 55th Sess., 915th mtg., U.N. Doc. S/2000/915 (2000) [hereinafter *Secretary-General’s Report*]; see also S.C. Res. 1315, *supra*; INTERNATIONAL CRISIS GROUP, *THE SPECIAL COURT FOR SIERRA LEONE: PROMISES AND PITFALLS OF A “NEW MODEL”* 3, 4, 10 (2003) (stating that “[c]oncerns to avoid appearing to be another overly large, cumbersome and virtually open-ended tribunal largely determined how the Special Court was set up”) [hereinafter *PROMISES AND PITFALLS*]; Douglas Farah, *Sierra Leone Court May Offer Model for War Crimes Cases: Hybrid Tribunal, with Limited Lifespan, Focuses on Higher-Ups*, WASH. POST, Apr. 15, 2003, at A21; Eric Pape, *A New Breed of Tribunal*, NEWSWEEK INT’L, Mar. 10, 2003; HUMAN RIGHTS WATCH, *BRINGING JUSTICE: THE SPECIAL COURT FOR SIERRA LEONE* 16 (8(A)) (2004) [hereinafter *BRINGING JUSTICE*].

7. See Avril McDonald, *Sierra Leone’s Shoestring Special Court*, 84 INT’L REV. OF THE RED CROSS 121 (2002).

are sometimes described as one unified enterprise. The reality is very different: the different institutions are the results of very different political compromises, and have been given very different mandates. Perhaps most significantly, some of these experiments involve prosecutions in theaters far removed from the theater of military operations which form the subject of the judicial inquiry, whether that removal is a result of distance (as in the International Criminal Tribunal for the Former Yugoslavia (“ICTY”)⁸ and the International Criminal Tribunal for Rwanda (“ICTR”)⁹), or time (as in the new Extraordinary Chambers in Cambodia, established by agreement between the United Nations and the Kingdom of Cambodia to try crimes under the Khmer Rouge between 1975 and 1979).¹⁰ Others, such as the Special Court and the prosecutions in Kosovo and East Timor, occur in the same social and legal space as the alleged military crimes in question, soon after their alleged commission.¹¹ These “in-theater” experiments consequently engage with a range of political, social, economic and security dynamics which pose particular challenges to our traditional notions of law enforcement and criminal justice, and especially to the United Nations’ involvement in them.

It is striking that it is those very tribunals that have been established to operate “in theater,” confronting these additional challenges, that have been characterized as “shoestring” justice.¹² Those institutions — like the Special Court — are in many ways being asked to do more than their *ad hoc* cousins, but with fewer resources. Even more striking is that this should be

8. See Statute of International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess. Annex, 3217th mtg., art. 20, U.N. Doc. S/RES/827 (1993), as amended by S.C. Res. 1166, U.N. SCOR, Annex, U.N. Doc. S/RES/1166 (1998), S.C. Res. 1329, U.N. SCOR, Annex I, U.N. Doc. S/RES/1329 (2000), S.C. Res. 1411, U.N. SCOR, Annex I, U.N. Doc. S/RES/1411 (2002), S.C. Res. 1431, U.N. SCOR, Annex II, U.N. Doc. S/RES/1431 (2002), S.C. Res. 1481, U.N. SCOR, Annex, U.N. Doc. S/RES/1481 (2003) [hereinafter ICTY Statute], available at <http://www.un.org/icty/legaldoc/index.htm> (last visited Feb. 5, 2005).

9. See Statute of International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., art. 19, U.N. Doc. S/RES/955 (1994), as amended by S.C. Res. 1431, U.N. SCOR, Annex I, U.N. Doc. S/RES/1431 (2002) and S.C. Res. 1512, U.N. SCOR, Annex, U.N. Doc. S/RES/1512 (2003) [hereinafter ICTR Statute], available at <http://www.ictt.org/ENGLISH/basicdocs/statute.html> (last visited Feb. 5, 2005).

10. See *Cambodian Genocide Program*, art. 4, RS/RKM/0801/12, available at http://www.yale.edu/cgp/KR_trans.06.09.2001.html (last visited Mar. 2, 2005).

11. See *Secretary General’s Report*, *supra* note 6.

12. See McDonald, *supra* note 7, at 138-42.

done through a “hybrid” model. The aim is to marry the best of two worlds — the expertise of the international community with the legitimacy of local actors; but the risk is to intermix the worst of both — the externality of international actors with the weakness of local institutions which produced the violence in question.¹³ The danger that such institutions, if not properly designed or resourced, will produce resentment rather than reconciliation cannot be entirely discounted. And if the United Nations is implicated in such a failure, the flow-on effects for a broader peace operation in the country in question may be significant. Allowing these U.N. “hybrid” tribunals to fail risks turning the two U.N. goals in these enterprises — peace and justice — from complementary to competing objectives.

At this moment of reflection for the field of international criminal justice, this piece aims to consider some of the challenges for hybrid tribunals — and the U.N. involvement with them — that have, to date, been little scrutinized. The issue is considered through a discussion of the first couple of years of work of the Special Court. That institution stands in a critical position in the development of U.N. involvement in the enforcement of the law of war. Political support and financial resolve for prosecutions on the scale of the *ad hoc* tribunals is dwindling.¹⁴ The International Criminal Court (“ICC”) faces sustained opposition from the United States, and perhaps also other great powers such as China.¹⁵ The East Timor and Kosovo experiments have largely passed, meeting with mixed reviews.¹⁶ The willingness of States to finance the Extraordinary Chambers in Cambodia — or even to try violations of international humanitarian law committed in Liberia, the Democratic Republic of Congo, and Darfur — will turn significantly on their perceptions of the success or failure of the “hybrid” model in Sierra Leone.¹⁷

13. *See id.* at 126.

14. *See Zacklin, supra* note 2, at 545.

15. *See Pape, supra* note 6.

16. *See F.M. Lorenz, The Rule of Law in Kosovo: Problems and Prospects*, 11 CRIM. L. F. 127 (2000).

17. For discussions of the various hybrid institutions, see Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. F. 185 (2001); *see also* Lorenz, *supra* note 16; Hansjoerg Strohmeyer, *Building a New Judiciary for East Timor: Challenges of a Fledgling Nation*, 11 CRIM. L. F. 259 (2000); INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *CRYING WITHOUT TEARS: IN PURSUIT OF JUSTICE AND RECONCILIATION IN TIMOR-LESTE* (2003), available at <http://www.ictj.org/downloads/>

In the pages which follow, I look in detail at whether the Special Court is, at present, succeeding or failing, drawing lessons along the way both for the system of international criminal justice generally, and more specifically for U.N. enforcement of the law of war. In Section II, I suggest a method for measuring success and failure in an international criminal tribunal. I suggest that there are a number of identifiable performance standards which should guide our assessment, each linked to a stakeholder group: the international community, the affected population, and the defendants. In Sections III-V, I assess the Special Court's early performance from the perspective of each of these stakeholder groups, against these performance standards. In Section VI, I assess the implications of these trends, suggest ways that negative consequences might be avoided or at least minimized, and point to longer-term implications, particularly for the U.N. involvement in the enforcement of the law of war. I conclude that a hybrid tribunal, like the Special Court, engages with a range of dynamics affecting the humanitarian community and complex peace operations that the *ad hoc* tribunals have avoided, but which produce unexpected effects in the context of criminal justice. Those dynamics are not presently taken into account either in the design and resourcing of the Special Court, or in stakeholders' expectations of what it can achieve. Careful consideration of these challenges is required lest "hybrid" tribunals upend the maxim "no peace without justice," preventing peace by pursuing justice.

I. *MEASURING SUCCESS AND FAILURE OF INTERNATIONAL CRIMINAL TRIBUNALS*

How can, and should, we measure success and failure in international criminal tribunals? A comprehensive answer to this question would require much deeper and more extensive reflection than I can offer in these pages, but in order to assess the current direction of the Special Court and the system of international criminal justice, we need to establish some yardsticks, however rudimentary. My aim here is not to provide a comprehen-

Crying_Without_Tears_designed.pdf [hereinafter *CRYING WITHOUT TEARS*]; INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *INTENDED TO FAIL: THE TRIALS BEFORE THE AD HOC HUMAN RIGHTS COURT IN JAKARTA* (2003), available at http://www.ictj.org/downloads/IntendedtoFail_designed.pdf; Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245 (2003).

sive framework for such assessments, but simply a rudimentary model; it might well be criticized and contested elsewhere.

Broadly stated, international criminal tribunals have three groups of stakeholders, each with distinct interests: the international community; the population affected by the alleged crimes; and the defendants themselves. For each stakeholder group, we can identify certain minimum performance standards from the legal and political discourse surrounding a particular tribunal. These will usually include some benchmarks relatively precisely defined in legal rights, such as fair and expeditious trial and due process.¹⁸ In addition, they will include less precisely defined standards such as financial propriety and cooperative behavior with other members of the international community.¹⁹ Some standards will not apply to all tribunals, but only to the specific tribunal in question — for example the expectation that the Special Court's work might be completed within three years.²⁰

We might also consider that the interests of different stakeholder groups should be prioritized in some manner: for example, that due process is a *sine qua non* of good practice for international criminal tribunals. Making that assessment is beyond the scope of this Article. My aim here is simply to come up with rudimentary measures of success and failure that will allow us better to understand whether the Special Court is meeting the high expectations placed on it, and where it is finding unexpected challenges. My approach in this is simply summarized in Table 1 (below). I identify three stakeholder groups, to which the Special Court for Sierra Leone owes distinct governance responsibilities.²¹ Its success or failure in discharging those responsibilities can be measured by reference to performance standards arrived at as a matter of legal or political consensus, re-

18. See Press Release, Council Agrees on Creation of War Crimes Tribunal for Sierra Leone, U.N. Doc. SC/6910 (2000) (stating that the "international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law").

19. See, e.g., Global Policy Forum, The International Community's Resolve to End Impunity Must Be Strengthened, Apr. 24, 2001, available at <http://www.globalpolicy.org/security/issues/sierra/court/2001/0424ai.htm>.

20. See *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, 57th Sess., App. II, art. 2, § 4, U.N. Doc. S/2002/246 (2002) [hereinafter *Special Court Agreement*].

21. See *Secretary General's Report*, *supra* note 6.

flected in the legal texts which provide the legal foundations of the Special Court and its practice.

In Sections III-V, I use these performance standards to assess signs of success and failure emerging from the early performance of the Special Court.

TABLE 1: PERFORMANCE STANDARDS FOR THE SPECIAL COURT FOR SIERRA LEONE

Stakeholder groups	Governance responsibility	Performance standard	Performance standard reflected in. . .
International community	Expeditious trial	Completion of trial (and if possible appeal) processes within 3 years	Political consensus reflected in Letter Dated 12 July 2001 from the Secretary-General Addressed to the President of the Security Council. ²²
	Financial propriety	Financial management in accordance with international standards	<i>Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone</i> ("Special Court Agreement"), arts. 5-6 ²³ ; Financial Regulations and Rules of the Special Court for Sierra Leone; 2003 Audit. ²⁴
	Good management practices	Satisfaction of Management Committee; meeting international best practice, including on judicial propriety	<i>Special Court Agreement</i> , art. 6 ²⁵ ; <i>Statute of the Special Court for Sierra Leone</i> ("Special Court Statute"), arts. 13, 25. ²⁶

22. Letter Dated 12 July 2001 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2001/693 (2001) [hereinafter Secretary-General's Letter].

23. See *Special Court Agreement*, *supra* note 20, arts. 5-6.

24. Shauket A. Fakie, Summary Report of the Auditor (Mar. 26, 2004) (submitted to the Management Committee for the Special Court), available at <http://www.sc-sl.org/documents.html>.

25. See *Special Court Agreement*, *supra* note 20, art. 6.

26. See *Statute of the Special Court for Sierra Leone*, U.N. SCOR, 57th Sess., App. II, Attachment, arts. 13, 25, U.N. Doc. S/2002/246 (2002) [hereinafter *Special Court Statute*].

	International comity	Cooperation with States, good faith use of privileges and immunities	<i>Special Court Agreement</i> , arts. 12-17. ²⁷
Affected population	Investigation and prosecution of those bearing the greatest responsibility	Good faith investigations and prosecutions to international standards	<i>Special Court Statute</i> , art. 1, § 1. ²⁸
	Security and reconciliation	Improved security situation and improvement in the prospects of peace; expedition of national and regional reconciliation	U.N. S.C. Resolution 1315 ("S.C. Res. 1315"), pmb., ¶¶ 6, 11. ²⁹
	Generation of an accurate and impartial historical record	Credible and accurate record provided by trial proceedings	S.C. Res. 1315, pmb., ¶ 4. ³⁰
	Respect for victims' rights	Protection of victims' security to a level provided by other international criminal courts, including through a Victims and Witnesses Unit; access to compensation	<i>Special Court Statute</i> , art. 16, § 4 & art. 17, § 2 ³¹ ; <i>Special Court Agreement</i> , art. 16. ³²
	Legacy creation	Strengthening the judicial system; developing respect for the rule of law	S.C. Res. 1315, pmb. ¶ 10 ³³ ; Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone ("Secretary-General's Report"), ¶ 7. ³⁴

27. See *Special Court Agreement*, *supra* note 20, arts. 12-17.

28. See *Special Court Statute*, *supra* note 26, art. 1, § 1.

29. See S.C. Res. 1315, *supra* note 6, pmb., ¶¶ 6, 11.

30. See *id.* ¶ 4.

31. See *Special Court Statute*, *supra* note 26, art. 16, § 4 & art. 17, § 2.

32. See *Special Court Agreement*, *supra* note 20, art. 16.

33. See *id.* ¶ 10.

34. See *Secretary-General's Report*, *supra* note 6, ¶ 7.

Defendants	Satisfaction of pre-trial, mid-trial and post-conviction detention standards	Compliance with internationally recognized detention standards	<i>Special Court Statute</i> , art. 22 ³⁵ ; Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone ("Rules of Detention"), ³⁶
	Fair and expeditious trial	Internationally agreed due process rights	<i>Special Court Statute</i> , art. 17 ³⁷ ; <i>Rules of Procedure and Evidence</i> , R. 33-46 ³⁸ ; S.C. Res. 1315, pmb. ¶ 5. ³⁹

II. *THE INTERNATIONAL COMMUNITY'S PERSPECTIVE*

A. *Expeditious Trial*

The Special Court was designed as a bold experiment with a new, hybrid form of international criminal justice, seeking to combine existing local enforcement capacity and international expertise. As the foundational documents of the Special Court make clear, it was hoped that this new model, by capitalizing on the capacities of the domestic judicial system, would offer improvements over the *ad hoc* criminal tribunals in a number of areas, most obviously the speed and cost of trial.

Measured on the performance standard of speed, the Special Court has to date done well, by most accounts. The formal agreement establishing the Court came only in mid-January

35. See *Special Court Statute*, *supra* note 26, art. 22.

36. Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone, Special Court of Sierra Leone, Mar. 7, 2003 (amended May 4, 2004), available at <http://www.sc-sl.org/documents.html> [hereinafter Rules of Detention]. These rules are substantially based on the *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the U.N. Congress on the Prevention of Crime and the Treatment of Offenders, 1955, endorsed by the U.N. Economic and Social Council, Resolution 663 C (XXIV), July 31, 1957. See E.S.C. Res. 663C, U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. E/3048 (1957).

37. See *Special Court Statute*, *supra* note 26, art. 17.

38. See SPECIAL CT. FOR SIERRA LEONE R. PROC. & EVID. R.33-46, available at <http://www.sc-sl.org/scsl-procedure.html>.

39. See S.C. Res. 1315, *supra* note 6, pmb. ¶ 5.

2002. By the end of August 2004, a remarkable number of complex administrative and litigation processes had been completed or were well under way: the investigation of crimes to international standards; the location and arrest of suspects; the establishment of adequate detention facilities; the construction of a court-house and compound after an international design competition; the acquisition of 1.6 megawatts of electrical power for the Court; the establishment of a medical clinic; installation of microwave communications links; establishment of security capacities and protocols; creation of a website; a large and diverse outreach program; the employment and training of hundreds of local and international staff in jobs ranging from translation to transport; the disposal of more than 150 pre-trial motions; and the commencement of two joint trials. These are all significant achievements of which the Special Court should be proud.⁴⁰ Nevertheless, danger signs have emerged since the commencement of trials in June 2004.

The early pace of trials was remarkably slow.⁴¹ Early pre-trial assessments suggested that the Court might meet its target of completing its work by the end of December 2005.⁴² Unfortunately, the first few months of both the Civil Defense Force ("CDF") and Revolutionary United Front ("RUF") trials were relatively slow, both in terms of the number of witnesses called and the proportion of the indictments covered. Both trials were disrupted somewhat by defendants changing counsel or refusing to attend trial.⁴³ The pace of trial was not assisted by a noticeable willingness on the part of the Bench to adjourn proceedings,

40. See First Annual Report of the President of the Special Court for Sierra Leone: For the Period 2 December 2002 – 1 December 2003, Special Court of Sierra Leone, available at <http://www.sc-sl.org/specialcourtannualreport2002-2003.pdf> (last visited Feb. 2, 2005) [hereinafter First Annual Report]. The First Annual Report provided by the Special Court contains a much more comprehensive account of the Court's developments. *Id.* See BRINGING JUSTICE, *supra* note 6, at 4.

