# Wrong-sizing international justice? The hybrid tribunal in Sierra Leone $^{\otimes}$

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## Introduction: what size should international justice be?

Even as the International Criminal Court undertakes investigations in Uganda and the Democratic Republic of Congo, policymakers and academics continue to debate what the "right" tools to respond to past atrocities are. Naturally there are concerns that justice must be done, weighed against concerns that weak states will be destabilized by attempts at accountability.<sup>1</sup> While many have celebrated the entry into force of the ICC statute, and the exercise of universal jurisdiction, the United States continues to challenge both of these tools of international justice as undemocratic and illegitimate.<sup>2</sup> There are also reasons to be concerned that tools of international justice, operating as they do very far from the victims and sites of the original crimes, may simply fail to accomplish what we hope for.<sup>3</sup> The *ad hoc* criminal tribunals for the Former Yugoslavia and Rwanda are both being encouraged to complete work by 2008, having prosecuted relatively few cases over the course of more than a decade, but having contributed significantly to the corpus of international law. International justice may be developing, but it has its limits. Yet it is also the case that after civil war or internal atrocity, domestic courts are often unable or unwilling to seriously pursue cases. This leaves a potential gap, one that some believe can be filled by a device between the national and the international-the hybrid or mixed tribunal. While these tribunals are said by some to be an example of "right-sizing" international justice, the

case of the Special Court for Sierra Leone suggests that, perhaps, we ought not be so sanguine.<sup>4</sup> While perhaps a necessary compromise, I suggest, the Court suffers from the limits of being a partially domestic court, in terms of resources and mandate, but also from the limits of being a partially international court, in that it is viewed by many as foreign. Understanding the workings of different justice mechanisms is, importantly, more than a concern for lawyers these days: it is centrally bound up with any discussion of effective conflict resolution and war termination, and longer term peace implementation.<sup>5</sup>

#### What is a hybrid court?

A hybrid court is a novel development in international attempts at accountability for past offenses. Unlike the international ad hoc criminal tribunals or the international criminal court, it is not purely a creation of the international community, employing international law and international prosecutors and judges. It is also distinct from domestic processes such as prosecutions or commissions of inquiry, in that it does not solely utilize domestic judges and law. Instead, it is an attempt to address the limitations of domestic and of international models, utilizing a complex mix (determined on a case-by-case basis) of domestic and international law and domestic and international judges and staff. It theoretically runs less of a risk of being subject to political pressures, or compelled to use limited, antiquated, or unjust laws, as domestic courts might do alone. It is also less likely to be removed from the circumstances where the crimes occurred, which should assist it not only in obtaining information and witnesses, but also in serving to inform and educate the populace at large, and perhaps help to build the capacity of collapsed domestic legal institutions. Thus in many instances, it is considered the "right size" of justice. Proponents of the mixed or hybrid tribunal argue that it may offer the best of both national and international justice. They suggest that hybrid tribunals, which are composed of domestic and international judges, and often utilize a combination of domestic and international law, can evade the risk of political manipulation that domestic courts face and that, unlike international tribunals, they are better suited to the needs of countries emerging from conflict. However, while in principle this logic is appealing, in practice hybrid tribunals have proven flawed. I examine in this essay the experience of the Special Court for Sierra Leone, which represents an important commitment of the international community to post-conflict justice, and which has produced important judicial decisions, but which does not appear to otherwise fulfil the great hopes of hybrid tribunal advocates.

## The Special Court experiment

The history of the conflict in Sierra Leone is well-known, and need not be rehearsed here in any detail.<sup>6</sup> Conflict between the government and the Revolutionary United Front (RUF) erupted in 1991 and endured for over a decade, resulting in an estimated 50,000 – 75,000 deaths and widespread atrocities including mutilation and sexual violence. The conflict was notable also for the widespread use of child combatants, often abducted and drugged, who were both victims and perpetrators of abuses. It appeared that the conflict might finally end when negotiations in 1999 resulted in the Lomé peace agreement, and the mandate by the UN Security Council for a peacekeeping force, UNAMSIL (UN Assistance Mission in Sierra Leone).<sup>7</sup> The accord provoked concern from the international community for its inclusion of an amnesty for crimes committed during the conflict, and the United Nations, which acted as a "moral guarantor" of the agreement, issued a reservation

indicating that it did not consider the amnesty provision to cover international crimes. Despite the agreement, fighting and atrocities continued, along with attacks on UNAMSIL. In May of 2000, the notorious RUF leader Foday Sankoh was captured, leading to discussions of the possibility of an international or other tribunal to prosecute him and other war criminals. In June, the government asked the UN to set up a court to try such cases.

Ultimately, <u>a</u> complex system of a commission of inquiry and a mixed tribunal was created to address accountability for past abuses.<sup>8</sup> While both institutions are too new to assess properly, it is worth examining their features briefly, and considering the prospects for success. Certainly, the relevance of proceedings in the tribunal is of concern to many in the international community who seek to support it. This would suggest that the international community has recognized key concerns from the Timorese experience. Whether a mixed tribunal can surmount problems such as the disconnect between international and local processes, and a lack of understanding by, or inclusion of, the local population, remains to be seen. The Special Court for Sierra Leone may well prove an interesting test case. Because the Court is unique in several respects, any discussion of its potential, and potential limitations, must begin with key features of the institution itself.

# General mandate of the Court

The United Nations created the Special Court through an agreement with the government of Sierra Leone and pursuant to U.N. Security Council Resolution 1315 in August 2000.<sup>9</sup> As discussed below, it is worth noting that in this instance, the Council was not acting in Chapter VII mode. The court's statute, completed on January 16, 2002, gives it the power to prosecute persons who bear the greatest responsibility for serious violations of national and international humanitarian law

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since November 30, 1996.<sup>10</sup> The crimes within the ambit of the court include crimes against humanity, violations of common article 3 of the Geneva Conventions and additional protocol II, other serious violations of international humanitarian law, and crimes under national law.<sup>11</sup> In March 2002, the agreement for the court was formally ratified.<sup>12</sup>

Eight to eleven judges of mixed international backgrounds sit on the court.<sup>13</sup> Following the agreement between the United Nations and the government of Sierra Leone, the Trial Chamber is to <u>consist\_of three judges</u>, one appointed by the government and two by the U.N. Secretary-General, based on nominations from member states.<sup>14</sup> Any additional Trial Chambers will be similarly composed. Five judges are to serve on the appeals chamber, of whom two will be selected by the government, and three by the Secretary-General.<sup>15</sup>

# Relation to the Truth and Reconciliation Commission

The establishment of the Special Court is nearly contemporaneous with the creation of the Truth and Reconciliation Commission.<sup>16</sup> In principle, their responsibilities do not overlap and there ought not be any conflicts between the two institutions.<sup>17</sup> The Commission, as is common for commissions of inquiry, does not have the power to punish, but rather to investigate the causes, nature, and extent of the violence, and also to make recommendations regarding reparations and legal, political, and administrative reform.<sup>18</sup> However, concerns remain about the handling of evidence and witnesses, in particular.<sup>19</sup> There was a possibility that evidence disclosed to the Commission, which has different remit and evidentiary requirements, could also be brought before the court; while the Court's prosecutor foreclosed that option, many believe it is still a risk.<sup>20</sup> Care must be taken to ensure that the introduction of such