41. See BRINGING JUSTICE, *supra* note 6, at 13-16, App. (analyzing the timeliness of rulings on motions).

42. See PROMISES AND PITFALLS, *supra* note 6, at 1.

43. See Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4) (d) of the Statute of the Special Court, Prosecutor v. Norman, Case No. SCSL-04-14-T-125, Special Ct. for Sierra Leone (Trial Chamber 2004), available at <http://www.sc-sl.org/CDF-decisions.html> [hereinafter Self-Representation Decision]; Gbao — Decision on Application to Withdraw Counsel, Prosecutor v. Sesay, Case No. SCSL-04-15-T, Special Ct. for Sierra Leone, Trial Chamber 2004, available at <http://www.sc-sl.org/gbao.html>; Prosecutor v. Sesay, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Le-

and a limited hearing schedule, including lunch-breaks of up to three hours in the first months of the trials.⁴⁴ A revised schedule since early September 2004 appears to have accelerated hearings a little, and the completion of an on-site canteen is also expected to reduce luncheon adjournment times. However, even if the current pace is significantly accelerated, projections allowing for the Court's monthly alteration of CDF/RUF trials and for scheduled court recesses⁴⁵ indicate that it will take until at least December 2005 *just to hear the Prosecution case* in each trial, with more than 150 prosecution witnesses in each trial. That is not accounting for the Armed Forces Revolutionary Council ("AFRC") trial, to be heard by a trial chamber which was established only in early 2005.⁴⁶

It would be easy to dismiss the slow pace of proceedings as "teething problems," if proceedings were open-ended. But the life of the Court is not indefinite: it has assured political support, as reflected in the attitude of the Management Committee,⁴⁷ only until December 2005.⁴⁸ Its life beyond that point re-

one on 7 July 2004 and Succeeding Days, Case No. SCSL-04-15-T-194, Special Ct. for Sierra Leone, Trial Chamber 2004, available at <http://www.sc-sl.org/gbao.html>.

44. Cf. BRINGING JUSTICE, *supra* note 6, at 17 (criticizing the court for inefficient courtroom management).

45. The Court has scheduled recesses each August and December. See BRINGING JUSTICE, *supra* note 6, at 17; see also Judicial Calendar for Trial Chambers No. 1, Special Court for Sierra Leone, at www.sc-sl.org/calendar.html (last visited Feb. 5, 2005).

46. See BRINGING JUSTICE, *supra* note 6, at 8, 12-13; see also Press Release, Special Court for Sierra Leone, Judges of Second Trial Chamber Sworn In (Jan. 17, 2005), available at <http://www.sc-sl.org/Press/pressrelease-011705.pdf> [hereinafter Second Trial Chamber].

47. See *Special Court Agreement*, *supra* note 20.

Article 7 ("Management Committee") of the Special Court Agreement states:

It is the understanding of the Parties that interested States may wish to establish a management committee to assist the Special Court in obtaining adequate funding, provide advice on matters of Court administration and be available as appropriate to consult on other non-judicial matters. The management committee will include representatives of interested States that contribute voluntarily to the Special Court, as well as representatives of the Government of Sierra Leone and the Secretary-General.

Id.

In practice, the Management Committee consists of major donor and activist countries: Canada (formerly Chair), Lesotho, Netherlands, Nigeria, the United Kingdom (new Chair), and the United States, as well as the Sierra Leone government and the Secretary-General represented by the Office of Legal Affairs. See *Letter to the President of the Security Council* (Dec. 22, 2000), U.N. Doc. S/2000/1234; *Letter Dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council*, U.N. SCOR, 57th Sess., at 9, 43, U.N. Doc. S/2002/246 (2002). Its role has additionally encompassed: identify-

mained under negotiation at the time of writing.⁴⁹ There is no time for “teething problems.” The commencement of the AFRC trial is also likely to slow matters down: although a second Trial Chamber has been appointed to hear this case,⁵⁰ it was unclear whether there would be additional budgetary support for provision of additional legal officers in the Chambers⁵¹ — meaning the already-thinly stretched Chambers support staff could be forced to cover three trials.

Two steps can be taken to remedy this problem. First, the parties themselves must do what they can to expedite proceedings without harming due process rights. They have begun to do so, e.g., by working to agree on matters which could be judicially noticed.⁵² Further steps could be taken. For example, the Prosecution currently plans to call over 150 witnesses in each case; similar cases are often tried in the *ad hoc* tribunals with fifty witnesses.⁵³ Second, judicial practice can improve; the control of

ing Registrar, Prosecutor and judicial candidates; securing funding; and reporting to interested States. *See id.* In addition, a Group of Interested States (“GIS”) was established (under Term of Reference 3(f)) which receives reports from the Management Committee, and thereby monitors the progress of the Court and provides an advocacy base within the U.N. system. *Id.* Canada, the Netherlands, the United Kingdom, and the United States provided two-thirds of the Court’s first-year budget. *See* INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, THE SPECIAL COURT FOR SIERRA LEONE: THE FIRST EIGHTEEN MONTHS 10 (2004), available at http://www.ictj.org/downloads/SC_SL_Case_Study_designed.pdf (last visited Feb. 5, 2005) [hereinafter FIRST EIGHTEEN MONTHS]; *see also* First Annual Report, *supra* note 40, at 30; Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Special Ct. for Sierra Leone, Appeals Chamber 2004, available at <http://www.sc-sl.org/norman.html>. An application by Chief Norman for a declaration that the Court lacked jurisdiction over the indictees or, alternatively, for a stay pending financial guarantees on the basis that the Management Committee’s financial control over the Court breached international standards of judicial independence, was dismissed. *See id.*

48. *Twenty-Second Report of the Secretary-General on the United Nations Mission in Sierra Leone*, U.N. Doc. S/2004/536 (2004), ¶ 39 [hereinafter *Twenty-Second Report*].

49. *See* Fakié, *supra* note 24, at 29; *see also* Request for a Subvention to the Special Court for Sierra Leone: *Thirty-First Report of the Advisory Committee on Administrative and Budgetary Questions*, 58th Sess., Agenda Item 121, ¶ 2, U.N. Doc. A/58/7/Add.30 (2004) [hereinafter *Subvention Request*].

50. *See* BRINGING JUSTICE, *supra* note 5, at 12-13; *see also* Second Trial Chamber, *supra* note 46.

51. *See id.* at 15.

52. *See, e.g.*, Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence, Prosecutor v. Norman, Case No. SCSL-04-14-PT, (Trial Chamber 2004), available at <http://www.sc-sl.org/norman.html>.

53. For example, in the celebrated *Aleksovski* case in the ICTY, only 36 witnesses

the pace of trial is one of the central tasks of the Bench⁵⁴. The Chambers are deliberately — and properly — insulated from external pressures such as the Management Committee.⁵⁵ Any attempt by that body to encourage a rapid acceleration in proceedings would be an improper interference with judicial independence.⁵⁶ The turn-around must, therefore, come from the judges themselves. And since the Trial Chamber has given little indication of probable acceleration of proceedings — despite rhetorical nods to the need for expedition⁵⁷ — the onus must fall on the President of the Court, Judge Ayoola, to encourage his fellow judges to move the pace along.⁵⁸ A drastic acceleration of trials is required, or the Court will simply run out of money and friends.

It is also important to note one other criticism that might be leveled at the Court in relation to expeditious trial. One of the means by which the Court has ensured expedition of the trial process is by severely limiting the numbers of those indicted.⁵⁹ As we shall see below, this has drawn criticism that the Court is failing the local population.⁶⁰ Equally, however, this may be seen as a failure to meet its responsibilities to the international community: by indicting so few, the Special Court has in fact begun to replicate the high cost/conviction ratio seen in the *ad hoc* tribunals.⁶¹ It may represent a lower cost option than those

were called. *See* Prosecutor v. Aleksovski, Case IT-95-14/1-T, [1999] Int'l Crim. Trib. For Fmr. Yugoslavia (Trial Chamber), ¶ 11; *see also infra* note 263 and accompanying text.

54. *See* SPECIAL CT. FOR SIERRA LEONE R. PROC. & EVID. R.26 *bis*. Rule 26 *bis* (adopted May 29, 2004) charges the Trial and Appeals Chamber with ensuring a “fair and expeditious” trial. *Id.*

55. *See Special Court Agreement, supra* note 20, art. 7 (referring to the Management Committee consulting on non-judicial matters).

56. *See id.*

57. *See, e.g.*, Self-Representation Decision, Case No. SCSL-04-14-T-125, Special Ct. for Sierra Leone, ¶ 26 (Trial Chamber 2004).

58. *See* SPECIAL CT. FOR SIERRA LEONE R. PROC. & EVID. The President might offer this counsel under his power to “co-ordinate the work of the Chambers.” *Id.* at R.19.

59. *See* BRINGING JUSTICE, *supra* note 6, at 2.

60. *See id.* at 2-3.

61. *See* BRINGING JUSTICE, *supra* note 6, at 5-6. By September 2004, the Special Court had only indicted 13 individuals and is not expected to indict more than a few more individuals. This makes the ratio of indictments to spending and resources very high. The article cited suggests that the amount of resources available should allow for the Court to expand its indictments past the few top officials to include mid-level commanders who have also committed numerous, heinous crimes. *See id.*

tribunals — but it also represents a lower output option.⁶² In other words, the “hybrid” model may offer the United Nations and its member States a less costly model of enforcing the law of war — but it may also be a less effective model, in the long run.

B. *Financial Propriety and Good Management Practices*

Perhaps even more impressive than the fact that the Special Court has achieved so much in such a short time, prior to the commencement of trials, is that these achievements have not generally come at the cost of financial propriety or good management practices. The 2003 Audit of the Court, carried out by a national-level auditor operating according to international accounting standards,⁶³ indicated that the Court’s operations had to that point been carried out in accordance with relevant international financial and management standards⁶⁴ — no mean feat in corruption-riddled West Africa,⁶⁵ especially given that the Court’s finance section was “tasked with providing all the necessary functions of both a field mission” and UNHQ.⁶⁶ Moreover, the Special Court’s human resources management is clearly miles ahead of much U.N.-wide practice, managing to combine national diversity with relatively fast employment times, as well as employing both national and international staff.⁶⁷ The Special Court enjoys significant freedom as a result of not being gov-

62. *See id.*

63. *See Fakie, supra* note 24. The Report was conducted in accordance with the common auditing standards of the Panel of External Auditors of the United Nations, the specialized agencies and the International Atomic Energy Agency. *See id.* ¶ 1. “The Internal Audit Division of the *Office of Internal Oversight Services* (OIOS) performed an internal audit of the Special Court for Sierra Leone . . . in report AP 2003/61/1(OBS-7) [dated May 6, 2003].” *Id.* ¶¶ 82, 83.

64. These standards include those established by the Financial Regulations and Rules of the Special Court, approved by the Management Committee on June 21, 2002. These are based on relevant U.N. financial regulations from 1985 (recently updated). *See Fakie, supra* note 24. The Report was conducted in accordance with the common auditing standards of the Panel of External Auditors of the United Nations, the specialized agencies and the International Atomic Energy Agency. *See id.* ¶ 1; *see also* First Annual Report, *supra* note 40, at 29.

65. *See, e.g.,* TRANSPARENCY INT’L, TRANSPARENCY INT’L CORRUPTION PERCEPTIONS INDEX 2004, available at <http://www.transparency.org> (last visited Feb. 8, 2005).

66. First Annual Report, *supra* note 40, at 20.

67. *But see* 1(2) SPECIAL CT. WATCH 1 (Jan. 2003) (on file with the author) (criticizing the slow pace of recruitment of Sierra Leonean staff). Local staff hold 40% of professional positions with the Court, and between 50% and 60% of all positions. *See* BRINGING JUSTICE, *supra* note 6, at 36. *Cf.* First Annual Report, *supra* note 40, at 20 (listing 106 international staff members and 149 national staff members).

erned by U.N. administrative rules. To date, the Court has not abused that freedom, but instead has chosen to use it creatively and successfully.⁶⁸ Most insiders attribute that success to the leadership of the Registrar, Robin Vincent, but it is also a result of careful pre-planning by the Management Committee, and the benefit of lessons learned from the *ad hoc* tribunals.⁶⁹

Despite this overall good track record on management issues, the Special Court cannot be given an entirely clean bill of health on this performance standard. There are two key problems, both of them structural.

The first problem, which infects all of the Special Court's activities, is the financial uncertainty which flows from financing by voluntary contributions from U.N. Member States.⁷⁰ States have proved unwilling to voluntarily contribute sufficient funds even to meet the tight, three-year, U.S.\$57 million budget originally approved for the Court by the Management Committee.⁷¹ As the 2003 Audit of the Special Court bluntly stated:

The Special Court has not received sufficient contributions and pledges to cover its future operations. This condition . . . indicate [sic] the existence of a material uncertainty, which may cast doubt about the Special Court's ability to continue as a going concern.⁷²

Consequently, "at the very moment when trials were about to

68. Unfortunately, most sources focus on criticism rather than praise.

69. See *BRINGING JUSTICE*, *supra* note 6, at 1-2. Unlike past *ad hoc* tribunals, the Special Court is located in the country where the crime was committed, which eliminates many logistical problems concerning witnesses. It also hires a significant number of Sierra Leone nationals, thereby leaving skilled staff behind to perpetuate the justice system. The court prosecutes both domestic as well as international crimes, whereas other only prosecuted international crimes. See *id.*; see also First Annual Report, *supra* note 40, at 30 (concerning the planning stages of the Management Committee).

70. See S.C. Res. 1315, *supra* note 6, ¶ 8(c); see also *Secretary-General's Report*, *supra* note 6, ¶¶ 56, 68-72; *Special Court Agreement*, *supra* note 20, art. 6.

71. See *Secretary-General's Letter*, *supra* note 22. The Management Committee exercises financial control over the Court under the Financial Regulations and Rules of the Special Court, approved on June 21, 2002, especially Art 4. See First Annual Report, *supra* note 40, at 29-30 (discussing funding and the role of the Management Committee). The original proposal was for a budget of U.S.\$114.6 million over three years. See *Annan Authorizes Tribunal Despite Funding Shortfall*, U.N. WIRE, Jan. 4, 2002, available at http://www.unwire.org/UNWire/20020104/22831_story.asp. The approved budget now stands at U.S.\$75 million over three years. See *FIRST EIGHTEEN MONTHS*, *supra* note 47, at 10; *BRINGING JUSTICE*, *supra* note 6, at 4; see also Author's Correspondence with Court Official (Sept. 2004) (on file with author).

72. Fakie, *supra* note 24, at 1.

begin, the Court has confronted a serious financial crisis.⁷³ The Secretary-General's request to the General Assembly for a subvention from Member States' assessed contributions was, mercifully, approved in the amount of U.S.\$16.7 million,⁷⁴ tiding the Court over until December 2004⁷⁵ — though voluntary contributions remained the preferred mode of finance for the Court.⁷⁶ Even now, though, the financial future of the Court remains uncertain. Human Rights Watch states that as of July 2004, only U.S.\$49.3 million had actually been paid,⁷⁷ and indicates a budget shortfall through 2005 of U.S.\$23.3 million;⁷⁸ the Court's First Annual Report indicates that third-year funds were used in the second-year to shore up shortfalls.⁷⁹ When approached on this issue in September 2004, a Court official indicated that only three of thirty-six States had not honored pledges, representing only U.S.\$206,000 dollars in unmet pledges; that the Court had not called for the disbursement of the original U.S.\$16.7 million subvention; and that the U.N. General Assembly would shortly approve additional funds through the end of December 2005.⁸⁰ The radical divergence in these assessments of the Court's financial position makes the very uncertainty of that position clear: financing depends on the Court constantly working to convince Member States to provide more cash to stave off impending financial paralysis. It will not be surprising, therefore, if the Court

73. *Rule of Law*, *supra* note 4, ¶ 43.

74. *See Special Court for Sierra Leone*, G.A. Res. 58/284, U.N. GAOR, 58th Sess., Supp. No. 7A, ¶ 2, U.N. Doc. A/Res/58/284 (2004). This was on the understanding that any regular budget funds appropriated for the Court would be refunded to the United Nations at the liquidation of the Court, if sufficient voluntary contributions had been received. *See id.* at 23 n.9; *see also Subvention Request*, *supra* note 49, ¶ 4; *Request for a Subvention to the Special Court for Sierra Leone: Report of the Secretary-General*, ¶ 12, U.N. Doc. A/58/733 (2004).

75. *See Twenty-Second Report*, *supra* note 48, ¶ 39; *see also* G.A. Res. 58/284, *supra* note 74, ¶ 2.

76. The Resolution requests "the Secretary-General, in concert with the Management Committee, to redouble efforts to raise voluntary contributions" and appeals "to Member States, as a matter of urgency, to contribute voluntary funds in support of the Court and to honour existing pledges." G.A. Res. 58/284, *supra* note 74, ¶¶ 3-4.

77. *See BRINGING JUSTICE*, *supra* note 6, at 4.

78. *BRINGING JUSTICE*, *supra* note 6, at 5. Beyond these 18 months, there are significant long-term costs which have not yet even been addressed: witness protection, detention of convicts, the retention of a residual judicial capacity to hear matters relating to detention and, more than likely, the costs of Charles Taylor's trial. *See id.*

79. *See First Annual Report*, *supra* note 40, at 36.

80. *See Author's Correspondence with Special Court Official* (Sept. 2004) (on file with author).

at some point in the next year or two again faces a budget crisis, especially if the expected termination date of December 2005 comes and goes with the trials — let alone appeals — uncompleted.

Three consequences may flow: first, as the crisis looms, international personnel will jump ship, seeking greater security elsewhere;⁸¹ second, if the crisis actually arrives, the day-to-day operations of the Court might be imperiled as contractors (and perhaps employees) stop work; third, any bail-out from the United States — or even the Management Committee powers — would risk fatally tainting the political independence of the Court in the eyes of observers, including the Sierra Leone population.

This financial uncertainty, if it grows, may also raise issues beyond questions of management. The Secretary-General highlighted some of these before the Special Court was established:

The risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of continuous availability of funds, are very high, in terms of both moral responsibility and loss of credibility of the Organization, and its exposure to legal liability. In entering into contractual commitments which the Special Court and, vicariously, the Organization might not be able to honour, the United Nations would expose itself to unlimited third-party liability. A special court based on voluntary contributions would be neither viable nor sustainable.⁸²

There are additional concerns. Defendants might, for example, claim that detention by an institution with an uncertain financial future, which may not be able to complete the trials for which it has detained them for over two years, amounts to arbitrary detention.