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evidence does not violate due process, and that those who provide evidence are not endangered. Alternatively, it may be the case that in an attempt not to overlap with the Commission, the Court impedes its work--in several instances indictees held by the Court have not been allowed to testify before the Commission, leading to tensions, as discussed in the controversy surrounding Sam Hinga Norman below.<sup>21</sup> Perceptions of the TRC, as of the court, have been mixed: while some view it as an important institution with greater national ownership, difficulties with outreach and management have engendered significant criticisms.<sup>22</sup>

Some, such as the Special Court Prosecutor David Crane, believe that operating the Commission and Court more or less simultaneously was a positive and innovative choice.<sup>23</sup> Others, however, suggested that this simultaneous operation undermined the work of one or the other, or of both, institutions.<sup>24</sup> In particular, as discussed below, there were fears that the belief that the Court would use evidence presented before the TRC would prevent certain actors from testifying, or testifying fully and truthfully, before that institution. Initially fears about evidence sharing did prevent some perpetrators from testifying before the TRC, although over time such fears subsided. However, many participants in and witnesses to the TRC process have noted that those who testified often did not testify fully, and that often perpetrators who confessed to serious abuses exhibited no remorse or desire for forgiveness.<sup>25</sup> They have suggested that, in contrast to the South African TRC, which had the capacity to grant amnesty, and with the possibility of domestic legal proceedings in the background as leverage in South Africa, the Sierra Leonean TRC was unable to offer incentives, whether positive or negative.<sup>26</sup> Not only, they suggest, was there no threat, given the Lomé amnesty's validity internally, of prosecutions, but there was also no possibility of compensation/reparation for victims, as was available in the South

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African case.

These shortcomings led some to question whether the TRC had advanced or would advance reconciliation in the country, or even to suggest that it was more likely to open old wounds than support reconciliation.<sup>27</sup> Many also criticized the delay in the delivery of the TRC's report, due initially in March but delayed until September 2004, arguing that while the TRC was operational it had drawn some interest, but with the cases proceeding in the Court and the delay of publication of the report, interest in the latter had waned.

# The court's mandate, and relationship to national authorities

The Special Court is an exceptional institution, meaning that it is not part of the regular judiciary of the country.<sup>28</sup> It is unusual too in that it addresses not only crimes under international law, but also some crimes under Sierra Leonean law.<sup>29</sup> It is different from other mixed processes, which were grafted onto existing domestic court systems and utilized international judicial staff. The judicial system of Sierra Leone was simply too decimated for such an option to be available; there was also the standard concern that any prosecutions might be viewed as victors' justice or biased.<sup>30</sup> Offenses prosecuted before it are not, as the ratification act explicitly states, prosecuted in the name of the country.<sup>31</sup> The court can request assistance from the Attorney-General, to identify and locate persons, serve documents, arrest or detain, or transfer persons to the court.<sup>32</sup> Conversely, the Minister of Justice and the Attorney-General can make requests to the court for assistance in transmitting statements and other evidence, and questioning persons detained by the court.<sup>33</sup>

The court is unique in that it has concurrent jurisdiction with primacy over the courts of Sierra Leone. This means that upon the Court's request, domestic courts

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must relinquish cases to it. A much-debated exception is in instances where crimes are alleged to have been committed by peacekeepers and related personnel, in which case the state sending the personnel will have primary jurisdiction.<sup>34</sup>

# The court's power and funding

An immediately apparent weakness of the court lies in its mandate. Because the court was created by agreement between the UN and the government of Sierra Leone, rather than through a Security Council Resolution under Chapter VII as were the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda, the court is weak in two senses. First, it does not have the authority that the ad hoc tribunals do to demand extradition of suspects from other countries. This means that indictees who seek asylum elsewhere, such as former President of Liberia Charles Taylor, can evade prosecution if the sheltering states do not choose to extradite them. The Sierra Leonean conflict had regional dimensions, involving its neighbors as both targets and combatants, yet the jurisdiction of the Court is limited to the territory of Sierra Leone, meaning that even if it had the power to compel extradition, it could not consider cases arising from events taking place outside the country, even if they involved atrocities related to the conflict.<sup>35</sup>

Second, because the court was not created using Chapter VII powers, it is not the beneficiary of assessed (compulsory) UN contributions by member states. Given that the court will seek to try higher-level defendants and will pursue only about a dozen of those, such high-profile holdouts clearly undermine it. Instead, the court must solicit voluntary contributions, despite the request by the UN Secretary-General, Kofi Annan, that the court be financed through assessed contributions.<sup>36</sup> As a result, the court was scaled back: while initially the budget was to be \$30.2 million for the first year and \$84.4 million for the next two years, it is now set at \$16.8 million for the

first year and only \$57 million total for the first three years. By way of comparison, the annual budgets of the ad hoc criminal tribunals for the former Yugoslavia and Rwanda are approximately \$96 and \$80 million, respectively.<sup>37</sup> Such financial constraints were clearly a factor in the limited scope of trials planned.

The court has been unable to raise even the reduced budget through voluntary contributions. At the time of interviews conducted in July 2004 in Freetown, the Court had only an operating budget through December 2004, even though it is mandated to continue work through December 2005. The court faced a shortfall for 2004 as well, which was filled through relatively unique action by the UN General Assembly's 5<sup>th</sup> committee, taking monies for the Court from a little known 'subvention fund'--unallocated assessed contributions. Over \$16 million was released for the court in 2004, and some \$30 million remains in the fund; it is expected that the subvention fund will be drawn upon to support the Court's work in 2005 as well.<sup>38</sup>

# Limited time frame

The determination of the temporal jurisdiction of the Court was made for both pragmatic and political reasons. Given the scale of atrocities and the duration of the conflict, the UN Secretary-General determined that it would not be feasible for the court to address atrocities stretching back to 1991. Further, there is much dispute as to the exact date of initiation of the conflict. However, the date of termination of the Court's jurisdiction is indeterminate, as at the time of the Court's creation the hostilities were ongoing. While a number of dates for the start of jurisdiction were proposed, some were politically tendentious because they excluded key events. Ultimately, the date selected was November <u>30</u>, 1996, the date of the signing of the Abidjan accord, the first comprehensive peace agreement.<sup>39</sup> However, even this date

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has proven controversial, as prior to this date the fighting and atrocities remained largely in rural areas; it was only after it that the fighting reached Freetown. Some in Sierra Leone have argued that this unfairly implies that only atrocities occurring in Freetown matter.<sup>40</sup> Others have argued that the open-ended jurisdiction is also flawed, and that the Court should not have been established while hostilities were underway.<sup>41</sup>

# Child soldiers

As already noted, the conflict in Sierra Leone was characterized by the use of child combatants. As such, children were both victims and perpetrators, and the statute of the Court reflects that complicated fact.<sup>42</sup> The statute provides for the possibility of prosecuting child perpetrators of atrocities between the ages of 15 and 18, and also criminalizes the forcible recruitment of children for combat. The possibility that individuals under the age of 18 might be prosecuted by the court raised serious concerns among human rights advocates, and ran counter to the apparent standard set by the Rome statute for the International Criminal Court, which limited jurisdiction of that Court to those over the age of 18. Many were concerned that judicial proceedings would not help to rehabilitate and re-integrate former child combatants, many of whom were forcibly recruited and were victims themselves, but further marginalize them.<sup>43</sup> However, the concern now appears to be moot, as the Special Court's Prosecutor, David Crane, announced in November 2002 that he would not bring any cases against those between 15 and 18 years of age.<sup>44</sup>