The second structural issue arises from turnover at the Special Court. Financial uncertainty has recently spilled over into uncertainty over senior management positions within the Court.⁸³ Perhaps most threatening was the proposed departure

81. See BRINGING JUSTICE, *supra* note 6, at 7, 25 (explaining that the present practice of paying defence counsel a fixed, lump sum for all expenses incurred while representing the defendants already creates an incentive for counsel to work less, even when more work is absolutely necessary).

82. *Secretary-General's Report*, *supra* note 6, ¶ 70.

83. See *Funding Shortfall for Sierra Leone War Crimes Court to Be Made up by the U.N.*,

of Robin Vincent, the highly successful and greatly respected British Registrar.⁸⁴ He formally resigned in the middle of 2004, effective later that year, but many at the time read it as an attempt to leverage significant changes out of the Management Committee (including greater financial security for the Court as a whole).⁸⁵ During a trip in September 2004 to New York to discuss the Special Court's Completion Strategy,⁸⁶ he withdrew his resignation. His actual departure would have been a severe blow to the Court. Similarly, there has been significant turnover in the senior trial positions within the Office of the Prosecutor in the last few months. The most senior attorneys in both the CDF and RUF/AFRC prosecution complexes departed shortly after the commencement of trials. These departures plainly cannot assist the quality of prosecutions; and are also reflective of a broader pattern of comparatively high turnover at the Special Court.⁸⁷ More recently, both the Prosecutor and the Principal Defender have announced their departures.⁸⁸

That turnover is high, however, only if we compare the Special Court to the *ad hoc* tribunals. Compared to long-term peace-keeping missions, this rate may not be so high. In fact, many Special Court international staff have extended their stay well beyond their initial contracts. The living and working conditions in Freetown, and the fact that the Special Court is not a "family duty station," inevitably lead to higher turnover than we find in The Hague.⁸⁹ The increased costs which flow from it — personnel costs, loss of institutional memory and others⁹⁰ —

AGENCE FR. PRESSE, Aug. 6, 2004, available at 2004 WL 89182953 [hereinafter *Funding Shortfall*].

84. See *Special Court Registrar Announces Resignation*, DAILY NEWS FROM SIERRA LEONE, Aug. 4, 2004, available at http://www.visitsierraleone.org/news/news_item.asp?NewSID=108 (last visited Feb. 6, 2005).

85. See *Funding Shortfall*, *supra* note 83.

86. See *Twenty-Second Report*, *supra* note 48, ¶ 40. For the introduction of the "Completion Strategy" approach in the ICTY and ICTR, see S.C. Res. 1503, U.N. SCOR, 48th Sess., 4817th mtg., pmb., U.N. Doc. S/RES/1503 (2003).

87. To my knowledge this has not been documented, but it is self-evident to anyone who works with or at the Court for any significant period.

88. See Press Release, Special Court for Sierra Leone, Special Court Prosecutor to Step Down (Feb. 28, 2005), available at <http://www.sc-sl.org/Press/prosecutor-022805.pdf>; see also Vacancy Announcement, Special Court for Sierra Leone, at 2 (Mar. 7, 2005), available at <http://www.sc-sl.org/Vacancies/SCSL-2005-013.pdf>.

89. It would be useful, however, to compare turnover at the Special Court and ICTR. I am indebted to Caitlin Reiger for many of these points.

90. The provision on relocation allowances has apparently recently been deleted

must be factored into both stakeholders' expectations, and future institutional design. The Management Committee might address turnover by fine-tuning compensation packages to encourage (and perhaps even reward) long-term service to the Court, but the current nature of the lifestyle in Freetown and the short lifespan of the Court both tend to encourage short-term employment.⁹¹ A heavy reliance on interns who are paid from extra-budgetary sources, but often limited to a six-month-stay, and who are on short-term contracts designed to keep them, and other staff members, under conditions of financial uncertainty, also exacerbates turnover.⁹² High turnover is to be expected as part of the hybrid tribunal package, a direct consequence of locating the tribunal "in theater." Its costs must be factored into both the Court's budgets, and the Management Committee's expectations of what can be achieved in three years.

Overall, the Special Court has done a remarkable job in maintaining financial propriety and in achieving good management practices. Its continued ability to do so, however, depends on a more realistic assessment by the Management Committee — and the U.N. community generally — of the costs of such success. If the Special Court fails because of under-resourcing, it will not be the Court that has failed the international community, but the international community that has failed the Court.

C. *International Cooperation*

The financial insecurity of the Special Court is symptomatic of its broader inability, as an institution established by treaty between the United Nations and the host State, to secure cooperation from States and international organizations.⁹³ For the *ad hoc* tribunals, both financial and judicial cooperation flowed

from the Staff Rules and Regulations, reducing these costs. See Author's Correspondence with Court Official (Sept. 2004) (on file with author). However, indirect costs from relocation remain: new staff must, for example, spend more time getting to know the basics of life in Freetown, and new arrivals are also notoriously prone to mild sickness as their immune systems adjust to different environmental inputs. Both factors reduce productivity. See *id.*

91. See Bruce M. MacKay, *The Special Court for Sierra Leone — The First Year*, 35 *CASE W. RES. J. INT'L* 273, 276 (2003).

92. See Special Court for Sierra Leone, *Internship Programme*, at <http://www.sc-sl.org/internships.html> (last visited Feb. 7, 2005).

93. See *Report of the Security Council Mission to West Africa, 20-29 June 2004*, U.N. SCOR, ¶ 39, U.N. Doc. S/2004/525 (2004) [hereinafter *West Africa Report*].

from their Chapter VII mandates.⁹⁴ The Special Court, lacking such a mandate, must persuade each and every State and international organization to cooperate with it on specific issues, not merely involving funding, but also regarding issues such as identification of, and access to, evidence, witnesses and suspects.⁹⁵ Beyond considerations of justice, the only real incentive for the Special Court's interlocutors to cooperate with the Court is their reputation as good international citizens. Since the informal norm that has emerged in relation to State cooperation with the Special Court is, however, one of non-cooperation, or at best lethargic and tardy cooperation, few reputation-related costs flow for States that drag their feet, play deaf or simply refuse to cooperate.

The most obvious example of this problem is the Special Court's continuing incapacity to secure custody of Charles Taylor, its most prominent indictee.⁹⁶ The impotence of the Court is underscored by the fact that Taylor is currently in Nigeria — and Nigeria is a prominent member of the Special Court's Management Committee.⁹⁷ If the members of the Management Committee will not cooperate, why should anyone else? In an-

94. See U.N. CHARTER ch. VII. The Statute of the International Criminal Tribunal for the Former Yugoslavia and the Statute of the International Criminal Tribunal for Rwanda were established by the U.N. Security Council acting under Ch. VII of the U.N. Charter. See ICTY Statute, *supra* note 8; see also ICTR Statute, *supra* note 9.

95. As the Secretary-General explained in his Report:

The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.

Secretary-General's Report, *supra* note 6, ¶ 10.

The First Annual Report details a wide range of organizations (from UNAMSIL to Interpol) and issues (from arrest of detainees to relocation of witnesses) involved in cooperation agreements with the Special Court. See First Annual Report, *supra* note 40, at 19.

96. See Lansana Fofana, *Rights — Sierra Leone: War Crimes Trials are Opening Old Wounds*, INTER PRESS SERVICE, Jan. 18, 2005, available at 2005 WL 61722900 (noting that to date Charles Taylor is "on the run").

97. See BRINGING JUSTICE, *supra* note 6, at 39-41. Human Rights Watch states simply that "Nigeria's harbouring of Taylor goes against international law, undercuts the investment made by the international community to combat impunity in Sierra Leone, and is an affront to victims of the crimes committed in Sierra Leone." *Id.* at 39.

other case where the absence of Chapter VII powers benefited an indictee, the Court was unable to induce cooperation from either the ICTY or ICTR to host the initial appearance of one of the indictees.⁹⁸ Sometimes, though, the indictees are the losers: Foday Sankoh's death in Special Court custody occurred despite the Registry's stringent efforts to find a State willing to provide Sankoh with the urgent medical assistance he required.⁹⁹ Chapter VII powers might not have allowed the Special Court to *require* a State to render that assistance, but adding to the diplomatic weight of the Court would have made it much harder for any State to refuse such a request.

International cooperation must cut both ways. The Special Court has carefully discharged its obligations of cooperation with other international actors — for example, cooperating with Sierra Leone authorities when a senior investigator was charged with serious sexual offenses against a Sierra Leone minor.¹⁰⁰ The international community cannot expect the Special Court to behave like a good international citizen — for example, by not working covertly to secure custody of Taylor — if the members of the community will not, reciprocally, afford the Court the respect, benefits and cooperation the Court requires. The problem here is structural: the Special Court was not given the power to compel cooperation, and so is not receiving it. Chapter VII powers are no panacea, but they certainly send a signal that the international community is serious about accountability in a particular situation, and give a tribunal diplomatic clout.

The broader issue is that the standing of international criminal tribunals within the international community — and in particular their ability to draw on the U.N. diplomatic leverage — needs to be clarified. Institutional designers in the future must give this careful consideration. It is not only a question of Chapter VII mandate; other issues, such as the inclusion of diplomatic expertise in a tribunal's start-up staff, are also implicated.¹⁰¹ The

98. See First Annual Report, *supra* note 40, at 8.

99. See *U.N. Blamed for Sankoh Death*, BBC News (U.K.), July 31, 2003, available at <http://news.bbc.co.uk/1/hi/world/africa/3112659.stm>.

100. See Press Release, Special Court for Sierra Leone, Statement by the Registrar on Peter Halloran (Aug. 18, 2004), available at <http://www.sc-sl.org/press/pressrelease-081804.pdf>.

101. I am indebted to Marieke Wierda for a number of these points. The lack of diplomatic expertise at the Special Court has been a central charge of the diplomatic community, especially after the Prosecutor's unsealing of the indictment against

ad hoc tribunals could draw on the Security Council for the diplomatic maneuverings required to produce compliance; the hybrid model leaves tribunals with no such diplomatic recourse.

This is not merely an abstract or political concern. It may have real legal force. If defendants, either independently, or through the Special Court, are unable — and this is as yet untested — to secure access to exculpatory evidence they reasonably believe to be in the custody of foreign States or organizations, what prospect is there for fair trial? The Prosecution narrative in the CDF case has to date minimized the involvement of ECOMOG with CDF forces, suggesting that there may be evidence in Nigerian custody that would either exonerate CDF inductees, or at least cast doubt on Prosecution allegations in that case. Similarly, the links between the RUF and Liberian groups, and perhaps also Burkina Faso, suggest significant evidence relevant to the RUF case may be located in those jurisdictions. If the Court cannot gain access to that evidence, will it acquit these defendants? If it convicts them, without that evidence, will those convictions be sound? The prospects of the trials failing to secure convictions as a result of a lack of international cooperation is, therefore, not academic.

The question of international cooperation also touches on a deeper issue, namely what the implications are for the United Nations of being involved in both peace and justice enterprises. Whether through Chapter VII or otherwise, international criminal tribunals have, to date, looked to the United Nations for the cooperation and enforcement capacity the tribunals themselves lack. Despite its independence from the United Nations, the ICC may be similarly reliant upon it, particularly in relation to the provision of evidence. The two institutions recently approved a Relationship Agreement.¹⁰² Among other things, the

Charles Taylor when he was attending peace negotiations in Ghana, which many considered diplomatically naïve and unhelpful. For discussion, see, e.g., PROMISES AND PITFALLS, *supra* note 6, at 7-10; Kathy Ward, *Might v. Right: Charles Taylor and the Sierra Leone Special Court*, 11 HUM. RTS. BRIEF 8 (2003); Cesare P.R. Romano & André Nollkaemper, *The Arrest Warrant Against the Liberian President, Charles Taylor*, ASIL INSIGHT, June 2003, available at <http://www.asil.org/insight/insigh110.htm>. Regardless of the justifiability of that charge, the inclusion of experienced diplomats in senior tribunal staff may help avoid such difficulties in the future.

102. See Press Release, Agreement Between the International Criminal Court and the United Nations (Oct. 4, 2004), available at <http://www.icc-cpi.int/press/press-releases/47.html>.

Agreement creates an obligation for the United Nations to cooperate with the ICC, and to provide it with information and documents, subject to a stipulation that the United Nations must have “due regard to its responsibilities and competence under the Charter.”¹⁰³ The Relationship Agreement allows the ICC or the United Nations to take protective measures where provision of information to the Court would “endanger the safety or security of current or former personnel of the United Nations, or otherwise prejudice the security or proper conduct of any operation or activity of the United Nations.”¹⁰⁴ What remains unclear is whether the United Nations can refuse to hand over information or documents requested by the ICC on the basis that to do so would prejudice existing or future peace-making activities, e.g., by undermining the trust of negotiating warring factions. It is not clear whether that would rise to the level of “prejudice[ing] . . . the proper conduct”¹⁰⁵ of that U.N. activity, or whether the United Nations might refuse to hand over information on the basis that to do so would be to disregard its peacemaking obligations under the U.N. Charter. Until that question is resolved, the presumption in favor of information-sharing created by the new Relationship Agreement may have a markedly chilling effect on U.N. peacemaking activities as potential interlocutors come to appreciate that what they say to the United Nations may be passed onto the ICC Prosecutor. What this signals is broader tension confronted by the United Nations — made clear by the question of what role it should play in facilitating cooperation with international criminal tribunals — between enforcing the law of war through criminal prosecutions, and standing as a neutral mediator in the bargaining process designed to end a war. Aligning the United Nations with criminal prosecutions risks undermining perceived legitimacy in the eyes of potential interlocutors. That is increasingly a problem the United Nations faces not only with the ICC, but also with hybrid tribunals such as the Special Court.

103. See Negotiated Draft Relationship Agreement between the International Criminal Court and the United Nations, June 7, 2004, art. 15, § 1, available at http://www.icc-cpi.int/library/asp/Pages_from_Negotiated_Draft_Relationship_Agreement_Part_1.pdf.

104. *Id.* art. 15, § 3.

105. *Id.*

D. *The Affected Population's Perspective*

The Special Court is, first and foremost, and as its very name suggests, *for Sierra Leone*.¹⁰⁶ The consequences for international criminal justice of the Special Court failing to discharge its responsibilities to the international community could be grave. But the primary objective of the international community in establishing the Court was not for the Court to accrue benefits directly, but rather to ameliorate the situation in Sierra Leone, and reduce the threat to international peace and security that the situation represented;¹⁰⁷ only in doing so would the Court indirectly benefit from its establishment of a more secure international community and an enhanced system of international criminal justice. If the Special Court is seen to fail Sierra Leone, then its primary objective will be unmet, and the hybrid approach to enforcing the law of war must be questioned.

1. Investigation and Prosecution of Those Bearing the Greatest Responsibility

The Special Court was established to investigate and prosecute those bearing the greatest responsibility for serious violations of international humanitarian law in the conflict in Sierra Leone since November 1996.¹⁰⁸ There is controversy in Sierra Leone as to whether the Court is adequately discharging this responsibility.¹⁰⁹ The controversy turns on two points, one of which can be discounted here, and one which cannot.

The first point is that many serious violations of IHL occurred prior to November 1996, and that the use of this date — the date of signature of the Abidjan Accord¹¹⁰ — to define the

106. Beyond the name, that is also the perception of the people of Sierra Leone. In a recent opinion poll covering 1,279 respondents throughout Sierra Leone, conducted by the Campaign for Good Governance, 61% of respondents stated that the Special Court is intended for the benefit of the people of Sierra Leone. Eight percent thought it was for the benefit of the international community, 5% for the Sierra Leone Government, 4% for no one, and 22% did not know. See CAMPAIGN FOR GOOD GOVERNANCE, OPINION POLL REPORT ON THE TRC AND SPECIAL COURT 13 (2003) (responses to Question 37), available at <http://www.slccg.org/opinionpoll.pdf> (last visited Feb. 7, 2005).

107. See S.C. Res. 1315, *supra* note 6, pmb., ¶¶ 12-13.

108. See *Special Court Agreement*, *supra* note 20, art. 1, § 1.

109. See *supra* notes 2-3 and accompanying text.

110. Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front, Nov. 30, 1996 [hereinafter Abidjan Accord], available at <http://www.sierra-leone.org/abidjanaccord.html> (last visited Feb. 12, 2005).

commencement of the Special Court's temporal jurisdiction results in an arbitrary distinction between those who will be punished and those who will walk free.¹¹¹ This is an age-old problem in international criminal law. It represents the pragmatic political choice made by those who initiate post-conflict accountability to compromise the ideal of an absolute end to impunity with the political challenges of securing prosecutions.¹¹² We can discount this concern here because, in effect, it asks whether the Special Court was the right institution to achieve all the objectives represented by the performance standards identified in Table 1. That is an important question, but not the one I seek to address here; my concern is rather whether the Special Court is even managing to achieve the objectives which fall within the institutional parameters set out by its designers. It may be true that the November 1996 restriction leads to an inaccurate historical record, or to politicization of the trial process. It may be true that it was a poor institutional choice. Here, that is not my concern: my concern is to assess how the Court is performing within the parameters it has been set, including this limitation on its temporal mandate.

This leads us to the second point of controversy: what "those bearing the greatest responsibility" means, both in theory and, crucially, in practice.

The theoretical debate remains unresolved.¹¹³ The 2000 *Report of the Secretary-General on the Establishment of a Special Court for*

111. See Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 *BERKELEY J. INT'L L.* 436, 445 (2002); see also Press Release, Amnesty Int'l, Sierra Leone: The U.N. Security Council Must Make the Special Court Effective and Viable (Feb. 13, 2001), at <http://www.web.amnesty.org/ai.nsf/index/AFR510012001> (protesting the limit on jurisdiction and suggesting the limit extend to 1991).

112. The basis for the choice of date is explained in the *Secretary-General's Report*: [T]he Secretary-General has been guided by the following considerations: (a) the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded; (b) the beginning date should correspond to an event or a new phase in the conflict without necessarily having any political connotations; and (c) it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country. A temporal jurisdiction limited in any of these respects would rightly be perceived as a selective or discriminatory justice.