The court has faced the challenge of dealing with child soldiers as perpetrators of crimes but also as victims of crimes, of both forcible and voluntary recruitment. While forcible recruitment is clearly criminal, there was a dispute before the court as to the prohibition of voluntary recruitment and as to whether such prohibition also created a crime. The court, in response to a jurisdictional objection, found that

recruitment of child soldiers was not only prohibited in international law, but that there had been a crystallization of a norm whose violation would attract individual criminal accountability.<sup>45</sup>

## Dispute over the validity of the Lomé amnesty

The establishment of the court has had significant ramifications for the controversial amnesty embedded in the Lomé peace accord.<sup>46</sup> Article 10 of the Court's Statute provides that any amnesty for the crimes covered in the Statute would not be a bar to prosecution. Were that blanket amnesty still in force, it would radically contract the court's temporal jurisdiction to crimes committed only after the signing of the accord in 1999. However, several arguments have been advanced against the amnesty's constraining prosecutions by the Court. First, as noted above, the UN issued a reservation at the time of the signing of the accord, indicating that the amnesty could not cover international crimes such as genocide, crimes against humanity, war crimes, or other serious violations of international humanitarian law. The argument was thus made that to the degree that the amnesty was valid, it was valid only in respect of domestic crimes. The UN, further, was not party to the agreement, but rather, along with a number of other institutions and governments, agreed to act as guarantor of the agreement. Thus, it argued, it was not in breach of any agreements in the creation of the Court. However, the government of Sierra Leone was a party to the Lomé accord, and entered into a contract with the UN for the creation of the court. The government has argued, as have others, that the amnesty provision was nullified by the continued violation of the peace accord, through fighting and atrocities, on the part of the RUF.<sup>47</sup> In March of 2004, the Court itself had occasion to consider the validity of the amnesty and of article 10. It found that the Lomé accord could not be considered a treaty, and thus that the amnesty contained in the Lomé accord would only have domestic effect and would be regulated by domestic law. As a result, it could have no effect upon an international court.<sup>48</sup>

#### Dispute regarding head of state immunity and the legality of the Court agreement

The unsealing of the SCSL's indictment of then-President of Liberia Charles Taylor while he was attending peace negotiations in Ghana shocked many in the international community.<sup>49</sup> Rather than arrest Taylor, Ghana allowed him to leave the country; Taylor has since gone into hiding in Nigeria. Nigeria refuses to surrender him to the SCSL, having granted him "asylum", although in June 2004 the Nigerian High Court decided to review that asylum.<sup>50</sup> It has, however, said that it would honor a request for extradition from a permanent (rather than the current interim) Liberian government.<sup>51</sup> Attorneys for Taylor have filed legal challenges to the court's jurisdiction over him at the court itself and at the International Court of Justice (ICJ).<sup>52</sup> The ICJ has yet to hear the case filed, in which Taylor claims that proceedings against him violate head of state immunity and requests the immediate cancellation of the arrest warrant. The Court will not take any action with respect to this filing, however, unless Sierra Leone consents to the Court's jurisdiction in the case. Lawyers for Taylor have also challenged the Court's jurisdiction in a filing before the Liberian Supreme Court against the SCSL and the Liberian Ministry of Justice, challenging the legality of searches of homes of Taylor and his associates. They have argued that the jurisdiction of the Court does not extend beyond the borders of Sierra Leone.<sup>53</sup> Some Liberian officials have rejected that claim, arguing that Liberia was obliged to respect foreign courts and proceedings; however the Liberian Parliament has expressly rejected the possibility of allowing Taylor to face charges before the SCSL.54

The Special Court for Sierra Leone has already rejected the challenge to

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The legality of the agreement establishing the court has been challenged before the Special Court itself, and before the Supreme Court of Sierra Leone.<sup>56</sup> The Special Court rejected the legal challenges, finding that the agreement was valid and was neither an excess delegation by the UN Security Council of its own powers, nor was it an excess transfer of jurisdiction by Sierra Leone itself. As of mid-2004, hearings regarding the legality of the agreement continued in the national Supreme Court.<sup>57</sup>

# Reception of Court

A key obstacle for the court has been the view by many in Sierra Leone, including its most obvious constituency, human rights and reform-oriented NGOs, that it is an imposition, either by the government, or the international community, or both. This view appears to have been exacerbated by the indictment of Civil Defence Forces (CDF) commander Samuel Hinga Norman, still viewed by many as a national hero.<sup>58</sup>

#### View as government driven

Many human rights advocates view the court as a purely government institution, even referring to it as Kabbah's court. This has generated fears that the court will be merely a <u>"kangaroo" court.<sup>59</sup> Perversely, the view of the court as government-driven</u> runs in several contradictory directions. On the one hand, many view with approval

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the initial government request that a court be created, but to address only the actions of the Armed Forces Revolutionary Council (AFRC) and the RUF. Yet at the same time, many object to the indictment of Sam Hinga Norman, arguing that he was defending a democratically elected government. This objection bears within it several contradictory strains--many argue that this is the first time that a post-conflict court has addressed the winners (i.e. the government and the forces defending it), and that this is unacceptable. That is to say, there is a belief that the government ought not be held accountable. Alternatively, there is an argument made that Hinga Norman has been made a scapegoat--that if he is responsible for the excesses of his forces, then President Kabbah, to whom he was answerable, must surely also answer himself to the court. <sup>60</sup>

View as international-community driven

Alternatively, or sometimes simultaneously, detractors of the court have argued that *it* is an institution driven by the international community. They suggest that in contrast to the TRC, which they portray as a more internal, national structure, the court is internationally directed. They argue in particular that the dominance of internationals in high profile positions such as that of the registrar and the prosecutor reinforces the international nature of the court.<sup>61</sup> Some have even suggested that the promotion of the court is part of the larger US campaign against the International Criminal Court, as it attempts to demonstrate that alternate models can work.<sup>62</sup> At the same time, some view the court not only as internationally-driven, but as a betrayal of the government's initial desire to pursue only the RUF and the AFRC. They suggest that the court has overstepped in pursuing the CDF, and at the same time ask why it is, if responsibility is expanded, that all parties to the conflict are not responsible for their excesses, including ECOMOG (Economic Community of West African States

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Military observer Group) and UNAMSIL.<sup>63</sup> It is well worth observing in this regard that there is little or no evidence to support some of the more extreme criticisms, but the very fact that they are aired poses a problem of perception for the court.

# Do views of the Court vary by group membership?

One might expect distinct receptions of the court by various sectors of Sierra Leonean society; in particular one might expect that victims perceive it rather differently than do ex-combatants, and that ex-combatants are likely to vary in their views of the court according to previous group affiliation. It is as yet unclear what victims think of the court, as no large-scale surveys of their views have been completed as yet. The best approximation of their attitudes comes from assessments of the relevance of the court for victims made by human rights and other NGOs in Freetown. Greater research has been carried out as to the attitudes of ex-combatants on a host of related issues, such as democracy, participation in the political process, and intention to return to the use of force, but not directly on the issue of the Court.<sup>64</sup> More general views of excombatants of the Court, and in fact the TRC as well, can be gleaned from those who worked with them in the process of DDR (disarmament, demobilization, and reintegration).<sup>65</sup>A key benefit of the court for victims is perhaps obvious: it allows them to see some measure of justice exacted against those responsible for the harms that they have suffered. Further, and in contrast to many trials of human rights perpetrators, victims in Sierra Leone have the opportunity to see and follow the process because the court is in-country. Some can make it to Freetown to follow the proceedings, while others can follow it, though admittedly less well, through radio programs on Radio UNAMSIL and informational spots on other radio stations as well as through innovative outreach activities in areas upcountry that radio and newspapers Deleted: i

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do not reach regularly. These include thirty-minute video summaries produced every week and distributed throughout Sierra Leone's fourteen provinces via mobile video units.<sup>66</sup> Some of the criticisms of the court's impact on victims by human rights groups have already been discussed above. An additional objection to the court has been adduced, however, by human rights and other NGOs, on behalf of the victims. This objection is to the very mandate of the court, seeking accountability for those who "bear the greatest responsibility" for abuses. The objection is to the focus upon commanders rather than direct perpetrators, and the objection, repeatedly, is that victims wish to know why it is that a commander is in custody, rather than the man who actually cut off a hand, or burned down a house. The criticism is often carried further, suggesting that the interpretation of greatest responsibility is incorrect--that it is those direct perpetrators who in fact do bear it, not those who "just" gave orders.<sup>67</sup> On this account, then, the prosecutions at the court will not address the needs of victims, many of whom are said to feel abandoned by the government.<sup>68</sup> Many victims and witnesses before the court have expressed expectation that they might receive compensation for their efforts or suffering, but this (with some limited exceptions to cover costs for witnesses) is not feasible; many victims complain that their needs are not addressed, and point to DDR benefits for ex-combatants by contrast.

One might expect that ex-combatants would have a uniform, and negative,

view of a court designed to punish their commanders, and condemn by implication their own activities. However, given the complex nature of warring factions in Sierra Leone, the situation is somewhat more complicated. First and foremost, it is the case that ex\_combatants of all groups were suspicious of the court, fearing that they themselves would be indicted by it. This suspicion arguably extended beyond the

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court, leading many to fear testifying before the Truth and Reconciliation Commission, as despite the explicit announcement by the prosecutor that he would not use testimony to the TRC as evidence for indictments or prosecutions, many former fighters simply did not believe him.<sup>69</sup> However, this suspicion may or may not have had a lasting impact on the work of the TRC: according to some observers after a few months this concern abated and they began to testify.<sup>70</sup> Similarly, there have been concerns that fear of indictment might have deterred some fighters from engaging in the DDR process. However, given the extensive nature of the DDR in Sierra Leone, and the apparently broad-based buy-in to the process, the ultimate effect appears to have been negligible.<sup>71</sup> As discussed elsewhere in this essay, however, the primary objection amongst some ex-combatants has been the decision to pursue cases against the CDF, and in particular the case against Sam Hinga Norman. Former CDF fighters view themselves and Norman as heroes who defended the democratically elected government, and resent being called to account. This resentment has led to rumors and fears that supporters of Hinga Norman will seek to destabilize the country.<sup>72</sup> One editorial in a Freetown paper expressed its concerns thus:

We only hope this court will not leave behind an ugly legacy that will spark another war in this country. You see, Chief Norman has a very large following that is angry with the treatment currently meted out to him.<sup>73</sup>

Systematic surveys of ex-combatants, conducted by a local NGO with international support, support cautious skepticism. Their analyses find moderate levels of support for the Court and the TRC, which rises following sensitization or outreach processes. It is worth noting that support of RUF ex-combatants, many of whom see themselves as victims of forcible recruitment as well as betrayal by their ex-commanders, express relatively strong support for the court as well as willingness to testify. Conversely,

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CDF ex-combatants, the vast majority of whom joined willingly, and who believe that they helped to defend the nation and the democratically elected government, express greater resistance to the Court.<sup>74</sup>

# Outreach--efforts, limits, and dealing with embedded prejudices

Given that a notable failing of international tribunals has been their <u>in</u>ability to communicate with the affected society, and that placing hybrid tribunals in the territory of the country where crimes occurred, the importance of outreach for the Special Court for Sierra Leone cannot be underestimated. And indeed, the outreach effort has been impressive, but it is also worth noting that it was limited by at least two factors, on<u>e</u> internal and one external.

Outreach has been extensive, and in comparison to other tribunals, quite timely. The outreach for the SCSL began well before the court was functional, overlapping with the workings and outreach of the TRC. Indeed, on some occasions the outreach activities were carried out jointly. Outreach was initially conducted by the Prosecutors, often through the person of the Prosecutor, who visited every district in the country in the process. Outreach offices are present in every province in the country.<sup>75</sup> In addition outreach programs are aired regularly on radio stations across the country, outreach officers have established "Accountability Now" clubs in universities and engaged in extensive training of key sectors of civil society on substantive issues around the court.<sup>76</sup>

The Office of the Principal Defender also conducts outreach now that it is operational. However, this development points squarely to some of the internal limitations of the

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outreach process. Because outreach was initially conducted largely by the Prosecutor, this heightened profile generated an identification of the Court with the Prosecution, even though outreach was formally housed in the office of the Registrar. The creation of a separate Outreach Section came later, with a permanent director appointed in January 2003. Similarly, because the office of the Principal Defender became operational after the office of the Prosecutor, its outreach activities began later, contributing to the (mis)perception that the court and the prosecution were one and the same. The Outreach section and the Principal Defender have worked assiduously to address this perception, with the Defender pursuing outreach around the country and through high-profile appearances, to combat this early problem.<sup>77</sup>

Outreach also suffered from a perceived lack of importance or legitimacy within the court, according to the Outreach Director. She has suggested that while certain staff, such as the Registrar and the Prosecutor, recognized the importance of outreach from the outset and pursued it vigorously, many legal staff did not. This was in part, she has suggested, due to the lack of prioritization for it in terms of funding--the Court's management committee decided not to fund outreach and thus funding had to be found elsewhere.<sup>78</sup>

Finally, it appears that outreach, and perhaps the image of the Court generally, suffered from an obstacle beyond its control--embedded biases and preconceptions. For at least some who view the Court as politicized, it is possible that no amount of outreach will change their minds. Many respondents suggested, for example, that excombatants fearing testimony before the TRC would be shared with the Court maintained that fear not because they were unaware of the Prosecution's assurances, but because they did not believe them.<sup>79</sup> For this reason, the Outreach Director observed, it is perhaps not surprising that children receiving outreach at schools were considerably more receptive to it than many adults.<sup>80</sup> Another court employee, off the record, suggested that the court was very effective at getting information out, but that the perceptions of it within the country varied significantly, with particular concerns surrounding both the indictment of Hinga Norman and the decision not to indict Kabbah.<sup>81</sup>

## The legacy of the SCSL: unrealistic expectations?

A common criticism of international trials is that they fail to assist national reconciliation, and do not contribute to the re-institution of the rule of law. It might perhaps be hoped that mixed tribunals, by virtue of functioning within the society affected, can counter the first objection. Significant hopes have been pinned on the capacity of the Special Court for Sierra Leone to assist in the second as well.<sup>82</sup> Recent research by the UNDP and the International Center for Transitional Justice has indicated that many in Sierra Leone hope that the court will leave behind a greater "legacy" than simply the record of a few prosecutions. Great, perhaps unrealistic, hopes, are that it will contribute to institution-building in the country, helping to rebuild a shattered judiciary, revitalize legal education, and assist in legal reform even as it is expected to contribute to reconciliation. Many involved in the work of the Court hope to meet some of these expectations, although there are real concerns that seeking to do so may divert efforts of Court staff, and more generally, that the Court is not the appropriate institution to support broader capacity-building in the country.<sup>83</sup>

First and foremost, there is an expectation that the Special Court can help to rebuild the shattered judicial system. The court is formally separate from the judicial system Deleted: expected

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of Sierra Leone.<sup>84</sup> This separation has created concerns among the members of the court that they must ensure that they leave a legacy for the country beyond the specific trials. External actors, such as donors and the United Nations, are also concerned that activities of the court serve to benefit and strengthen the domestic legal and judicial system. This is particularly important in Sierra Leone, where the court system lacks even the most basic elements, including law reports from past decisions. The system is rife with funding and morale problems, corruption, and challenges to independence.