Imposing a temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the Court.

Secretary-General's Report, *supra* note 6, ¶¶ 25-26.

113. See Carla Del Ponte, *Prosecuting the Individuals Bearing the Highest Level of Re-*

Sierra Leone, drafted by the U.N. Office of Legal Affairs (which had negotiated the text of the Special Court Statute) stated that the formulation was not designed to limit jurisdiction to leaders, but to provide guidance in prosecutorial strategy.¹¹⁴ Despite this apparently authoritative interpretation, one Trial Chamber of the Special Court has decided otherwise, indicating that the formulation *does* provide a jurisdictional limitation.¹¹⁵ The Chamber's decision may appear to play into the hands of the defendants — it offers them an apparent jurisdictional defense, if they can establish that others bore greater responsibility than they for the acts alleged; but it also remains litigable.

The central point is, however, a political one: the credibility of the Court has been negatively affected in some eyes by its choice of defendants. The criticism comes in four variants.

First, many of those being prosecuted are not the “big fish,” but at best middle-ranking officers. It is certainly true that four top defendants have so far escaped justice: Foday Sankoh and Sam “Mosquito” Bockarie have passed away; Johnny Paul Koroma, head of the AFRC *junta* remains an outlaw through covert evasion tactics; and Charles Taylor escapes prosecution by overt evasion tactics.¹¹⁶ Even though this criticism seems to pre-judge the issue of whether these individuals do in fact “bear the greatest responsibility,” the infamy of Taylor and Koroma within

responsibility, 2(2) J. INT'L CRIM. JUST. 516 (2004) (discussing these issues in a broader context).

114. See *Secretary-General's Report*, *supra* note 6, ¶ 30. The *Secretary-General's Report* specifically argues that, “It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.” *Id.* It also advocates for the use of the term “persons most responsible.” *Id.* ¶¶ 29-31. His recommendation was not adopted in the 2000 U.N. Security Council Resolution 1315. See Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 EUR. J. INT'L L. 857, 862 (2000). See generally S.C. Res. 1315, *supra* note 6. Compare *Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone*, U.N. SCOR, 57th Sess., Annex, ¶ 29, U.N. Doc. S/2002/246 (2002) [hereinafter *Report of the Planning Mission*], with PROMISES AND PITFALLS, *supra* note 6, at 10 (arguing this may produce “selective justice” because it is a “highly subjective standard”).

115. See *Prosecutor v. Fofana*, Decision on the Preliminary Defence Motion on the lack of Personal Jurisdiction on behalf of Accused Fofana, Case No. SCSL-2004-14-AR72(E), Special Ct. for Sierra Leone (2004), ¶¶ 21-27 (“the Chamber therefore concludes that the issue of personal jurisdiction is a jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion, as the Prosecution has submitted”).

116. See BRINGING JUSTICE, *supra* note 6, at 11.

Sierra Leone means it will be hard for the Court to claim it has discharged its mandate of prosecuting those who do in fact bear the greatest responsibility, while they remain at large.¹¹⁷

Second, many Sierra Leoneans resent the indictment of the CDF leaders, particularly Chief Sam Hinga Norman, since many consider the CDF to have saved the country.¹¹⁸ (This explanation ascribes little influence over the outcome of the conflict to ECOMOG, the United States, the United Kingdom, and private mercenary groups such as Executive Outcomes and Sandline International.) These critics argue that the CDF does not bear responsibility for committing serious violations of International Humanitarian Law (“IHL”) — they bear responsibility for *ending* those violations,¹¹⁹ which were in fact committed by the RUF/AFRC. Some of these critics argue that the Titoesque policy of prosecuting all groups equally,¹²⁰ simply allows the international community to cast all of the combatants as villains, avoiding the difficult questions that the international community might otherwise confront about its own failure to defend democracy and the failure of U.N. interventions in the region.¹²¹

Like the first critique, this argument seems to prejudge the issue; there may be evidence of CDF violations of IHL — it is the point of the trial to assess whether that is so. Regardless, the indictment of the CDF leaders has irrevocably — and some would argue needlessly — politicized the Court in many Sierra Leonean eyes.¹²² Just as importantly, though, it has also *validated* the Court in many other Sierra Leonean eyes. For example, following the arrest of Chief Norman, the National Chairman of the War-affected Amputees Association said:

117. *Id.* at 20-21.

118. See PROMISES AND PITFALLS, *supra* note 6, at 5-6, n.34.

119. See Annex to the Letter Dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2000/786 (2000). It is notable, in this respect, that the letter sent by President Kabbah to Secretary-General Annan, which triggered the negotiations that produced the Court, asked for U.N. assistance in establishing a court to try “members of the Revolutionary United Front [(“RUF”)] and their accomplices”. *Id.*

120. See John R.W.D. Jones, *The Gamekeeper-Turned-Poacher’s Tale*, 2(2) J. INT’L CRIM. JUST. 486, 493 (2004) (detailing the Titoist tactic of prosecuting a Serb for nationalism one week, a Croat the next, and a Muslim the third).

121. See *id.* Jones suggests the same approach at the ICTY is, “a way of assuaging the West’s guilt over its failure to intervene in Bosnia. If all sides to the conflict were equally guilty, then that omission is not so terrible.” *Id.* at 493-94.

122. See PROMISES AND PITFALLS, *supra* note 6, at 7.

We are very pleased with actions taken by the Special Court We are the symbol of why this Court was created. We are the exhibits. Nothing will replace what we have lost. We know that the Special Court is on the victims' side and will make sure that this country is never again under attack.¹²³

Third, a smaller group argues that the indictment of the CDF leaders, particularly Chief Norman, was a political move orchestrated by the President, Ahmad Tejan Kabbah, to remove the threat that Norman and the CDF represented to his power-base.¹²⁴ This is ironic, they contend, because Norman was at all times throughout the conflict answerable to Kabbah.¹²⁵ If Norman bears responsibility for serious violations of IHL then, *ergo*, Kabbah bears greater responsibility. *Quod erat demonstrandum*, it cannot be Norman that bears the *greatest* responsibility, nor Fofana or Kondewa, the other CDF defendants, since by the Prosecution's own admission they were subordinate to Norman. Similar arguments can in fact be presented with respect to the RUF and AFRC accused, given the absence of Sankoh, Koroma and Taylor from the proceedings.

Fourth, other critics argue that the net should be cast wider.¹²⁶ They suggest that a number of lower-level commanders — such as AFRC commanders Savage and Al Hadji Bayoh, and CDF commander Musa Junisa — should be considered as “bearing the greatest responsibility” because of the particularly brutal nature of their crimes.¹²⁷ This is not so much a criticism of the Prosecutions' choice to indict the existing defendants, but its choice not to indict others.

These kinds of criticisms follow any attempt to impose post-conflict accountability. What is unusual — and perhaps unnecessary — about the notion of “greatest responsibility” is that it not only acts as a lightning-rod attracting political criticism of the Court, but that it may — if the prevailing interpretation of the phrase as a jurisdictional limitation holds — translate that political criticism into legal forms which brings it within the trial process, needlessly politicizing it from the inside out. This is not a feature of hybrid tribunals generally, but instead a result of the

123. *Id.* at 5-6.

124. *See generally id.* at 7. *See* CRYING WITHOUT TEARS, *supra* note 17, at 6.

125. *See* CRYING WITHOUT TEARS, *supra* note 17, at 6.

126. *See* BRINGING JUSTICE, *supra* note 6, at 5.

127. *Id.* at 5-6.

legalistic approach the Special Court has so far taken to the interpretation of its own Statute. What it does highlight, however, is how fine the line between prosecution and politics is in the transitional justice setting. That, in turn, re-emphasizes the questions we saw raised in relation to international cooperation about the dangers of the United Nations politicizing its peace-making processes by engaging in post-conflict prosecutions.

2. Improving security and reconciliation

Catch a taxi in Freetown in the late afternoon on a day that the Court happens to be sitting, and you are likely to hear Krio and English radio talk-shows — perhaps even talk-back — discussing the day's events at the Court. The activities of the Court have entered mainstream public discourse in the country. The commentary is not always well-informed, not always perfectly accurate, but that is to be expected: in which democracy are the popular media always well-informed and accurate? As this makes clear, perhaps *the* greatest advance achieved by the move to the “in theater” prosecution of hybrid tribunals is this immediate effect on public discourse within the affected population. The Court is clearly catalyzing a careful reconsideration of the nature and causes of the armed conflict that raged in Sierra Leone over the last decade. For many local commentators, of course, this is exactly the Court's central disadvantage: it reopens old wounds just at the time they are beginning to heal,¹²⁸ leading to serious security concerns.

It is probably too early to assess what impact the trials themselves are having on the security situation in Sierra Leone. The hope of the U.N. Security Council was that “a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace. . . .”¹²⁹ Perhaps it would even “expedite the pro-

128. See CAMPAIGN FOR GOOD GOVERNANCE, *supra* note 106, at 13, Question 38 (explaining that only 7% of respondents to the Campaign for Good Governance opinion poll on attitudes toward the TRC and the Special Court thought that the Special Court will make people relive the past and reopen wounds, making those wounds worse for them, while 56% thought it would provide justice for all).

129. S.C. Res. 1315, *supra* note 6, pmbl., ¶ 7. The Court further asserted the need for “a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace.” *Id.* pmbl., ¶ 9.

cess of bringing justice and reconciliation to Sierra Leone and the region”¹³⁰

Any trend that tends to undermine the credibility of the trials — some of which are discussed below — may, however, have a negative impact on both “peace” and “reconciliation,” since the trials might come to be seen by some portions of the population as an unwanted imposition, to be opposed by force. This was specifically acknowledged by the Secretary-General in July 2004:

Many observers believe that the Special Court trials, which began in June 2004 and are expected to conclude in 2005, may become a source of instability. It is expected that there may be an increased risk that elements hostile to the Court could use violent means to disrupt its work.¹³¹

Johnny Paul Koroma’s escape after a failed coup attempt in January 2003, perhaps motivated by the increasing presence of the Court, suggests these concerns are not theoretical.¹³² The Court has also slapped restrictions on Chief Sam Hinga Norman’s contact with the outside world on two occasions, after security concerns were raised.¹³³ But it is harder to gauge the broader impact of the trials on the general public, and on regional reconciliation.¹³⁴ One of the clearest impacts the Court has had on regional events arose when the Prosecutor announced the indictment of Charles Taylor just as Liberia’s factions were entering peace talks.¹³⁵ Those events have received much comment,

130. *Id.* pmb., ¶ 12. See *Report of the Security Council Mission to Sierra Leone*, U.N. SCOR, 55th Sess., ¶ 39, Mission Report, U.N. Doc. S/2000/992 (2000) [hereinafter *Report of the Security Council*] (reiterating “the importance of the Court for Sierra Leone’s long-term reconciliation”).

131. *Twenty-Second Report*, *supra* note 48, ¶ 6. See INTERNATIONAL CRISIS GROUP, SIERRA LEONE: MANAGING UNCERTAINTY 15-17 (Oct. 24, 2001); see also Peter Penfold, *Will Justice Help Peace in Sierra Leone?*, SUNDAY OBSERVER, Oct. 20, 2002.

132. See PROMISES AND PITFALLS, *supra* note 6, at 5-6.

133. See *Prosecutor v. Norman*, Decision Prohibiting Visits, Case No. SCSL-2004-14, Special Ct. for Sierra Leone (Registrar 2004), available at <http://www.sc-sl.org/CDF-decisions.html>; see also Decision Prohibiting Communications and Visits, *Prosecutor v. Norman*, Case No. SCSL-03-08-PT-128, Special Ct. for Sierra Leone, Registry 2004, available at <http://www.sc-sl.org/CDF-decisions.html>.

134. Press Release, Special Court for Sierra Leone, Registrar Visits Liberia (July 16, 2004), available at <http://www.sc-sl.org> (illustrating how the mandate for regional reconciliation has begun to be operationalized, i.e., through outreach work in Liberia).

135. See PROMISES AND PITFALLS, *supra* note 6, at 7.

both positive and negative.¹³⁶ All the same, there are larger institutional aspects of the establishment and operation of the Court which are having a clear impact on security,¹³⁷ and these we can assess.

First, the presence of the Court helps to keep international attention on Sierra Leone. Trials are media-friendly events. Coverage of the trials — and of the peace process generally — by foreign press and NGOs sustains public opinion and civil society pressures for foreign governments to remain engaged with the peace process. The fact that two of the chief indictees — Koroma and Taylor — remain outside Court custody also indicates that there is a continuing threat to regional peace and security, helping ensure external decision-makers do not “cut and run.”¹³⁸ In this sense, the trials are complementary to the United Nations’ broader goals of establishing peace and security in Sierra Leone and the region.

Second, the Court itself has brought significant revenue and (to a lesser degree) investment into Sierra Leone. That should be positive for development, and, one might therefore assume, security; we might think it positive for the United Nations’ stabilization goals generally. But the reality is complex and far from straight-forward. Like a complex peace operation such as the United Nations’ Mission in Sierra Leone (“UNAMSIL”), which the Court is not formally a part of, but with which it cooperates closely, the Court’s expenditures tend to be directed at services controlled by Sierra Leone’s merchant class — European-style restaurants and leisure complexes, leasing residential accommodation, security, construction, and import of office and other equipment. While the employment by these groups brings significant short-term benefit to those employed — reducing unemployment may also reduce incentives for crime — it is also clear that the benefits of this foreign investment accrue primarily to the owner-managers, reinforcing their dominant economic position within Sierra Leonean society. In Sierra Leone,

136. *Id.* See *supra* note 96 and accompanying text (discussing the arrest warrant against the Liberian President Charles Taylor and the Sierra Leonean Court).

137. See *West Africa Report*, *supra* note 93, ¶ 40 (noting that the Security Council Mission to West Africa in July 2004 “heard from several interlocutors that the work of the Special Court had a bearing on Sierra Leone’s stability”).

138. See *supra* note 116 and accompanying text (discussing Koroma and Taylor’s evasion of the Court).

this problem — often faced in one variety or another by U.N. peace operations — takes on a particular hue, in light of allegations that a few individuals within this middle class have a strong hand in the illicit resource extraction industries (particularly the diamond industry) which lie at the root of Sierra Leone's resource wars.¹³⁹ An even smaller subset of the merchant class is alleged to have strong ties to al Qaeda and perhaps Hizbollah.¹⁴⁰

Even disregarding such disturbing claims on the basis of their difficulty of substantiation, it is clear that a complex, sudden foreign military and reconstruction intervention will stimulate not only formal, but also informal and illicit economic activity in a post-conflict environment. In Sierra Leone, for example, there is no requirement that UNAMSIL or Special Court salaries be processed through the Sierra Leone banking system (perhaps because of fears relating to corruption and financial independence), depriving the government of an obvious source of revenue and liquidity. (Even if salaries were not taxed, their processing through the Sierra Leonean banking system could potentially offer Sierra Leone better borrowing rates on international financial markets.) Special Court salaries and allowances are paid in U.S. dollars cash — and almost without fail, changed by international staff (between 40% and 50% of the Court's staff) through black-market money-changers, not through the banking system. (The black market offers both better rates and greater convenience.) Some expatriate staff also directly and indirectly encourage other illicit transactions, particularly prostitution and diamond-trading. Both will have long term economic and security consequences for the country — for example, the stimulation of prostitution may lead to significant health-care costs and losses in national productivity through increased infection rates

139. See generally IAN SMILLIE ET AL., PARTNERSHIP AFRICA CANADA, THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS AND HUMAN SECURITY (2000); Alahji M. S. Bah, *Exploring the Dynamics of the Sierra Leone Conflict*, 29(1) PEACEKEEPING & INT'L REL. 1 (Jan.-Apr. 2000); THE DIAMONDS AND HUMAN SECURITY PROJECT, DIAMOND INDUSTRY ANNUAL REVIEW, SIERRA LEONE 2005 (Feb. 2005).

140. See *Al-Qaida, African Diamond Link Confirmed*, BLANKA DIAMONDS NEWS, Dec. 29, 2002, available at http://www.blankadiamonds.be/news/02_12_29.html; see also Glenn R. Simpson, *UN Ties Al Qaeda Figure to Diamonds*, WALL ST. J., June 28, 2004. Following U.S. moves to freeze al Qaeda assets following the Nairobi and Dar es Salaam embassy bombings in 1998, al Qaeda apparently moved to sink its funds into diamonds, operating through diamond smuggling networks with connections to Charles Taylor, the RUF, and Hizbollah. Later, Taylor apparently harbored at least two al Qaeda operatives following the September 11, 2001 attacks. See *id.*

of sexually transmitted diseases (especially HIV-AIDS). At the same time, other expatriate staff privately undertake private economic initiatives such as financing local children's upkeep and education.

The point here is *not* that the staff of the Special Court engage in such activity any more or less than other foreigners carrying out other functions as part of the United Nations presence there. There is nothing beyond anecdotal evidence to make any such assessment. Rather, the point is that the Court effectively exists as part of such a complex intervention, and that it is inevitably perceived by the affected population as a central element of that intervention. In assessing the contribution of the Court to security and reconciliation in Sierra Leone, we must take all these complex impacts — better understood in the humanitarian assistance and peacekeeping fields — into account. This requires more than simply stimulating greater dialogue between practitioners and commentators in the international criminal justice and peacekeeping fields to better understand the logistical challenges faced by in-theater prosecutions, and the impacts those prosecutions may have on local communities. It also requires a very careful reflection on how a prosecution in-theater may feed back into the prosecutorial and judicial process, with complex ramifications for peace and security. The issue at stake here is whether by adopting a “hybrid” model we not only encourage positive intermixing of international and domestic elements, but also facilitate the politicization of international criminal trials and undermine broader stabilization objectives. The question is whether hybrid tribunals contribute to the marriage of peace and justice, or instead set them against each other. The Special Court may shed light on answers to this question. Considering the role of “local” lawyers before the Court and examining national politics reveals the complexity of the issues.¹⁴¹ The inclusion of local lawyers in every aspect of the judicial process — including Prosecution, Defense, and on the Bench — is touted as a central advantage of the hybrid model, offering local nuance, knowledge, and legitimacy to the trial process while the international community provides an opportunity for education

141. The relationships detailed in the discussion which follows are only the tip of the iceberg. Desmond Da Silva QC, a Deputy Prosecutor, was, for example, a defense counsel in a 1967 treason trial in which Chief Norman, among others, was tried. Judge Gelaga King also served in the same trial.

and up-skilling of the local legal profession.¹⁴² “Local” lawyers bring the history and politics of local institutions to the Special Court trial process.¹⁴³ Charles Margai, lead Defense Counsel for CDF defendant Allieu Kondewa,¹⁴⁴ is a long-term political rival within the ruling Sierra Leone People’s Party (“SLPP”)¹⁴⁵ of co-defendant Sam Hinga Norman. The third defendant, Moinina Fofana, is represented, *inter alia*, by Arrow Bockarie,¹⁴⁶ a powerful SLPP figure in Bo district, a key SLPP constituency. Norman himself now has, as Assigned Counsel, another key SLPP figure, Dr. Bu-Buakei Jabbi. The key position of SLPP leadership figures in legal advocacy roles in the CDF case is not surprising, given the close ties between the SLPP and the CDF and the historical overlap of legal and political elites in Sierra Leone.¹⁴⁷ Approximately seventy percent of Sierra Leoneans are illiterate.¹⁴⁸ Consequently, an educated, wealthy upper class, which uses the institutions of the State — including the law — to maintain the status quo, easily dominates society. As a result, there has been no clear separation, either in the colonial or post-colonial periods, of the legal and political professional classes.¹⁴⁹

The interplay between this advocacy before the Special Court and national politics is little discussed in the international community, however. Representing these figures before the Special Court means defending them from charges brought by a Court established at the request of President Kabbah, the leader of the Defense Counsel’s own political party. Legal advocacy decisions thus become imbued with political ramifications. The most striking decision occurred when certain SLPP lawyers, along with other Special Court defense counsel, alleged before the Sierra Leone Supreme Court that Kabbah’s establishment of the Special Court violated the Sierra Leone Constitution since it

142. Cf. BRINGING JUSTICE, *supra* note 6, at 36-37.

143. *Id.*

144. See June 3, 2004 Transcript, Prosecutor v. Norman, Case No. SCSL-04-14-T, Special Ct. for Sierra Leone (Trial Chamber I 2004), available at <http://www.sc-sl.org/Transcripts/CDF-060304.pdf> [hereinafter Norman I].

145. President Kabbah currently heads the Sierra Leone People’s Party (“SLPP”).

146. See *Norman I*, June 3, 2004 Transcript, Case No. SCSL-04-14-T.

147. See JOE A.D. ALIE, A NEW HISTORY OF SIERRA LEONE 80-81, 224-55 (1990).

148. CIA, THE WORLD FACTBOOK: SIERRA LEONE, available at <http://www.cia.gov/cia/publications/factbook/geos/sl.html> (last visited Feb. 12, 2005).

149. See ALIE, *supra* note 147. Unsurprisingly, the medical and journalistic professions also played key roles, as did the clergy. See *id.*

purported to alter the structure of judicial power within the country without the necessary recourse to referendum.¹⁵⁰ The “constitutional case” represents more than legal maneuvering — it represents an important phase in the shifting network of personal and political alliances that make up Sierra Leone national politics.¹⁵¹

The *ad hoc* tribunals have already encountered the dangers that arise when local legal representation imports domestic political struggles into the trial process. Hybrid tribunals may risk exacerbating that danger by increasing the presence of local legal professions within the judicial process.¹⁵² Why is it difficult to admit that local lawyers’ connections to weakened, perhaps even corrupted, local political and legal institutions may be a liability for the Court while it is easy to admit that their local knowledge is an asset for the Court? After all, it is the very weakness of those institutions that has led to the need for an international presence to enforce the law of war. The challenge is to understand the full complexity of these interactions and to take them into account in design and resourcing decisions.

The Court’s complex interaction with domestic political processes has also played out in its relationship with the Truth and Reconciliation Commission (“TRC”). The two institutions were established separately.¹⁵³ Initially, many commentators worried that the looming trials at the Special Court would discourage potential witnesses from testifying before the TRC, fearing incrimination.¹⁵⁴ As early as October 2000, commentators

150. Section 108(3) of the Constitution of Sierra Leone requires that amendments to specified sections of the Constitution occur through referendum. The sections covered include those pertaining to the judicial power of the Republic. See SIERRA LEONE CONST. § 108(3).

151. On the SLPP aspects of these cases, see PROMISES AND PITFALLS, *supra* note 6, at 6-7.

152. In its recent report on the Special Court, Human Rights Watch commented that at the end of the conflict, “[c]orruption and political manipulation plagued the judiciary.” BRINGING JUSTICE, *supra* note 6, at 1. If that analysis held true of the broader legal profession, and not just the judiciary, then the risk of that corruption tainting the Special Court’s processes is clear.

153. See FIRST EIGHTEEN MONTHS, *supra* note 47, at 1, 11.

154. See generally HUMAN RIGHTS WATCH, POLICY PAPER ON THE INTERRELATIONSHIP BETWEEN THE SIERRA LEONE SPECIAL COURT AND TRUTH AND RECONCILIATION COMMISSION (2002), available at <http://www.hrw.org/press/2002/04/sierraleoneTRC0418.htm>; see also Briefing Paper, Office of the Attorney General and Ministry of Justice Special Court Task Force, Relationship Between the Special Court and the Truth and Reconciliation Commission (Jan. 7-18, 2002), available at <http://www.specialcourt.org/doc->

noted “the negative impact of the establishment and jurisdiction of the Court on the minds of ex-combatants who could be more reluctant to come forward to disarm for fear of prosecution.”¹⁵⁵ This fear was significantly reduced when David Crane, Prosecutor of the Special Court for Sierra Leone, announced that he would not use such TRC testimony.¹⁵⁶ The Special Court and No Peace Without Justice conducted an extensive outreach campaign to ensure that any remaining risk of deterrence did not materialize. At that point, the relationship appeared positive.

In December 2001 and January 2002, the Office of the U.N. High Commissioner for Human Rights and the Office of Legal Affairs convened a Group of Experts to discuss the relationship between the institutions.¹⁵⁷ It suggested that while the institutions remain independent, they should cooperate to set priorities.¹⁵⁸ That guidance clearly failed to hit home.¹⁵⁹ In October 2003, the Court responded to requests by the Truth and Reconciliation Commission for access to Special Court detainees in order to conduct public hearings with veiled derision (although limited access was ultimately granted, on the Court’s terms).¹⁶⁰

uments/PlanningMission/BriefingPapers/SLGovTRC_SpCt_Relationship.doc; William A. Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 HUM. RTS. Q. 1035 (2003), available at http://muse.jhu.edu/journals/human_rights_quarterly/v025/25.4schabas.html; MARIEKE WIERDA ET AL., INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, EXPLORING THE RELATIONSHIP BETWEEN THE SPECIAL COURT AND THE TRUTH AND RECONCILIATION COMMISSION OF SIERRA LEONE (2002), available at <http://www.ictj.org/downloads/TRCSpecialCourt.pdf> (last visited Feb. 12, 2005); Abdol Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE HUM. RTS. & DEV. L.J. 139 (2003).

155. *Report of the Security Council*, *supra* note 130, ¶ 40.

156. See Press Release, Special Court for Sierra Leone, Office of the Prosecutor, TRC Chairman and Special Court Prosecutor Join Hands to Fight Impunity (Dec. 10, 2002), available at <http://www.sc-sl.org/Press/prosecutor-121002.html>.

157. See *Report of the Planning Mission*, *supra* note 114, ¶ 51.

158. See *id.* ¶¶ 48-56.

159. One Court official has indicated that the lack of Special Court representation in the group made the group reticent to press its recommendations upon the Court without its consent. See E-mail from Allison Cooper & Giorgia Tortora, Special Court Officials, to James Cockayne, ¶ 15 (Sept. 22, 2004) (on file with author).

160. See Decision Prohibiting Communications and Visits, Prosecutor v. Norman, Case No. SCSL-2003-08-PT, Special Ct. for Sierra Leone (Trial Chamber I 2003), available at <http://www.sc-sl.org/CDF-decisions.html>; see also Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone (“TRC” or “The Commission”) and Chief Samuel Hinga Norman JP Against the Decision of His Lordship, Mr. Justice Bankole Thompson Delivered on 29 October 2003 to Deny the TRC’s Request to Hold a Public Hearing with Chief Samuel Hinga Norman JP, Prosecutor v. Norman, Case No.

In his decision on appeal, Judge Robertson even characterized the TRC's proposed hearings as an "uncontrolled environment" which might unleash "unpredictable trouble."¹⁶¹ Further, Judge Robertson described the proposed hearings as a spectacle in which the accused would be

paraded, in the very court where the trial will shortly be held, before a Bishop rather than a presiding judge The event will have . . . the appearance of a sort of trial familiar from centuries past, although the first day of uninterrupted testimony may resemble more a very long party political broadcast.¹⁶²

The litigation demonstrated the lack of coordination and rocky (diplomatically described as "cordial" in the First Annual Report)¹⁶³ relationship between the two institutions — not a recipe for maximizing their mutual benefits.¹⁶⁴ The outcome, however, did ensure that the detainees had limited access to the TRC process (and vice versa) and that the integrity of the judicial process was maintained. When the TRC issued its Final Report in October 2004, however, it was damning of the Special Court:

Sierra Leone, with its two institutions of transitional justice in operation at the same time . . . had the opportunity to offer the world a unique framework in moving from conflict to peace. Sadly, this opportunity was not seized. The two bodies had little contact and when they intersected at the operational level, the relationship was a troubled one. . . . The failure to clearly demarcate the roles and functions of the two bodies, together with the highly uncertain nature of the relationship between them, led to a great deal of confusion in the minds of the public. . . . The Commission finds that many Sierra Leoneans who might have wished to participate in the truth telling process stayed away for fear that their information may be turned over to the Special Court. . . . The Commission's ability to create a forum of exchange between victims and perpetrators was retarded by the presence of the

SCSL-2003-08-PT, Special Ct. for Sierra Leone (President's Decision 2003), *available at* <http://www.sc-sl.org/CDF-decisions.html> [hereinafter TRC Appeal].

161. TRC Appeal, Case No. SCSL-2003-08-PT, ¶ 26.

162. *Id.* ¶ 30.

163. See First Annual Report, *supra* note 40, at 6.

164. See generally Jayne Huckerby, Requests by Truth and Reconciliation Commissions for Public Hearings of Indictees: The Chief Hinga Norman Case and its Implications (Fall 2003) (unpublished manuscript, on file with author).

Special Court. . . . The Commission finds that the “Practice Direction” formulated by the Registry of the Special Court to regulate contact between the Commission and the detainees did not adequately consider the spirit and purpose behind the Commission’s mandate. . . . By removing the decision from the detainees, their rights under the Commission’s Act were effectively proscribed. . . . The decision to deny Chief Hinga Norman and the other detainees their right to appear before the Commission represents an impairment, not only to the detainees but also to the people of Sierra Leone. In practice, the decision of the President of the Special Court:

- a. rejected the right of the detainees to testify in an open and transparent manner before the Commission;
- b. denied the detainees their freedom of expression and their right to appear publicly before the Commission;
- c. denied the right of the Sierra Leonean people to see the detainees participate in the truth and reconciliation process. . . . The Commission holds that the right to the truth is inalienable. This right should be upheld in terms of national and international law. It is the reaching of the wider truth through broad-based participation that permits a [N]ation to examine itself honestly and to take effective measures to prevent a repetition of the past.¹⁶⁵

The Report was particularly damning of the United Nations’ failure to set down more detailed guidelines regarding how the two institutions should interact and how to protect the rights of detainees.¹⁶⁶ It also suggested that by establishing a Special Court that had partially overturned the validity of the amnesty granted by the Lomé Agreement, the United Nations “may have sent an unfortunate message to combatants in future wars that they cannot trust peace agreements that contain amnesty clauses.”¹⁶⁷ As we have seen, this may in the context of ICC prosecutions and the U.N.-ICC Cooperation Agreement have important long-term ramifications for the willingness of belligerents to engage in U.N. peace-making processes. More broadly, the tense relation-

165. Sierra Leone Truth and Reconciliation Commission, Final Report, ¶¶ 558-73 (Oct. 28, 2004).

166. *See id.* ¶¶ 564-65.

167. *Id.* ¶ 562.

ship between the TRC and the Special Court may signal policy-makers to carefully calibrate such institutions to ensure that they provide complementary, rather than competing, processes. The need to ensure that the two institutions present reinforcing, rather than mutually undermining, historical narratives of the conflict at hand, in order to generate one unified (if plural), accurate, and impartial historical record is especially clear.

3. Accurate and Impartial Record

In the previous Section I discussed the major success of the Special Court in stimulating Sierra Leonean public discourse on the nature and causes of the conflict. To assess the success of the Special Court, it is equally important to examine whether the Court is providing an accurate and impartial historical record. Early observations of the trial process suggest that the Court may be falling short on this front, although there may still be time to remedy the situation. Some of the reasons for that shortfall may be peculiar to the Special Court — such as prosecutorial practice — but others may be more structural and, therefore, bear on longer-term considerations.

To date, the major concern in this respect at the Special Court is that the historical narrative presented thus far by the Prosecution — in its opening statements, indictments, pre-trial briefs, and witness examinations — offers an un-nuanced and, some would argue, politically skewed reading of the last decade's events. This concern develops three ways. First, critics suggest that the Prosecution understates the role of ECOMOG, private mercenary groups including Executive Outcomes and Sandline, external assistance from the United Kingdom and United States, and the pivotal controlling role of Ahmad Tejan Kabbah, in its account of the conflict. Second, critics point to the black-and-white rhetoric of Chief Prosecutor David Crane, a former U.S. Judge Advocate, since it seems to over-simplify the complex, shifting dynamics of the conflict. International Crisis Group raised this concern as early as August 2003, pointing to the Indictments and public comments by Crane that seemed to over-simplify the conflict into one motivated by, in his own words, "pure greed," the desire "to control a commodity . . . diamonds."¹⁶⁸ In Crane's own assessment, he had "never seen a

168. Interview by Fred de Sam Lazaro with David Crane, Prosecutor of the Special

more black and white situation in my life, of good versus evil."¹⁶⁹ As International Crisis Group rightly assessed, this over-simplification of the root causes of the conflict — ignoring factors such as corruption, the mismanagement of State institutions, military non-accountability, an alienated youth, under-development, and poverty — risks undermining the credibility of the proceedings in the eyes of many Sierra Leoneans.¹⁷⁰ Despite this criticism, Crane's rhetoric has remained rigid and Manichean.¹⁷¹ In his opening statement at the CDF trial, he spoke of a

path . . . strewn with the bones of the dead, the mourns of the mutilated, the cries of agony of the tortured echoing down into the valley of death below. . . . The jackals of death, destruction and inhumanity are caged behind bars of hope and reconciliation. . . . [T]hat beast of impunity . . . howls in frustration and shrinks from the bright and shiny spectre of the law.¹⁷²

The next month, opening the Prosecution's case in the RUF trial, Crane described "a tale of horror, beyond the gothic into the realm of Dante's inferno. They came across the border, dark shadows, on a warm spring day, 23 March of 1991. . . . These dogs of war, these hounds from hell"¹⁷³ This time, Crane met with repeated objections from Defense counsel who argued that his rhetoric went beyond a summary of the alleged facts into a non-probative, prejudicial opinion. Their objections were sustained on many occasions, casting a pall over the opening of the Prosecution's case.

Third, critics also suggest the Prosecution has strongly overstated the connections between the combatants and particular foreign groups, especially Libya and al Qaeda. As the International Crisis Group noted in August 2003, the inclusion in the indictments of a reference to Colonel Mu'ammar Gadhafi as a

Court for Sierra Leone, Religion & Ethics News Weekly (Jan. 10, 2003), available at <http://www.pbs.org/wnet/religionandethics/week619/cover.html>.

169. PROMISES AND PITFALLS, *supra* note 6, at 14 (quoting David Crane at a press conference in Freetown on March 18, 2003).

170. *See id.*

171. *See, e.g., Norman I*, Case No. SCSL-04-14-T, Special Ct. for Sierre Leone, at 6 (Trial Chamber I 2004); July 5, 2004 Transcript, Prosecutor v. Sesay, Case No. SCSL-04-15-T, Special Ct. of Sierre Leone at 19 (Trial Chamber I 2004), available at <http://www.sc-sl.org/Transcripts/RUF-070504a.pdf>.

172. *Norman I*, Case No. SCSL-04-14-T, at 6.

173. *Id.* at 19.

force behind the RUF, “although factually correct, is disturbing because it is highly selective in a manner that adds to popular perceptions of a hidden agenda.”¹⁷⁴ Leaks from the Office of the Prosecutor to the *Wall Street Journal* disclosing evidence that the Office had collected of al Qaeda activities in the region¹⁷⁵ gave the impression that the Office is, at worst, providing a staging-base for U.S. intelligence operations in the region, and at best being used to promote American foreign policy in the region.¹⁷⁶ Whether either impression is or is not justified is not the central point here: the fact is that the leak was bound to undermine the Court’s legitimacy in the eyes of the local population.¹⁷⁷

None of these factors assist in persuading the Sierra Leonean population that the Special Court is there to create an impartial record for them. Still, there may be sufficient time left to correct that trend. The defense interventions at the commencement of the RUF trial served to remind us that that the responsibility for accurate historical reporting is shared by all the organs of the Court — defense included.¹⁷⁸ The Bench must carry the burden of the responsibility for the creation of a final, impartial historical record in the final judgment, but events have already served to emphasize that a particular responsibility accrues to the Prosecution from the fact that they are given the

174. PROMISES AND PITFALLS, *supra* note 6, at 16. The notable omission is any reference to the financing and material assistance provided to the RUF and Charles Taylor by Blaise Campaoré of Burkina Faso. *See id.*

175. *See* Simpson, *supra* note 140 (detailing a “dossier” held by the Office of the Prosecutor indicating that Aafia Siddiqui, “al Qaeda’s only female leader,” travelled to Monrovia in June 2001 for diamond-smuggling purposes, and quotes Crane, on the record, as saying that “al Qaeda is in West Africa and has been for years”).