Members of the court have attempted to engage in outreach to domestic legal authorities, members of civil-society groups, and the law school in Freetown. This outreach effort is intended to build basic legal capacity, to explain role of the prosecutions, and the procedure, and include the rationale for due process and the need for defense attorneys.<sup>85</sup> The relationship of the court to national justice mechanisms has not been consistently positive. The court has necessarily lured many talented legal experts away from current or potential roles in the national legal system. It has also taken land from the Prison Service, including land intended for a new training school.

The outreach staff of the court has also sought to train local chiefs and other leaders regarding the court, while simultaneously seeking to make the work of the court comprehensible and interesting to those actors. In particular, they have sought to workshop the links between international legal standards of due process and rule of law and the processes of traditional justice. This could prove to be important, as many Sierra Leoneans are little-affected by the formal legal sector, but do participate in traditional justice.<sup>86</sup> Simultaneously, however, some critics have suggested that addressing the crimes of the past would be better done through traditional modes such

as purification and cleansing ceremonies, and certainly that at the very least these traditional activities ought to supplement more formal ones.<sup>87</sup>

Actors involved in the functions of the special court, whether from United Nations Development Programme, bilateral donors and the World Bank, or the judges themselves, are far more concerned with the impact of the court on victims, the wider community, and national legal capacity than has been the case in other externalized, or mixed tribunal, experiences.<sup>88</sup> This is certainly a positive development. However, there have been negative effects on local capacity, and outreach is as yet limited.<sup>89</sup> The court, correctly, is not specifically designed to be a mechanism to build national legal capacity. Concerns should remain, however, if the court diverts attention and resources from other domestic needs as it appears likely to do. It may be the case that the experience of the court will be better than that in East Timor.

## What can the legacy of the court be and what are its limits? The view from Freetown

There appear to be two divergent views within Freetown about the possible legacy of the Special Court "beyond leaving behind a building." While registry and prosecution staff is optimistic about the Court's potential in this regard, many NGOs and some diplomats are more circumspect, if not frankly pessimistic. While many agree that the physical infrastructure, at least, will benefit the local judicial system after the court vacates it, even that is a matter of some dispute.

Robin Vincent, the Court's Registrar, offers three types of legacy that the court may leave for Sierra Leone--bricks and mortar, people (training), and organizational structures.<sup>90</sup> Most obviously, the court facility that will remain in Freetown after the court completes its work is impressive indeed--it offers modern courtrooms, an extensive library specializing in international humanitarian and human

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rights law, a secure and sanitary detention facility, and office space for the prosecution, defense, and other staff. With regard to people, despite criticism of the court as western, approximately half of court staff is Sierra Leonean. Registry staff are approximately 60% Sierra Leonean, and the Outreach staff are entirely Sierra Leonean; the finance staff are all African, though not all Sierra Leoneans.<sup>91</sup> The detention facility currently employs approximately 40 Sierra Leoneans, who will bring their training in international standards to the domestic penal system when they return to work there. The internship program endeavors to takes on roughly equal numbers (10-12) of international and national interns but in reality this has proved difficult because of a lack of Sierra Leonean applicants, although their applications through local universities have been strongly encouraged. According to Vincent, while Sierra Leoneans are employed in a mixture of administrative and professional posts that tilts towards the administrative, there are 16 Sierra Leoneans in professional positions across the court.<sup>92</sup> Finally, the court can bequeath training and proper judicial practice to a judiciary that has notoriously been corrupt and subject to political manipulation, and which essentially collapsed during a decade of conflict. The Special Court has conducted a survey of the Chief Justice's own office and made key recommendations to aid organization and capacity-building. The court will invite the Attorney General to send observers, and has done an evaluation for the Chief Justice of key needs of the judiciary.<sup>93</sup> The Court will invite the Chief Justice to send national judges to observe proceedings. The jurisprudence of the court itself offers a demonstration of the rule of law and due process in a country that has seen little of either, including procedural protections for witnesses and defendants alike.<sup>94</sup> Perhaps the greatest legacy is none of the specific benefits suggested above, but that of combating impunity in a country and a region where it has prevailed, demonstrating

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For each of these prospective benefits of the court, there are detractors who say that such benefits are overstated or entirely illusory. Even the structure itself is not without its detractors. Many have argued that the court facility is an expensive white elephant, costly to maintain and ill-designed for the functioning of an ordinary judiciary, should the domestic courts seek to move into it. Even Vincent recognizes that once the site is turned over to the national government, it will be costly to maintain.<sup>96</sup> Some have suggested that the court ought never have been built, that the national law courts and prison facility would have served the same purposes and had an important symbolic effect for the country and the bolstering of the judicial system. Others have suggested that the facility might still be of great use, but might better be used not by the domestic courts, but as a training facility, either for the sub region or for Africa, on international humanitarian and human rights law. Alternatively, it has been reported that the court might extend its jurisdiction to Liberia, or that the site could be used as the site of any Special Court for Liberia, both suggestions that are contentious. The Special Court for Sierra Leone will not extend its jurisdiction to Liberia, but the site could be used if a Special Court is to be set up for Liberia. This however is speculation only and not based on any fact.<sup>97</sup>

Skeptics question whether the court will have a significant impact in terms of training personnel who will return to the local judiciary or corrections system, noting that many are likely to leave Sierra Leone to reap the benefits of that training, and that many who do return to domestic work will be disappointed not only by small salaries

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but also poor working conditions. Some allege that a brain drain has already begun, with many local UNAMSIL staff pursuing opportunities abroad. They suggest that, perversely, the legacy might be to deprive Sierra Leone of many of its most skilled, rather than improving local capacities.<sup>98</sup> Skeptics also doubt that institutional or organizational capacities will be improved, suggesting that embedded corruption in the judicial and other sectors must first be rooted out, and that this will be a daunting task.<sup>99</sup> Finally, there are some that doubt that some of the key "big men" responsible for atrocities in Sierra Leone are not in the custody of the court, as they are either dead, in hiding, or outside of the country. Western diplomats and human rights NGOs, then, are skeptical about the potential for the court's legacy, seeing the meaning of the term as "elusive,"<sup>100</sup>

Some skeptics go further, worrying that the court might well bequeath a 'negative' legacy, either because it continues to be viewed as a political tool, or because the international funding poured into it has a distorting effect not just upon the local economy, but specifically on the development or reconstruction of the weak legal sector.<sup>101</sup>

## *Timing and security: did the Court begin operations too early?*

The UN peacekeeping operation, UNAMSIL, and the DDR process have been widely viewed as successful.<sup>102</sup> Nonetheless, there were concerns from the outset that the operation of the Court would begin too early, perhaps undermining DDR if fighters feared indictment. Happily, these fears do not appear to have been borne out.<sup>103</sup> Nonetheless, many skeptical NGO observers suggest that the Court did begin operation too early, examining crimes and societal rifts best left to heal; many have

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even suggested that a delay of five years or so would have been appropriate.<sup>104</sup> Conversely, the Prosecutor points out that any delay might have undermined justice, making it more difficult to obtain perpetrators, witnesses, and evidence; as it stands one key perpetrator, Foday Sankoh, died while in custody of the court.<sup>105</sup> As discussed above, the issue of timing has been fraught in other ways, with substantial disagreement as to the viability of operating a commission of inquiry and a court simultaneously.