176. *See* PROMISES AND PITFALLS, *supra* note 6, at 14-15 (discussing how Prosecutor Crane’s presence has affected the critic’s view of the Special Court). The U.S. Department of State however, was apparently as surprised as everyone else when the indictment of Charles Taylor was announced, belying claims that Crane is an agent of U.S. foreign policy. *See id.* at 15 (mentioning the tension arising between Crane and the U.S. Department of State following Taylor’s indictment). The leaks contradicted Crane’s earlier assurances to International Crisis Group that his office “is not looking at al-Qaeda.” *Id.* at 17.

177. *See id.* (stating that the suspicions of U.S. involvement, while implausible, are nevertheless prevalent among Sierra Leoneans).

178. *See, e.g.*, Decision on the Defence Preliminary Motion on Defects in the Form of the Indictment, Prosecutor v. Sesay, Case No. SCSL-03-05, Special Ct. of Sierra Leone (Trial Chamber I 2003), available at <http://www.sc-sl.org/Documents/SCSL-03-05-PT-074.pdf>.

first opportunity to present their case.¹⁷⁹ This initial presentation can create a lasting impression which may significantly influence public perception of the tribunal, cooperation with it, and perhaps even the political and security dynamics within a fragile post-conflict environment. Second, the difficulty for the Bench in producing an authoritative record is increased by the presence of a competing historical narrative, such as that recently provided by the TRC.¹⁸⁰ How the Court will choose to deal with that narrative, built from a deep and extensive engagement with victims, in particular, remains to be seen.¹⁸¹

4. Respect for Victims' Rights

The protections afforded victims and witnesses by international criminal tribunals are growing increasingly sophisticated.¹⁸² The Special Court, despite its small size and budget, is proving to be no exception to that developmental trajectory, presenting important advances in the treatment of child witnesses and witness protection in the theatre of the alleged crimes.¹⁸³ There have been occasional lapses — including the occasion on which the Presiding Judge in the CDF trial asked a protected witness the name of his brother, which would, if answered, have revealed the witness' identity.¹⁸⁴ Overall, however,

179. SPECIAL CT. FOR SIERRA LEONE R. PROC. & EVID. R.85(A)(i).

180. See *Report of the Planning Mission*, *supra* note 114, at 10-11 (describing the relationship between the Special Court and the TRC).

181. See HUMAN RIGHTS WATCH, POLICY PAPER ON THE INTERRELATIONSHIP BETWEEN THE SIERRA LEONE SPECIAL COURT AND TRUTH AND RECONCILIATION COMMISSION (2002) available at <http://www.hrw.org/press/2002/04/sierraleoneTRC0418.htm> (last visited Feb. 14, 2005) (describing the depth and emotionally charged nature of witness testimony to the TRC).

182. See generally BRINGING JUSTICE, *supra* note 6, at 29-31.

183. See generally *id.*

184. The witness in question had been granted protected status by the Trial Chamber, meaning that he was to remain anonymous to the public, though not to the parties. The session was open to the public, with the witness shielded from public view. At the end of questions by the parties, the following exchange occurred:

Mr President: I have one question for that witness. He said his brother was killed, what is the name of that brother?

Mr Caruso [for the Prosecution]: Your Honour, may I just make one comment? That name will, of course, identify this witness.

Mr President: Is that so?

Mr Caruso: I believe so.

Mr President: Alright.

June 15, 2004 Transcript, Prosecutor v. Norman, Case No. SCSL-04-14-T, Special Ct. of Sierra Leone at 65-66 (Trial Chamber I 2004), available at <http://www.sc-sl.org/Tran->

this is one area that the Special Court is perceived by the stakeholder group in question to have performed relatively well.¹⁸⁵

Perhaps too well. There is a very real concern that respect for victim witnesses has been taken so far at the Special Court that it is harming the rights of another stakeholder group — the defendants.¹⁸⁶ That perception arises from the recently revealed practice of the Office of the Prosecutor of reimbursing Prosecution witnesses for the expenses they incur while dealing with Prosecutors and testifying before the Court.¹⁸⁷ This is highly controversial, because it creates the impression that the witnesses are being paid for their testimony, undermining the reliability of that testimony — and more broadly, that the United Nations is aligning itself with one particular interest or political group within the country.¹⁸⁸ The sums involved are in comparison to average earnings in Sierra Leone, which sits at the bottom of the United Nations Development Programme's ("UNDP") Human Development Index, significant.¹⁸⁹ It is precisely to avoid this apparent exchange of "cash for convictions" (as one Defense counsel described it) that the Victims and Witnesses Unit (or its equivalent), housed within the Registry, has traditionally handled these payments.¹⁹⁰ The OTP has arguably transgressed the Special Court's rules;¹⁹¹ the remedy for this

scripts/CDF-060304.pdf. Human Rights Watch also details an incident in which an AFRC insider witness was "nearly beaten to death," apparently after he "ignored admonishments to stay inside his safe house by Protection Unit staff." BRINGING JUSTICE, *supra* note 6, at 31.

185. See *supra* note 6 and accompanying text.

186. See Author's Interviews, Freetown (June-Aug. 2004).

187. See MICHELLE STAGGS & SARA KENDALL, WAR CRIMES STUDY CENTER, SPECIAL COURT MONITORING PROGRAM UPDATE #3 (Sept. 17, 2004), available at <http://socrates.berkeley.edu/~warcrime/weeklyupdate.htm> (noting the practice of the Office of the Prosecutor offering compensation for testimony) [hereinafter PROGRAM UPDATE #3].

188. See *id.* (detailing the Defense's questioning of the practice of compensation).

189. Compare MICHELLE STAGGS & SARA KENDALL, WAR CRIMES STUDIES CENTER, SPECIAL COURT MONITORING UPDATE #6 (Oct. 8, 2004) available at <http://socrates.berkeley.edu/~warcrimes/weeklyupdate.htm>, with UNDP Human Development Index (2001), available at http://www.undp.org/hdr2003/indicator/pdf/hdr03_table_2.pdf (last visited Feb. 14, 2005) (noting that one witness made over U.S.\$90,000, which is staggering considering that Sierra Leone is ranked last among 175 Nations for human development, a ranking that factors in GDP per capita) [hereinafter PROGRAM UPDATE #6].

190. See Author's Interviews, Freetown (June-Aug. 2004). Similar practices have, apparently — and controversially — occurred at the International Criminal Tribunal for Rwanda. See *id.*

191. SPECIAL CT. FOR SIERRA LEONE R. PROC. & EVID. R.34. This rule provides that the Witnesses and Victims Section provided for by the Special Court's Statute shall sup-

transgression is not yet clear, but will almost certainly provide the basis for strong Defense attacks on witness credibility in cross-examination, and perhaps for appeals of convictions based on this evidence.¹⁹² More uncertain is the broader relationship between the Court and non-witness victims. Exactly what legacy it will leave them seems unclear.

5. Legacy Creation

One of the benefits which advocates of the hybrid tribunal model claimed would flow from the adoption of that model was a strong “legacy” in the Nation in which they operate, including improved infrastructure, respect for the rule of law and trust in public institutions, and improved professional standards.¹⁹³ Establishing the Court, the U.N. Security Council referred specifically to “the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone”¹⁹⁴

At the same time, whether legacy creation is a “core task” of the Special Court has remained disputed.¹⁹⁵ It remains unclear — even at this advanced stage of the Court’s operation — how the Court is expected to prioritize “legacy” creation in relation to its other tasks, or, in other words, how to reconcile its justice mandate with its peace and reconciliation mandate.¹⁹⁶

port witnesses. The established practice at both the Special Court and the *ad hoc* tribunals has been for that section, which falls within the Registry, to reimburse witnesses for their expenses. See Statute of the Special Court for Sierra Leone, Enclosure, art. 16(4) at 26-27, U.N. Doc. S/2000/915 (2000), *as amended* Jan. 16, 2002; ICTR R. PROC. & EVID. R.34(a); ICTY R. PROC. & EVID. R.34(a). Payments directly from the parties have not been standard practice, precisely because they taint the reliability of evidence. See Practice Direction on Allowances for Witnesses and Expert Witnesses, Case No. SCSL-04-14-T-150, Special Ct. for Sierra Leone (July 16, 2004) (on file with author) (noting that Article 2(B) states: “[T]he Witnesses and Victims Section shall ensure the payment of all allowances”). The *Practice Direction* provides a model of transparency for payments to witnesses, but unfortunately came after the controversy over Prosecution payments had arisen. It is anticipated that further litigation on this point will occur at the Special Court. See Author’s Interviews, Freetown (June-Aug. 2004).

192. See PROGRAM UPDATE #6, *supra* note 189. It should also be noted that the *Practice Direction* permits the same payments to be made to Defence witnesses. See Practice Direction on Allowances for Witnesses and Expert Witnesses, Case No. SCSL-04-14-T-150 Special Ct for Sierra Leone (Jul. 16, 2004). None have yet been requested or made. See Author’s Interviews, Freetown (June-Aug. 2004).

193. See BRINGING JUSTICE, *supra* note 6, at 36-38 (highlighting the hopes for the Special Court’s legacy).

194. S.C. Res. 1315, *supra* note 6, at pmbi., ¶ 11.

195. See Author’s Interviews, Freetown (June-Aug. 2004).

196. Compare Statute of the Special Court for Sierra Leone, *supra* note 191, at 21-

That balancing act is made even more difficult by the realization of the complexities involved in legacy creation. Even those remnants of the Court which would seem obviously to provide a positive legacy to Sierra Leone may bring hidden costs. One of the most commonly cited “legacies” of the Court is the brand new 11.5-acre Court compound,¹⁹⁷ even if it remains unclear how the compound will be used when the Court leaves.¹⁹⁸ The hidden costs of the compound include its maintenance and security. This matches the pattern, described in an earlier section,¹⁹⁹ of a complex economic and security legacy produced by the Court that goes unnoticed by a spectator international community.

Another widely cited legacy of the Court is rule of law reform.²⁰⁰ However as a recent report by the UNDP and the International Center for Transitional Justice (“ICTJ”) entitled *The “Legacy” of the Special Court for Sierra Leone*²⁰¹ pointed out, a positive legacy is not a self-fulfilling prophecy, but must be carefully designed and produced. That Report advocated the following three key legacy projects, all of which might have positive impacts for rule of law concerns: substantive reform of Sierra Leonean law; a strategic professional development program; and raising awareness of the Court as a rule of law exemplar.²⁰² The expected results of these interlocking projects were named as the following: updated and improved laws; availability of skills

29, with BRINGING JUSTICE, *supra* note 6, at 33-35 (exemplifying the dichotomy between trying those most responsible and providing outreach services to Sierra Leoneans).

197. See, e.g., *Secretary-General’s Report*, *supra* note 6, ¶ 61; *West Africa Report*, *supra* note 93, ¶ 37; *Rule of Law*, *supra* note 4, ¶ 44; PROMISES AND PITFALLS, *supra* note 6, at 19; First Annual Report, *supra* note 40, at 28. But see INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, DRAFT FOR DISCUSSION: THE “LEGACY” OF THE SPECIAL COURT FOR SIERRA LEONE 5, 12 (Sept. 29, 2003), available at <http://www.ictj.org/downloads/LegacyReport.pdf> [hereinafter DRAFT LEGACY REPORT].

198. One interesting proposal is for the compound to become a regional training centre on human rights and humanitarian law, aiming to bring together foreign experts, local academics and regional human rights lawyers, the NGO community, and military and government personnel, into a research and training facility. An earlier suggestion, that the compound operate as a regional outpost for the ICC, appears to have been scotched by an ICC policy decision to hold all trials for the foreseeable future in The Hague. See Author’s Interviews, Freetown (June-Aug. 2004).

199. See *supra* note 40 and accompanying text.

200. See BRINGING JUSTICE, *supra* note 6, at 32; see also First Annual Report, *supra* note 40, at 3, 28 (emphasizing rule of law reform as the Court’s legacy).

201. DRAFT LEGACY REPORT, *supra* note 197.

202. See *id.* at 1-2, 13-18 (outlining the goals for a legacy of the Special Court).

training and development opportunities for judges, lawyers, investigators, court administrators and prison guards; and an increased public awareness and dialogue about criminal processes and the role they fulfill in post-conflict societies.²⁰³ Unfortunately, few formal steps appear to have been taken to realize any of these projects.²⁰⁴

Much of the rhetorical support for “legacy” creation, both within the Court and from external commentators, appears either not to appreciate the complexity of the notion, or not to translate into a willingness to provide nuanced plans of action for realization of the notion.²⁰⁵ That is despite the increased expectations of an affected population much more “present” in the workings of the Court than those of the *ad hoc* tribunals.²⁰⁶ The interactions between the Court and its staff, on the one hand, and the affected population, on the other hand are often overwhelmingly positive,²⁰⁷ however it is also undeniable that there is a distinct sense of separation, of isolation of the Court and its staff from the realities of day-to-day life in the country. It takes on concrete form in the high walls around the Court compound and the Nigerian troops wielding aging machine-guns; the Court staff whisked through the teeming rain in air-conditioned white, four wheel drives while the local population walks by; the islands

203. See *id.* at 2. Human Rights Watch has pointed out the importance of Special Court engagement with domestic prosecutions to broaden the impact of accountability in Sierra Leone. See BRINGING JUSTICE, *supra* note 6, at 37-38.

204. The Special Court in fact declined to publicly support the report, indicating that the steps envisaged were ones it had already undertaken or that fell outside its mandate. See Author's correspondence with Special Court Official (Sept. 2004) (on file with author). One exception where further steps have been taken is perhaps the “rule of law awareness” component, which has received significant attention through the Court's Outreach program. See DRAFT LEGACY REPORT, *supra* note 197, at 17. While no systematic law reform processes have been initiated through the Court, to this author's knowledge, there have been occasional forays into this territory, for example the half-day workshop on death penalty reform held on August 4, 2004, organized largely out of the Defence Office. See Author's Interviews, Freetown (June-Aug. 2004). Human Rights Watch also refers to plans and steps being taken to train local police to create a domestic witness protection unit to provide ongoing protection to Special Court witnesses, itself a form of capacity-building. See BRINGING JUSTICE, *supra* note 6, at 31, 36. The First Annual Report also highlights plans to create internships for Sierra Leone university graduates. See First Annual Report, *supra* note 40, at 28.

205. See BRINGING JUSTICE, *supra* note 6, at 6-10.

206. ICTJ and UNDP characterise this as a lack of ownership of the Court process by the local population and a lack of access. See DRAFT LEGACY REPORT, *supra* note 197, at 12.

207. See Author's Interviews, Freetown (June-Aug. 2004).

of light in ex-pat compounds surrounded by a sea of darkness when the power to the city cuts out.²⁰⁸ All of these measures are necessary to attract and protect the staff needed to make the Court real, but they bring social and psychosocial costs, not assisted by the judicial decisions of the Court — however legally correct and practically advisable in the long-term — asserting its primacy over local courts and its separation from the Sierra Leonean legal system,²⁰⁹ and its characterization of local institutions such as the Truth and Reconciliation Commission in disparaging terms.²¹⁰

All of these issues are ones which the humanitarian and peacekeeping community has long confronted — but they take on a particular cast in the context of criminal justice, especially when one begins to discuss notions of “legacy”. The architects of future tribunals must realize that a sense of separation from the affected population is inevitable for foreign interventions generally, perhaps even more so for Courts, with their distinctly legal culture and space, and that steps must be taken simply to connect with that stakeholder group, let alone to leave it with a positive legacy, rather than a legacy of bitterness and resentment. It goes without question that the significant, professional Outreach program²¹¹ and the increasingly effective Public Affairs program²¹² run by the Court have done a very great deal to achieve the sense of connection that is needed for the Court’s purpose; but the kinds of measures the ICTJ and UNDP outlined²¹³ are also needed, if that is to translate into a broader social transformation agenda.

Perhaps the broader point, though, is that courts are not well designed to carry out such agendas.²¹⁴ That is the task of

208. See Author’s Observations While in Freetown (June-Aug. 2004).

209. See Decision on Constitutionality and Lack of Jurisdiction, Prosecutor v. Kallon, Case No. SCSL-2004-14-PT-035, Special Ct. for Sierra Leone (Appeals Chamber) (2004), ¶¶ 49, 52, available at <http://www.sc-sl.org/Documents/SCSL-2004-14-PT-035-II.pdf> (stating that “the Special Court is *not* part of the Judiciary of Sierra Leone,” and that, “the Special Court for Sierra Leone is established *outside* the national court system”).

210. Author’s Interviews, Freetown (June-Aug. 2004).

211. See generally BRINGING JUSTICE, *supra* note 6, at 33-35, (detailing recent cuts to Outreach funding).

212. See *id.* at 35.

213. See *supra* note 201 and accompanying text.

214. See DRAFT LEGACY REPORT, *supra* 197, at 1 (identifying the impossibility of the mere presence of the Special Court to achieve such legacy goals).

other elements of a complex peace operation like UNAMSIL.²¹⁵ We should not expect criminal tribunals to solve such complex problems, and given the review undertaken in this section, we should not, perhaps, be surprised if they tend to exacerbate some of these problems. Hybrid tribunals face all sorts of challenges, as a result of operating in a theater recently emerged from war, which the *ad hoc* tribunals have not faced. In some ways, then, we should expect them to be able to achieve less, dollar for dollar, than we expect *ad hoc* tribunals to achieve. Yet the reality is that we expect them to achieve more, with less. That is not sustainable. Either we give them more — more money, more security, more time, more support — or we lower our expectations. Doing neither is only a recipe for disappointment — not only the disappointment of the international community but also, and perhaps more importantly, of affected populations.