# After UNAMSIL—prospects for peace, security, and justice

Individuals interviewed for this research from a variety of sectors in Sierra Leone expressed pessimism regarding the future of Sierra Leone after the withdrawal of UNAMSIL. This was often articulated as an expectation that, simply, after withdrawal, fighting would resume. In some instances this was couched as likely to come in the form of an attack from outside, in others as a re-mobilization of combatants. In general, there was skepticism that the government could or would provide basic services or address corruption, which were seen as key "root" causes of the conflict, and far greater faith in international than national actors to provide for services and security.<sup>106</sup> This widespread expectation that conflict will resume may also have a dampening effect either upon the functioning or impact of the court—to the degree that people fear retribution for testifying or otherwise cooperating with the court, they are less likely to do so.

## A Special Court for Liberia?

Many of the lessons learned from the experiences of the SCSL may prove to be relevant for any future prosecutions in Liberia, beyond the issue of the pursuit of Charles Taylor. But the SCSL might also have a more direct impact upon Liberia. In addition to discussions of the creation of a similar court for Liberia, the idea has been



floated that the court could itself take up Liberia-centered cases. Further, there has been some suggestion that the site of the SCSL could be used for any Liberia court, if created. The perceived linkage to the SCSL in Liberia is such that, according to one interviewee, there is a widespread belief amongst demobilizing Liberian fighters that the card issued them to entitle them to DDR benefits will also be used to identify them for indictment before the SCSL.<sup>107</sup> In the meantime the transitional Liberian government announced the creation of a Truth and Reconciliation Commission in November 2004. This commission may become contentious itself, as according to sources the members had been selected in the summer of 2004, well before any such commission was formally mandated, leading to speculation that it would be biased.<sup>108</sup> *Conclusion: problems and prospects of mixed justice* 

I have suggested that mixed tribunals might not be able to address the flaws of internal and external justice in the ways that their advocates suggest that they might. I then turned to the somewhat unrealistic expectations placed upon the Special Court for Sierra Leone to consider the prospects for that institution in addressing key concerns for that society. I argued that the Court has significant shortcomings that may limit its ability to operate successfully or contribute to the needs of that post-conflict country. I suggested further that the expectations placed upon the Court in particular to provide capacity building and a broader legacy for the country's judiciary may be unrealistic. I argue that trials in mixed tribunals, like those in purely domestic or international institutions, are not necessarily a panacea, addressing all needs of societies emerging from violence, repression, or war.

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University of Maryland School of Law and from October of 2005 will be Professor of Human Rights at the University of East London School of Law. She is author of CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE VS. PEACE IN TIMES OF TRANSITION (2004), and GLOBALISING JUSTICE FOR MASS ATROCITIES: A REVOLUTION IN ACCOUNTABILITY (2005). The author gratefully acknowledges the support of the British Academy for field research in Freetown, Sierra Leone, during summer 2004 under Grant No. SG-3725; the author also gratefully acknowledges the time and space granted by the Rockefeller Foundation's Bellagio Study and Conference Center, which aided immeasurably in the writing-up process.

<sup>1</sup> The literature on the subjects of both transitional justice and international criminal accountability is too expansive to be fully cited here. Important works include, to note just a few, STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBURG LEGACY (2001); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995); PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001); RAMA MANI, BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR (2002). Most have been works of international lawyers or policy analysts, although mainstream political science has begun to address these issues more directly. *See, e.g.*, Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5 (2004).

<sup>2</sup> On the "undemocratic" objection, *see* Madeline Morris, *The Disturbing Democratic Defect of the International Criminal Court,* 12 FINNISH Y.B. INT'L L. 109 (2001). <sup>3</sup> See Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301 (2003).

<sup>4</sup> Beth K. Dougherty, *Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone*, INT'L AFF., Mar. 2004, at 311.

<sup>5</sup> This literature too is burgeoning. Important works include BARBARA WALTER, COMMITTING TO PEACE: THE SUCCESSFUL SETTLEMENT OF CIVIL WARS (2002); ENDING CIVIL WARS: THE IMPLEMENTATION OF PEACE AGREEMENTS (Stephen John Stedman et al. eds., 2002); PEACEBUILDING AS POLITICS: CULTIVATING PEACE IN FRAGILE SOCIETIES (Elizabeth M. Cousens & Chetan Kumar eds., 2001).

<sup>6</sup> See generally JOHN HIRSCH, SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY (2001). On the regional dimensions of the conflict, see Michael Pugh et al., Sierra Leone in West Africa, in WAR ECONOMIES IN A REGIONAL CONTEXT [PAGE] (2004) and Comfort Ero & Jonathan Temin, Sources of Conflict in West Africa, in EXPLORING SUBREGIONAL CONFLICT: OPPORTUNITIES FOR CONFLICT PREVENTION 141 (Chandra Lekha Sriram & Zoe Nielsen eds., 2004); see also WEST AFRICA'S SECURITY CHALLENGES: BUILDING PEACE IN A TROUBLED REGION (Adekeye Adebajo & Ismail Rashid eds., 2004).

<sup>7</sup> Peace agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, U.N. SCOR, Annex U.N. Doc. S/1999/777 (July 7, 1999), available at http://www.sierra-leone.org/lomeaccord.html [hereinafter Lomé Accord]; for the mandate of the United Nations Mission in Sierra Leone (UNAMSIL), see SC RES 1270, UN Doc. S/RES/1270 (1999), available at

http://www.un.org/Depts/dpko/missions/unamsil/mandate.html.

<sup>8</sup> See Special Court Agreement, 2002, Ratification Act, 2002 Supplement to Sierra

Leone Gazette, vol. CXXX, No. II (Mar. 7, 2002) [hereinafter Ratification Act 2002] (outlining the administration of the Special Court). *See generally* Abdul Tejan-Cole, *The Special Court for Sierra Leone: Conceptual Concerns and Alternatives*, 1 AFR. HUM. RTS. L.J. 107 (2001).

<sup>9</sup> See S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., U.N. Doc. S/Res/1315 (Aug. 14, 2000).

<sup>10</sup> See Statute for the Special Court, Office of the Attorney General and Ministry of Justice, Special Court Task Force, art. 1 (Jan. 16, 2002) [hereinafter Special Court Statute].

<sup>11</sup> See id. art. 2.

<sup>12</sup> See Ratification Act 2002, supra note 8.

<sup>13</sup> See Special Court Statute, *supra* note 10, at art. 12.

<sup>14</sup> See id.

<sup>15</sup> See id.

<sup>16</sup> See Lomé Accord, supra note 7, at art. VI. See generally on the Commission,

Laura Hall & Nahal Kazemi, Prospects for Justice and Reconciliation in Sierra

Leone, 44 HARV. INT'L L.J. 287 (2003).

<sup>17</sup> See Truth and Reconciliation Commission Act 2000, ¶6 (Feb. 2000), available at

http://www.sierra-leone.org/trcact2000.html.

<sup>18</sup> See id.

<sup>19</sup> See Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L. L. 436, 452-53 (2002).

<sup>20</sup> See id. at 456.

<sup>21</sup> Kim Lanegran, The First Two Years of the Special Court for Sierra Leone, Paper

presented at International Studies Association Annual Conference (Mar. [X], 2004).

<sup>22</sup> In particular, many of the Sierra Leonean commissioners were viewed as demonstrating a bias in favor of the government and its supporters during the hearings. Interviews with NGO and UN officials, in Freetown, Sierra Leone (July 2004); National Forum for Human Rights, Report on Monitoring the Two Transitional Justice Mechanisms in Sierra Leone (Special Court for Sierra Leone and the Truth and Reconciliation Commission) (July 2004) (photocopy on file with author).

<sup>23</sup> Interview with David Crane, Prosecutor of the Special Court for Sierra Leone, in Freetown, Sierra Leone (July 6, 2004).

<sup>24</sup> Some suggested that the operation at the same time was not necessarily bad, but that it ought not have been allowed to occur accidentally, as it did in Sierra Leone, but only if done by careful design. Interview with Bert Theuermann, UNAMSIL Child Protection Adviser, in Vienna, Austria (July 1, 2004).

<sup>25</sup> Telephone Interview with William Schabas, TRC Commissioner (June 9, 2004); Interview with Bert Theuermann, UNAMSIL Child Protection Adviser, in Vienna, Austria (July 1, 2004); Interviews with several Sierra Leonean NGOs, in Freetown, Sierra Leone (July 2004); National Forum for Human Rights, *supra* note 22. Many who testified did so in the hope of some reparations or remunerations and were disappointed at not receiving these; others such as President Kabbah were seen as using their own testimony as a political platform.

<sup>26</sup> Interviews with UN officials and local NGOs, in New York and Freetown, Sierra Leone (June and July 2004).

<sup>27</sup> National Forum for Human Rights, *supra* note 22.

<sup>28</sup> See Ratification Act 2002, supra note 8, at part III, art. 11(2).

<sup>29</sup> 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 BROOKLYN J. INT'L L. 361 (2001).

<sup>30</sup> Suzannah Linton, *Cambodia, East Timor, and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 185, 233-34 (2001).

<sup>31</sup> Ratification Act 2002, *supra* note 8, at part III, art. 13.

<sup>32</sup> See id. part IV, art. 15.

<sup>33</sup> See id. part IV, art. 19.

<sup>34</sup> Robert Cryer, *A "Special Court" for Sierra Leone*?, 50 INT'L & COMP. L.Q. 435 (2001).

<sup>35</sup> Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L.J. 391, 417 (2001).

<sup>36</sup> Schocken, *supra* note 19, at 453-54.

<sup>37</sup> *Id*.

<sup>38</sup> The Secretary General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 43 & n.9, U.N. Doc. S/2004/616 (August 23, 2004); Interview with Derek Smith, Second Secretary, Press and Public Affairs, British High Commission, in Freetown, Sierra Leone, (July 13, 2004); Interviews with Court staff, not for attribution, in Freetown, Sierra Leone, (July 2004).

<sup>39</sup> Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, Nov. 30, 1996, <u>http://www.sierra-leone.org/abidjanaccord.html</u>.

<sup>40</sup> Fritz & Smith, *supra* note 35, at 411-12.

<sup>41</sup> Tejan-Cole, *supra* note 8, at 115-16.

<sup>42</sup> See generally Michael A. Corriero, *Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone*, 18 N.Y.L. SCH, J. HUM, RTS, 337 (2002).

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<sup>43</sup> Corriero, *supra* note 42, at 348-48.

<sup>44</sup> Sierra Leone: Special Court will not Indict Children-Prosecutor, UN

INTEGRATED REGIONAL INFORMATION NETWORK, Nov. 4, 2002,

http://www.irinnews.org/report.asp?ReportID=30752&SelectRegion=West\_Africa&S electCountry=SIERRA\_LEONE.

<sup>45</sup> Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), *Decision on preliminary motion based on lack of jurisdiction (Child recruitment)* (May 31, 2004).

<sup>46</sup> See generally Macaluso, *supra* note 29.

<sup>47</sup> For criticism of these arguments, see Macaluso, *supra* note 29.

<sup>48</sup> See Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals

Chamber of the Special Court of Sierra Leone, Case nos. SCSL-2004-15-AR72(E)

and SCSL-2004-16-AR72(E) (Mar. 13, 2004).

<sup>49</sup> The Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-I, *Indictment* 

(March 3, 2003), available at http://www.sc-sl.org/taylorindictment.html.

<sup>50</sup> Nigerian High Court Agrees to Review Charles Taylor Asylum, GLOBAL POL'Y FORUM, June 3, 2004,

http://www.globalpolicy.org/intljustice/wanted/2004/0603agree.htm.

<sup>51</sup> Sierra Leone: Taylor could be tried upon request by Liberian Government, UN

# INTEGRATED REGIONAL INFORMATION NETWORK, June 28, 2004,

http://www.irinnews.org/report.asp?ReportID=41902&SelectRegion=West\_Africa&S electCountry=SIERRA\_LEONE.

<sup>52</sup> International Court of Justice, *Liberia applies to the International Court of Justice in a dispute with Sierra Leone concerning an international arrest warrant issued by the Special Court for Sierra Leone against the Liberia President*, ICJ PRESS RELEASE 2003/26 (Aug. 5, 2003), http://www.icj-

cij.org/icjwww/ipresscom/ipress2003/ipress2003/ipresscom2003-

<u>26\_xx\_20030805.htm</u>.

<sup>53</sup> *Taylor's Lawyers File Petition against Special Court*, UN INTEGRATED REGIONAL INFORMATION NETWORK, Mar. 16, 2004.

http://www.irinnews.org/report.asp?ReportID=40087&SelectRegion=West\_Africa&S electCountry=LIBERIA-SIERRA\_LEONE.

<sup>54</sup> Liberia: Parliament Rejects Petition for Taylor to be Tried in Sierra Leone, UN INTEGRATED REGIONAL INFORMATION NETWORK, Aug. 13, 2004,

http://www.irinnews.org/report.asp?ReportID=42068&SelectRegion=West\_Africa&S electCountry=LIBERIA.

<sup>55</sup> Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I *decision of 31 May 2004*, ¶¶ 40, 42. *See generally* C. Jalloh, *Immunity from Prosecution for International Crimes: The Case of Charles Taylor and the Special Court for Sierra Leone*, ASIL INSIGHTS (October 2004), <u>http://www.asil.org/insights/insigh145.htm</u>.

<sup>56</sup> Prosecutor v. Augustine Gbao, Case No. SCSL-2004-15-AR72(E) (May 25, 2004); Prosecutor v. Allieu Kondewa, Case No. SCSL-2004-14-AR72(E) (May 25, 2004); Interviews with human rights NGOs, in Freetown, Sierra Leone (July 2004).

<sup>57</sup> Author's discussions with Alpha Sesay, in Freetown, Sierra Leone (July 2004).

<sup>58</sup> I discuss this case as well as the dispute between the Court and the TRC regarding testimony by Hinga Norman at the TRC below.

<sup>59</sup> Roundtable discussion with members of the Human Rights Clinic, Fourah Bay College, University of Sierra Leone, in Freetown (July 20, 2004); Interview with Sulaiman Jabati, Coalition for Justice and Accountability, in Freetown, Sierra Leone (July 16, 2004).