E. *The Defendants' Perspective*

There is one last stakeholder group to whom the Special Court owes responsibilities: the defendants. The defendants' perspective on an international criminal tribunal is an important one, not least because it may help us to appreciate whether a tribunal is producing justice, or simply convictions. Beyond overall concerns about the legitimacy and legality of the process as a whole, the defendants' interests relate specifically to detention and fair trial standards.²¹⁶

1. Detention

The detention conditions of the detainees in Freetown are respectable. By all accounts, they are a vast improvement on the conditions in which the detainees were held on Bonthe Island, when they were first arrested.²¹⁷ The length of pre-trial deten-

215. See *United Nations Mission in Sierra Leone ("UNAMSIL"), Mandate*, at <http://www.un.org/Depts/dpko/missions/unamsil/mandate.html> (last visited Feb. 14, 2005) (denoting UNAMSIL's mandate as it is described and revised in various Security Council resolutions).

216. See Author's Interviews, Freetown (June-Aug. 2004).

217. The detainees were originally held in a renovated prison on Bonthe Island because of security concerns around detention in Freetown. See FIRST EIGHTEEN MONTHS, *supra* note 47, at 3 (noting the nature of the detention facility at Bonthe Island).

tion is, similarly, a marked improvement on the *ad hoc* tribunals: the majority of Special Court defendants have been brought to trial within eighteen months of their arrest.²¹⁸ There are some areas in which detention conditions might be improved to bring them better in line with the *U.N. Standard Minimum Rules on the Treatment of Prisoners*, for example by ending the practice of “slopping out,”²¹⁹ and perhaps also by improving the training of staff involved in visitor searches.²²⁰ Overall, though, the Court has achieved respectable detention standards in a remarkably short time.

2. Fair and Expeditious Trial

The final baseline against which the Court’s performance must be measured is that of fair and expeditious trial. If trials are perceived to be unfair, including as a result of tardiness, the entire process will be tainted, and seen as a failure — not only by the defendants, but perhaps even more generally.

I have already touched on the speediness with which much of the Court’s work has been achieved, including the impressive

218. *See id.* at 8-11 (comparing and praising the Special Court to its *ad hoc* predecessors).

219. “Slopping out” involves providing prisoners not with integral toilet facilities overnight, but only buckets or bedpans which they then, personally, clean or “slop out” into a communal facility the next morning. *See* Author’s Interviews, Freetown (June-Aug. 2004). The European Committee for the Prevention of Torture (“CPT”) considers “slopping out” to constitute degrading treatment violating international law. *See* ANTONIO CASSESE, *INHUMAN STATES: IMPRISONMENT, DETENTION AND TORTURE IN EUROPE TODAY* 49-50 (1996); *see also* Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 September to 5 October 1993, CPT/Inf (95)14 (Strasbourg/Dublin Dec. 13, 1995); Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 29 July 1990 to 10 August 1990, CPT/Inf.(91) 15, ¶ 229 (Nov. 26, 1991). The practice was also declared a violation of human rights recently in Scotland. *See* Robert Napier (AP) v. The Scottish Ministers, Case P739/01, 2004 S.L.T. SSS (Sess., Scot.) (Lord Bonomy, J.); *see also* The Greek Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. 468, 484 (Eur. Comm’n on H.R.).

220. Controversy erupted at the Court in July 2004 over allegations that detainees’ family members had been improperly subjected to intrusive body searches by Detention Facility staff. The allegations were not substantiated, but defence counsel also raised objections about procedural unfairness in the inquiry conducted into the allegations. The matter was given prominent coverage by the local press. *See* July 23, 2004 Transcript, Prosecutor v. Sesay, Case No. SCSL-04-15-T, Special Ct. for Sierra Leone, at 21 (Trial Chamber I 2004), available at <http://www.sc-sl.org/Transcripts/RUF-072304.pdf>.

time in which many defendants have been brought to trial, despite the complexity of war crimes investigations in a country in which armed conflict has only recently ceased.²²¹ Those achievements stand as testament to the skill and professionalism of the Court's management and, particularly, Prosecution investigators. That sense of urgency has, unfortunately, been lost at the trial stage.²²² In some respects this slowdown is in the interests of the defendants, since the costs of the rapid speed with which the Court was previously moving are likely to fall squarely on the defendants.²²³ On the other hand, the slowdown has produced serious questions, touched on above, about the financial future of the Court. As I noted earlier in the paper, this may very well raise concerns — sure to be litigated by the defendants at an appropriate juncture — about the arbitrariness of detention by an institution which cannot guarantee its own ability to complete the very “judicial” process it subjects defendants to.

The fairness of trials before the Court is further imperiled by two crucial factors: judicial impropriety, and inequality of arms. Both of these points are crucial to the future success or failure of the Court, and more broadly to the enterprise of international criminal justice, so I turn to each of them now in some detail.

a. Judicial Professionalism

The cornerstone of the system of international criminal justice is judicial independence and professionalism.²²⁴ Without independence, the system would lose legitimacy and fail. But equally, without judges who will wield that independence wisely and professionally, the system will fail.²²⁵ If judicial independence is the cornerstone, perceived judicial professionalism and propriety is the cement. At the Special Court, hard questions must be asked about the cracks emerging in that cement.

The problem is not the slow pace of trials in the Trial Chamber — that can be rectified. Even inappropriate questioning like

221. See *supra* pt. IIA.

222. See BRINGING JUSTICE, *supra* note 6, at 13 (discussing the judges' long response time for motions).

223. See *id.* at 21-26 (discussing limited financing for the defense).

224. See *id.* at 11.

225. See *id.*

that mentioned above and detailed elsewhere²²⁶ can be improved with a little judicial education. Some respected commentators have called the current quality of judicial reasoning coming out of the Special Court into question; for example, in a forthcoming piece in the *Journal of International Criminal Justice*, Judge Antonio Cassese severely criticizes the Court's reasoning in the *Lomé Amnesty Decision*.²²⁷ But the quality of judicial reasoning is always contestable. The judges have in fact dispensed in a remarkably short time with a complex array of pre-trial motions, helping to reduce overall trial lengths.²²⁸

What is disturbing is the questionable judgment exercised when judges' professionalism has been called into question by the adversarial parties. I have provided a more detailed account of some of these issues elsewhere,²²⁹ but it is worth highlighting two particular episodes.

First, we should note the Judge Robertson's questionable decision to accept a position on the Court's bench after earlier making statements which appeared to prejudge the guilt of the RUF and Charles Taylor in his 2002 book, *Crimes Against Humanity*.²³⁰ Robertson accused the RUF of "committing such crimes" as torture, pillage, rape, looting, amputation and mutilation, and terrorization of the civilian population, and gave graphic descriptions of those crimes.²³¹ He described Foday Sankoh as

226. For details of the inappropriate questioning which occurred at the initial appearances, see PROMISES AND PITFALLS, *supra* note 6, at 11. Human Rights Watch has also drawn attention to references by trial judges to the "degree of intelligence of a witness," literacy, and to one incident where the judges required a witness with amputated arms to raise them in Court to allow the fact of amputation to be recorded. See BRINGING JUSTICE, *supra* note 6, at 16-17. The same passage also points out that "judges have demonstrated sensitivity in other instances to witnesses, particularly with rape victims . . ." *Id.*

227. Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Prosecutor v. Kallon & Kamara, Joined Cases SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Special Ct. for Sierra Leone (Appeals Chamber 2003), available at <http://www.sc-sl.org/Documents/SCSL-04-15-PT-060-I.pdf> [hereinafter *Lomé Amnesty Decision*]; see also Antonio Cassese, *The Special Court and International Law: The Decision Concerning the Lomé Amnesty Agreement*, 2(4) J. INT'L CRIM. JUST. (2004); cf. Daniel Macaluso, *Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lomé Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone*, 27 BROOK. J. INT'L L. 347 (2001).

228. See PROMISES AND PITFALLS, *supra* note 6, at 11-12.

229. See James Cockayne, *Special Court for Sierra Leone: Decisions on the Recusal of Judges Robertson and Winter*, 2(4) J. INT'L CRIM. JUST. 1154 (2004).

230. GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* (2002).

231. See Decision on Defence Motion Seeking the Disqualification of Justice Rob-

“the [N]ation’s butcher”²³² and a “psychopath given to mutilating civilians,” Charles Taylor as the RUF’s “sponsor,”²³³ and the RUF as “guilty of atrocities on a scale that amounts to a crime against humanity [which] must never again be forgiven.”²³⁴ This conflict eventually led to his removal from all RUF cases,²³⁵ and perhaps even from the Presidency of the Court.²³⁶ (Arguably, it may also provide the basis for his removal from the remaining cases.)

Second, Judge Winter handled a motion for her recusal in an even more controversial fashion.²³⁷ Shortly after the Robertson removal events, counsel for Sam Hinga Norman filed a motion seeking Judge Winter’s recusal from hearing a motion concerning the inclusion in the indictment against him of charges relating to enlisting child soldiers, because of alleged links between Winter and UNICEF (an *amicus curiae* in the proceeding) on this specific issue.²³⁸ Winter, who had taken over from Robertson as Acting President of the Court, responded to the motion in a manner apparently so problematic that the Court later made her response, already released to the public, confidential. The Court’s public records indicate that Robertson responded and that, mysteriously, the Prosecution and some members of the Defense quickly signed some kind of agreement (again, confidential) relating to the matter. Equally mysteriously, the Winter-Robertson exchange was excluded from discussion in the ju-

ertson from the Appeals Chamber, *Prosecutor v. Sesay*, Case No. SCSL-2004-AR15-15, Special Ct. for Sierra Leone, at 3 (Appeals Chamber 2003), available at <http://www.sc-sl.org/SCSL-04-15-PT-058.pdf>.

232. *Id.* at 2.

233. *Id.* at 3.

234. *Id.*

235. See Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, *Prosecutor v. Sesay*, Case No. SCSL-2004-AR15-15, Special Ct. for Sierra Leone (Appeals Chamber 2003), available at <http://www.sc-sl.org/SCSL-04-15-PT-058.pdf>; see also Press Release, Plenary Meeting of the Special Court, Special Court for Sierra Leone, Justice Geoffrey Robertson Disqualified from the Appeals Chamber in RUF Cases (Mar. 13, 2004), available at <http://www.sc-sl.org/Press/press-release-031304.html>.

236. Press Release, Special Court for Sierra Leone Press and Public Affairs Office, Justice Renate Winter to Act as President of the Special Court (Mar. 16, 2004), available at <http://www.sc-sl.org/Press/pressrelease-031604.html>.

237. Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, *Prosecutor v. Norman*, Case No. SCSL-2004-14-PT, Special Ct. for Sierra Leone (Appeals Chamber 2004).

238. See *id.*

dicial decision which followed (which determined not to remove Judge Winter from the proceeding).²³⁹ Chief Norman sacked two of his lawyers soon afterwards.

Dysfunction within the Appeals Chamber has also spilled over into antagonistic passages in judicial decisions. For example, commenting on a separate opinion of Judge Robertson in the *Child Soldiers* decision, Judge Gelaga King wrote:

Finally, I will end up by referring to a passage in Justice Robertson's decision. He states, *inter alia*:

the baggage train, as Shakespeare's Henry V reminds us, is not always a place of safety for children, and the Little Drummer Boy may be as much at risk as the 'powder monkey' on the Les Miserables barricades.

With all due respect to my learned colleague, it is this type of egregious journalese the relevance of which I cannot fathom that has made it impossible for me to appreciate his reasoning.²⁴⁰

It is not uncommon for sibling judges to criticize each other's reasoning; it is the combative tone — arguably excessive and needless — of this particular attack which marks it out.

All of these episodes raise concerns about professional judgment in the Appeals Chamber, giving ammunition to those who would cast doubt on the quality of their broader judgment, the wisdom of those selecting such judges, and on the safety of judicial independence and propriety in the Court generally.²⁴¹ Unfortunate incidents elsewhere — such as the decision by Judge Vaz, then Vice-President of the ICTR, to allow an attorney from her home country of Senegal to stay in her house while appear-

239. *Id.* A later attempt by counsel for Sesay to force the public release of these documents was rejected. See Decision on Confidential Motion Seeking Disclosure of Documentation Relating to the Motion on the Recruitment of Child Soldiers, Prosecutor v. Sesay, Case No. SCSL-04-15-PT-219, Special Ct. for Sierra Leone (Appeals Chamber 2004).

240. Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Separate Opinion of Justice Gelaga King, Prosecutor v. Norman, Case No. SCSL-04-14-AR72(E), Special Ct. of Sierra Leone, ¶ 7 (Appeals Chamber, 2004), available at [http://sc-sl.org/SCSL-04-14-AR72\(E\)-131-7398.pdf](http://sc-sl.org/SCSL-04-14-AR72(E)-131-7398.pdf) (citing Paragraph 8 of Justice Robertson's Dissenting Opinion).

241. See BRINGING JUSTICE, *supra* note 6, at 14-16 (discussing the Appeals Chamber); *id.* at 16 (specifically discussing the availability of the Appeals Chamber); *id.* at 45 (recommending that Chambers resolve motions timely, treat witnesses consistently and with respect, and participate in ongoing sessions on criminal procedure, substantive law, courtroom management, and treatment of witnesses).

ing in a case on which Vaz was sitting²⁴² — allow critics to suggest that the failure of judicial propriety may be systemic. There are few remedies one can suggest for this kind of failure, if it is in fact systemic — except that States and the United Nations should select international judges with extreme care. It does, however, send a warning signal about the vulnerability of the system of law of war enforcement upon which the United Nations and the international community is hanging so many expectations. The international community must take the institutional concerns seriously, investing the resources and energy needed to educate and prepare judges for the solemn responsibilities they are being given.²⁴³ Judicial selection procedures need to be refined, to improve the quality of judicial practice.²⁴⁴ Civil society also has an important role to play here, for example in monitoring and recording judicial practice, and informing States of the records of judicial candidates.

b. Inequalities of Arms

The defense of accused war criminals is a complex and challenging task, made more challenging within the Special Court by the particular dynamics of the hybrid tribunal — especially its location within the affected country.²⁴⁵ Unfortunately, that task has been made even harder at the Special Court by serious under-resourcing and structural design flaws.²⁴⁶ Observers have long been troubled by the inequality of arms before international criminal tribunals, with an institutionally supported Prosecution at times appearing to vastly outgun an isolated and disorganized Defense.²⁴⁷ Human Rights Watch recently summarized the emerging problem: “While fairness does not require a dollar

242. See Decision on Motion by Nglrumpatsefor Disqualification of Trial Judges, Prosecutor v. Karamera, Case No. ICTR-98-44-T, Special Ct. of Sierra Leone (Appeals Chamber 2004), available at <http://www.ictor.org/ENGLISH/cases/Karemera/decisions/040517c.html>; see also Press Release, ICTR, Presiding Judge Withdraws from Karamera et al. case, ICTR/INFO-9-2-390.EN (May 18, 2004).

243. See BRINGING JUSTICE, *supra* note 6, at 38-39 (discussing international cooperation); *id.* at 42-44 (stating recommendations to the United Nations and donors to the Special Court).

244. See *id.* at 18 (suggesting that future judicial appointees have criminal trial experience).

245. See *id.* at 10 (discussing the establishment of the Special Court).

246. See *id.* at 21-29 (noting the inadequate resources given to the defence).

247. For a brief overview, see Sylvia de Bertodano, *What Price Defence? Resourcing the Defence at the ICTY*, 2(2) J. INT'L CRIM. J. 503 (2004).

for dollar match between resources available to the OTP and the defense, the extent of disproportionate allocation of such resources at the Special Court could contribute to a perception that trials are unfair and that equality of arms is not upheld.”²⁴⁸ In municipal systems, lone defendants face an inequality of arms when confronted with the resources and authority of a State; in the international system, the defendant confronts the resources, authority and normative structures of the entire State system. Partly to address the dangerous potential for inequality which results, the Special Court took an important step away from the *ad hoc* tribunal model, empowering a centralized Defense Office, modeled on the U.S. system of Public Defenders, to provide representation to defendants in certain circumstances, and to coordinate the representation of clients in other circumstances, including through the provision of common research services.²⁴⁹ This represented an important step forward in the design of international criminal tribunals. Nevertheless, focus on this institutional development aspect may have masked the reality of the situation on the ground, even allowing external observers to think that the problem of inequality of arms has been “solved.”

It has not been solved. The Prosecution has been overseeing investigations for two years; most Defense teams are only began investigations after the commencement of trial.²⁵⁰ The Prosecution investigates with court vehicles, satellite phones, dedicated drivers and security, translators, and professional international investigators; Defense team staff are not formally permitted to use Court transport (transport costs are supposed to be covered by each team’s budget), have no dedicated drivers or security or access to logistical equipment, and must find their own translators and investigation staff, with only national-level salaries for those staff covered by their budgets.²⁵¹ Until recently, investigators (who are employed — and therefore approved — by the Defense Office) had to have a background in

248. BRINGING JUSTICE, *supra* note 6, at 6.

249. See John R.W.D. Jones et al., *The Special Court for Sierra Leone: A Defence Perspective*, 2(1) J. INT’L CRIM. J. 211 (2004).

250. See BRINGING JUSTICE, *supra* note 6, at 27.

251. *Cf. id.* at 6. The Defence Office is allocated one vehicle, which it is expected to make available to all Defence Teams. In reality, the vehicle is used primarily by the Defence Office staff, rather than the contracted lawyers, and is expected to remain in Freetown and not be taken beyond for investigative purposes.

policing; many of the defendants are charged with attacks on police as a Crime Against Humanity. That policy was recently changed,²⁵² but only after a significant delay resulting in some defendants starting trial without investigators. The Prosecution, in contrast, has relied heavily on skilled, practiced international investigators, many with ICTY and ICTR experience.²⁵³ The Prosecution budget takes up a large percentage of the overall U.S.\$83 million budget; the Defense teams receive around U.S.\$4 million altogether. Prosecution staff are permanently stationed in Freetown; many Defense counsel come and go (with the associated travel costs significantly eroding Defense budgets).²⁵⁴ The Prosecutor is an Assistant Secretary General; the head of the Defense Office is many rungs lower in the U.N. employment hierarchy. The Prosecution has until recently received approximately five times the office space assigned to the Defense, and also greater access to office resources.²⁵⁵ The Prosecutor has easy access to a helicopter to go up-country; Defense personnel hitch a ride in public transport. The Prosecution can conduct systematic investigations and analyses of evidence across cases; the Defense is fragmented into nine different teams — an important and necessary step to protect defendants' rights, but one creating coordination challenges.²⁵⁶

Nor is the Defence Office functioning as it was originally envisaged. There have been three occupants of the top post in the Defence Office in less than eighteen months, none at the level of seniority originally planned. That the Court budgeted

252. *Cf. id.* at 26.

253. Human Rights Watch also points out that investigation budgets are at present intended to last only six months into trial, even though Prosecution disclosure is expected to continue well after that point in each trial. *See id.* at 27.

254. *See id.* at 103.

255. *See id.* at 6-7, 23-24. Until recently, the defence teams have received three offices, each roughly 12' x 15', to share between nine teams. Each team comprises three or four counsel and usually at least one assistant and one investigator. Each office was therefore expected to accommodate roughly 15 people, during periods in which the Court was in session, not only impacting on productivity, but also confidentiality. *Cf. id.* at 23. These 15 people shared three computers. Six offices, each roughly half the size of the previous offices, have recently become available, roughly doubling the space — to 40% of the space available onsite to the OTP. The OTP also has an off-site evidence storage facility, and a separate residence for the Prosecutor. Defence teams must use a Registry-wide fax — which means sensitive documents cannot be faxed — and also share a photocopier with the entire Registry. Needless to say, OTP has private access to both of these resources.

256. *See id.* at 23.

for more senior positions than the level at which it has ultimately employed the acting and permanent Principal Defenders suggests either that the Court was trying to save money, or that it could not induce candidates of the requisite experience for employment at the higher level to relocate to Freetown. All three occupants of the position are generally considered to have done a remarkable job with the available resources. Nor has the Office provided substantial research support to Defense teams as had been envisaged. Given that was a central justification for the strict control of defense budgets, the only result can be that Defense teams will either not carry out the necessary research, leading to sub-standard representation or will, as many are now doing, turn to lower-cost options, such as junior lawyers, unpaid interns and *pro bono* arrangements with U.S. Law School clinics and firms.²⁵⁷

Even more disturbing to many of the detainees in terms of inequality of arms, however, is the Prosecution's access to the diplomatic community, press and Sierra Leonean population. The Office of the Prosecutor has run an aggressive Outreach campaign, originally out of its own office, and later through a Registry Outreach office.²⁵⁸ Independent Defence staff have only recently been brought into that Program.²⁵⁹ While the Prosecutor has been careful to emphasize that the defendants are innocent until proven guilty,²⁶⁰ access to Outreach has also given him an opportunity to represent the Prosecution's posi-

257. At least two defence teams have made impromptu arrangements with U.S. law schools to provide clinical support. The Defence Office recently organised for a prominent New York firm to provide *pro bono* research support. The problem of reliance on overseas *pro bono* support is also exacerbated by the lump-sum payment system which caps defence counsel's fees, reducing their incentive to work on the cases. See BRINGING JUSTICE, *supra* note 6, at 7, 25-26.

258. See PROMISES AND PITFALLS, *supra* note 6, at 17-18 (providing a detailed summary); see also DRAFT LEGACY REPORT, *supra* note 197; First Annual Report, *supra* note 40, at 26-27.

259. In an e-mail to the author, Court officials point out that Robert Vincent attended even the early Outreach meetings organized out of the Office of the Prosecutor, and since the Defense Office falls within his remit, he was mandated to represent defense interests at those meetings. See E-mail from Allison Cooper of the Special Court for Sierra Leone to James Cockayne (Sept. 22, 2004) (on file with author). That formalistic approach fails to appreciate the impact that the separate representation of the Prosecution, without independent Defence representation, may have had in the early stages of public opinion formation in Sierra Leone.

260. See Alastair Leithead, *S Leone Awaits Catalogue of Horror*, BBC NEWS, June 3, 2004, available at <http://news.bbc.co.uk/1/hi/world/africa/3774979.stm>.

tion to the population, without significant Defense representation. It cannot be doubted that the visibility of the Prosecution amongst the local population far outstrips that of the Defense, creating a danger of unwarranted identification of Court and Prosecution interests. There has been a greater Defense presence in recent months, but the Prosecution continues to enjoy first mover advantages in this area. Outreach is positive in that it sensitizes the population to the work of the Court, but it is problematic because, first, many of the defendants feel that they are being tried in the court of public opinion as much as in the Special Court — and Outreach creates a trial *in absentia* in those terms — and, second, because this process actually feeds back into the Special Court's processes by encouraging potential witnesses to come forward and allowing the Prosecution to work actively during Outreach trips in order to identify potential witnesses. Absent Defense representatives, the encouragement given to potential witnesses for the Defence to come forward is less active.

The unverified implication is that Outreach may produce more Prosecution than Defense witnesses. There is a danger that the public begins to perceive the Prosecution and the Court as broadly indistinguishable. The blanket use of protection measures for insider witnesses also exacerbates this tendency, since it leads to challengeable and less sympathetic insider testimony occurring in closed hearings out of public earshot, while more sympathetic victim testimony occurs in public, skewing the public perception of the judicial record. One of the indirect results of these processes appears to be that the defendants feel obliged to respond to these influences on public opinion in the only place they can — the courtroom. They are given an incentive to politicize proceedings. The result is that they lose faith in the trial process, and refuse to cooperate, as both Chief Sam Hinga Norman and Augustine Gbao have now chosen to do.²⁶¹ That result only serves to undermine the legitimacy of the trials in the eyes of the affected population and weaken the contribution that criminal prosecution can make to stabilization and peace-building.

What this all tends to suggest is that the defense must be

261. See, e.g., Press Release, Special Court for Sierra Leone, Norman Communications Restricted (Jan. 21, 2004).

given a more prominent role in the life and budget of criminal tribunals, if their legitimacy is to be safeguarded. This may mean giving a Defense Office greater independence, to make it really the Fourth Pillar (alongside Prosecution, Registry and Chambers) that it is often claimed to be.²⁶² In the Special Court, the Office could be removed from the Registry structure. It may be too difficult to amend the Statute, so some other arrangement might be reached where the Registry granted the Office greater autonomy. The Principal Defender should, at least in future tribunals, be employed at the same level as the Prosecutor, and be engaged in Tribunal development from the same time as the Prosecutor, to ensure defense interests are adequately represented. Only through such structural reforms will we ensure that defendants' rights are protected, and with them the perceived legitimacy of tribunals as an effective tool for enforcing the law of war. Without that legitimacy, the United Nations and the international community risk aligning their interests with failing institutions, undermining their own authority and capacity to achieve peace and justice.

F. Rethinking Hybrid Tribunals: Implications and Recommendations

The Special Court for Sierra Leone has achieved a very great deal in a very short time, but its first six months of trials also point to difficulties and lessons about the complexities of operating a hybrid tribunal. In this section, I highlight some of the implications of Sections 3-5 and make recommendations for steps that might be taken in the short, medium and long terms to improve the outlook for the Special Court, hybrid tribunals generally, and for the achievement of the complementary objectives of peace and justice.

1. Hybrid Tribunals — Not Just Shoestring Justice

Many of the problems the Special Court confronts — principally under-resourcing, politicization and complex operational challenges — flow from unrealistic expectations about what the Court can and cannot achieve with the resources it has been given. Too often, the Special Court is perceived as a scaled-down version of the *ad hoc* tribunals — shoestring justice. It is not. Its location “in theater” and the resulting intersection with

262. See, e.g., First Annual Report, *supra* note 40, at 16-17.

local political and social dynamics present a range of operational challenges that the *ad hoc* tribunals have not faced. To overcome those challenges, it may be necessary to give a hybrid tribunal more, and different, resources than we give an *ad hoc* tribunal, ranging from diplomatic expertise to communications staff. A hybrid tribunal's presence in the affected country fundamentally alters the dynamics of its work. It has upsides — helping to stimulate debate and organic reconciliation within the country. And it has downsides — increasing security costs and operational challenges, rendering complex the question of legacy, and risking the politicization of the judicial process. We need to think very carefully about these dynamics: in what we — especially the Management Committee — expect of the Special Court in the next couple of years; in what we expect of hybrid tribunals generally; and in how we expect the International Criminal Court and the United Nations to engage with each other, and how they should carry out their complementary peace and justice mandates.

2. Saving the Fraying Shoestring in Sierra Leone

The Special Court itself faces some immediate dangers; understanding how we can avoid those dangers will teach us about the changes we need to make in future to hybrid tribunal design, to our own expectations, to resourcing, and to the United Nations' role in enforcing the law of war.

Without immediate steps to ensure the Special Court has adequate finance — for example by agreeing to fund the rest of the Court's work from the United Nations' general appropriations budget, rather than by voluntary contributions — we risk a financial crisis for the Court down the line, inducing senior staff to jump ship before it sinks, to protect their finances and reputations. Eventually, if the money simply runs out, contractors will cease performance, and the whole enterprise might grind to a halt. At some point in that process, the defendants will move *en masse* (inside the Courtroom, or through the national press and political channels) for release from arbitrary detention. Such a scenario would only taint the Court, the United Nations and the whole project of international criminal justice.

What should we do? The experiment in voluntary contributions has been tried — and has failed. Allowing a bail-out by the

United States or even a small group of countries may fatally taint the legitimacy of the Court. Providing finance through assessed U.N. contributions, for the remainder of its life, is the only way to ensure the Special Court has the necessary financial guarantees. The international community must come up with the money, or it will have failed the Special Court — and the population of Sierra Leone.

Next, immediate steps must be taken, preferably by the parties and by the President of the Court, to radically accelerate trial proceedings. Court sittings should be modeled on those of the ICTR under President Møse. Lunch-breaks must be reduced to one hour. Adjournments must be minimized. Additionally, the Trial Chamber should force the Prosecution to rationalize its witness lists. Many complex, government-level prosecutions at the ICTR and ICTY are run with fifty witnesses.²⁶³ Why does the Prosecution at the Special Court need three or four times that number?

Third, there must be a radical and immediate improvement in the quality of Defense resourcing (and consequently representation). The Defense are terribly under-resourced, but there may simply be no more resources to give them — unless money is taken out of the Prosecution budget. Perhaps that is the radical remedy needed. Alternatively, the Management Committee should consider such steps as the organization of an international consortium of *pro bono* lawyers to provide research support to the Office. For the future, consideration could be given to subjecting defense counsel to performance monitoring by a panel of independent experts.

Finally, further thought needs to be given to aspects of international cooperation with international criminal tribunals. The mechanisms available to these courts to exercise diplomatic leverage need to be creatively reconsidered, and care should be taken to ensure personnel with diplomatic experience are employed in senior positions at new courts. In the Special Court context, the Management Committee must take political action to secure the Special Court's custody of Charles Taylor. Following the Court's failure to secure custody over Taylor when he was

263. Justice Hassan B. Jallow, *The OTP-ICTR: Ongoing Challenges of Completion*, Guest Lecture Series of the Office of the Prosecutor 5 (Nov. 1, 2004), available at http://www.icc-cpi.int/library/organs/otp/Jallow_presentation.

in Ghana, the President wrote to the Secretary-General on June 10, 2003, requesting Chapter VII powers for the Court.²⁶⁴ That request seems to have gone nowhere, perhaps because the Management Committee is unwilling to put Nigeria (where Taylor has sought asylum), one of its members and a significant regional player, on the spot.²⁶⁵ The cost of that laxity is increasingly paid in the currency of the legitimacy of the Court. The United Kingdom, United States and others must bring pressure on President Obasanjo to hand Taylor over. They may have to offer him strong incentives, to overcome Obasanjo's unwillingness to create tension between himself and the Nigerian military by allowing Taylor to reveal in Court what many suspect is dirty laundry regarding diamond-trafficking within the Nigerian military. In addition, the Management Committee will have to accept that securing Court custody of Taylor will both significantly extend the life of the Court, and increase its day to day costs (due to heightened security concerns and greater international attention). They must be prepared to underwrite those financial and political costs, for the benefit of the legitimacy and effectiveness of the process. Without Taylor, the Court will tell the truth – but not the whole truth.

3. Rethinking the Central Pillars

The challenges faced by a hybrid tribunal like the Special Court also help illuminate some of the weaknesses of the central pillars in the existing approach to law of war enforcement, particularly the role of the Bench and the Defense.

Judicial professionalism is the cornerstone of the trial process, on which the whole project of international criminal justice is built. But as we have seen, at times it is not living up to the high standards of professionalism set by other actors within the process. Judicial practice could be significantly improved by judicial education. The Special Court bench has already received some instruction in The Hague.²⁶⁶ Human Rights Watch's suggestion that all judges in the Second Trial Chamber have criminal trial experience also appears eminently sensible, and points

264. See *FIRST EIGHTEEN MONTHS*, *supra* note 47, at 11.

265. U.N. Security Council Resolution 1478 did, however, explicitly request that states cooperate with the Special Court. See S.C. Res. 1478, U.N. SCOR, 58th Sess., 4751st mtg. at 2, U.N. Doc. S/2003/1478 (2003).

266. See *BRINGING JUSTICE*, *supra* note 6, at 17-18.

to the need, in future tribunals, for higher minimum qualifications for judicial candidates.²⁶⁷

Judicial decision-making will determine the quality of the record provided by criminal trial, not only through its own judgments but also by the control it exerts over Prosecution and Defense narratives within the trial process. Both parties will only improve the nuance in their theories of the case, examination and cross-examination, and general advocacy if they are placed under pressure from the bench to do so. (The parties might also bring pressure on each other, for example through tough cross-examination of each other's witnesses, but if the bench does not exhibit a preference for the more nuanced approach when it is offered, the other side will not have the incentive to change their position.) In the Special Court, this may require the bench: to press for greater historical clarity and accuracy; to pursue the details of, especially, the involvement of ECOMOG and President Kabbah in particular situations; not to accept allegations of command-and-control at face value; and not to be satisfied with one explanation of events but actively to seek out others.

Judges could also reduce the incentives to defendants to use their trials as political platforms by imposing a *sub judice* rule on all parties to the trial. That would leave the Sierra Leone and international community free to comment on the trial but restrict the opportunity for the parties to intertwine political and legal narrative. Since the defendants face significant restrictions (nominally for security reasons) on their freedom of expression and thus their rights of political participation,²⁶⁸ it seems only fair that the Prosecution should be similarly restricted. All Outreach should be done by Registry staff alone.

We may also need to rethink the current approach to the Defense, particularly in relation to equality of arms issues. As I have suggested above, the Defense needs to be given a greater

267. *See id.* at 18.

268. *See, e.g.*, Press Release, Special Court for Sierra Leone, Norman Communications Restricted (Jan. 21, 2004), available at <http://www.sc-sl.org>; *see also* TRC Appeal, Case No. SCSL-2003-08-PT, Special Ct. for Sierra Leone, ¶¶ 39-40 (Appeals Chamber 2003); *cf.* Press Release, ICTY Registry, Registry Imposes Communication Restrictions on Detainees with Regard to Political Campaigning in the Media from the Tribunal's Detention Unit, ICTY Doc. No. JL/P.I.S./810e (Dec. 12, 2003), available at <http://www.un.org/icty/latest/index.htm>.

prominence within the life and budget of the Court, from an earlier point in the process. While the ICC, designed before the Special Court, lacks even the rudimentary centralized coordination mechanism provided by the Special Court Defense Office model,²⁶⁹ the ICC Prosecutor has a duty to investigate exculpatory evidence that *ad hoc* tribunal Prosecutors have not had,²⁷⁰ presumably including by requesting exculpatory material from the United Nations. How that will impact on U.N. peace-making processes remains to be seen.

The Special Court for Sierra Leone stands at a critical moment in not only its own development, but in the maturing of the system of international criminal justice, and the whole idea that the law of war can be effectively enforced through individualized prosecutions. The honeymoon is over; the U.N. community is at a critical moment of reassessment. We have asked a very great deal of the Special Court, as we do of hybrid tribunals generally. Their operation in-theater exposes them to the very political and social dynamics over which we ask them to sit in detached judgment. That creates new hurdles for hybrids which the *ad hoc* tribunals have not faced — yet we have asked them to do more with less. The Special Court's experiences to date teach us much about the challenges that the ICC will face in the future, and about the complexities for the United Nations of balancing a role in making peace with a role in bringing justice. Most important, however, the Special Court's experiences to date have helped to highlight the vulnerabilities of the existing approach. The shoestring seems to be fraying. There is still time to repair it. If we do not, and it snaps, we risk undermining the confidence of the international community generally in the effectiveness of prosecution as a tool for enforcing the law of

269. The ICC system does, however, have a strong International Criminal Bar Association which acts as advocate of defense rights, but is an external actor, excluded from the internal workings of the Court. See Official Website of the Int'l Crim. Bar Ass'n, at <http://www.bpi-icb.org/en/index.html> (last visited Feb. 5, 2005).

270. See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 53rd Sess., U.N. Doc. A/CONF/183.9, as amended by process-verbaux of Nov. 10, 1998, July 12, 1999, May 8, 2000, Jan. 17, 2001, Jan. 16, 2002, art. 54 (1998). Article 54 states:

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

- (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

war. Unless we lower our expectations of hybrid tribunals or increase the resources, time and support we are prepared to give them, we must prepare for disappointment.