<sup>60</sup> Roundtable with Human Rights Clinic, *supra* note 59; Interview with Jabati, *supra* note 59; Interview with Valnora Edwin, Campaign for Good Governance, in Freetown, Sierra Leone (July 13, 2004). *Kamajors never fought on their own*, AWOKO (Freetown), March 26, 2004, front page.

<sup>61</sup> Interview with Edwin, *supra* note 60. Interview with Christof Kurz, International Rescue Committee, Freetown, (July 10, 2004). *Special Court for Foreign Audience Only*, THE NEWS (Freetown), March 19, 2003. Note that this objection may be overstated--the Chief of the Court's Press and Public Affairs section notes that local press tend not to point out the nationality of the prosecutor as they once did, and that the announced departure of the registrar, a Briton, was viewed with genuine sadness by local press. Robin Vincent has since reconsidered his resignation and is staying after being asked to by the United Nations and several governments including the GOSL. Interview with Allison Cooper, SCSL Press and Public Affairs, in Freetown, (July 16, 2004). It is further worth noting that both the registrar and prosecutor were appointed in consultation with the government of Sierra Leone, and that the head of outreach is a Sierra Leonean.

<sup>62</sup> Such a conspiratorial view may well be overstated. Note that the American

Prosecutor, an avid proponent of the model, argues not that hybrid tribunals can replace the ICC but that they might be part of the ICC treaty's scheme of complementary jurisdiction, acting where national courts are unable to act, but in lieu of the ICC where appropriate. Interview with Crane, *supra* note 23. However, this may be in line with the suggestion by US Ambassador at large for war crimes that the *ad hoc* must complete work by 2007/8 and that the US will provide support for domestic trials; *see* Stacy Sullivan, *United States Calls for Dissolution of UN War Crimes Tribunals*, CRIMES OF WAR PROJECT, (March 6, 2002),

# www.crimesofwar.org/onnews/news-dissolution.html.

<sup>63</sup> Roundtable with Human Rights Clinic, *supra* note 59; Interview with Lawrence Sesay, of Post-Conflict Reintegration for Development and Empowerment (PRIDE), in Freetown (July 15, 2004) (with supplemental comments from PRIDE staff). A repeated claim in interviews was that most Sierra Leoneans would have been satisfied with seeing prosecutions of the RUF and the AFRC; there seemed to be a persistent objection to the idea that all parties, including government-supported ones, should on principle be subject to the Court's jurisdiction.

<sup>64</sup> Macartan Humphreys & Jeremy M. Weinstein, What the Fighters Say: A Survey of Ex-Combatants in Sierra Leone June-August 2003 (Interim Report, July 2004, on file with current author).

<sup>65</sup> PRIDE & ICTJ, EX-COMBATANT VIEWS OF THE TRUTH AND RECONCILIATION COMMISSION AND THE SPECIAL COURT IN SIERRA LEONE (2002),

<u>http://www.ictj.org/downloads/PRIDE%20report.pdf</u>. It should be noted that the concept has expanded over time, with additional 'R' terms being added, such as rehabilitation, etc., but for the sake of this analysis I use the original term. For an

excellent analysis of the DDR process in Sierra Leone, see Desmond Molloy, The DDR Process in Sierra Leone: An Overview and Lessons Learned, (Draft, DDR Coordination Section, UNAMSIL) (June 2004) (unpublished, on file with author); see also Bengt Ljunggren & Desmond Molloy, Some Lessons in DDR, The Sierra Leone Experience (June 2004) (draft on file with author) and Desmond Molloy, Brief, DDR Coordination Section UNAMSIL for Visit of Security Council to Sierra Leone, 24/25 June 2004, (draft on file with author).

<sup>66</sup> Interview with Binta Mansaray, Outreach Director, SCSL, in Freetown (July 22, 2004) and Interview with Cooper, *supra* note 61.

<sup>67</sup> Interview with Valnora Edwin, Campaign for Good Governance, in Freetown (July 13, 2004); Interview with Wilfred Bangora, National Forum for Human Rights, in Freetown (July 15, 2004).

<sup>68</sup> Interview with UN official, not for attribution, in Freetown (July 19, 2004).

<sup>69</sup> Interview with Lawrence Sesay, and other staff of PRIDE, in Freetown (July 15, 2004) and numerous other interviewees concurred on this point.

<sup>70</sup> Interview with Crane, *supra* note 23; Interview with Desmond Molloy,

UNAMSIL DDR Expert, in Freetown (July 9, 2004) and numerous others concurred on this point.

<sup>71</sup> Interview with Molloy, *supra* note 70. However, this fear remains a valid one for the future. A team from the Special Court visiting Liberia in July to provide information about the Court learned that the rumor amongst some fighters undergoing DDR there was that their cards, issued to provide them access to DDR programs and benefits, had a secondary purpose--to identify them for indictment before the SCSL. Interview with Allison Cooper, SCSL Press and Public Affairs, in Freetown (July 16,

# 2004).

<sup>72</sup> Special Court Lied Against Me... Norman... Defence Lawyers Drag Special Court to Court, CONCORD TIMES (Freetown), Jan. 27, 2004, front page; As Courthouse Opens Police Clamp Down on Free Norman Supporters, CONCORD TIMES (Freetown), Mar. 11, 2004, at [PAGE]; Kamajor administrator arrested for talking to Norman, CONCORD TIMES (Freetown) Jan. 28, 2004, at [PAGE]; More headache for Special Court: Hinga Norman Planning a Coup?, STANDARD TIMES (Freetown), Jan. 22, 2004, at [PAGE].

<sup>73</sup> Watch out, Sierra Leoneans!! The Special Court Could Leave and Ugly Legacy Behind, THE DEMOCRAT (Freetown), April ?, 2004, at 3 [author's note: the day was obscured on all pages of this edition of the paper].

<sup>74</sup> PRIDE & ICTJ, *supra* note 65, at 16-17.

<sup>75</sup> Interview with Crane, *supra* note 23; Interview with Binta Mansaray, *supra* note 66.

<sup>76</sup> E-mail communication from Patrick Fatoma, Senior Outreach Associate, SCSL, to author (July 28, 2004).

<sup>77</sup> Interview with Mansaray, *supra* note 66.

<sup>78</sup> Interview with Mansaray, *supra* note 66.

<sup>79</sup> Interviews with Edwin and L. Sesay and PRIDE staff. But compare this with the relatively positive effect of sensitization efforts recorded by PRIDE & ICTJ, and willingness to participate in the TRC process even if information were to be shared with the Court. PRIDE & ICTJ, *supra* note 65, at 4-5, 7. The report, completed in 2002, may reflect positive attitudes that declined but summer of 2004, or may yet provide a fuller reflection of attitudes than do individual opinions provided in

interviews to this author.

<sup>80</sup> Interview with Mansaray, *supra* note 66.

<sup>81</sup> Interview with member of court staff, not for attribution, in Freetown (July 12, 2004); see discussions of the Hinga Norman disputes elsewhere in the chapter. Even the decision to grant Hinga Norman's petition to represent himself before the court is viewed with suspicion in some quarters. *See* Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the statute of the Special Court, SCSL-2004-14-T (June 8, 2004).

<sup>82</sup> Fritz & Smith. *supra* note 35, at 403-07.

<sup>83</sup> International Center for Transitional Justice, The 'Legacy' of the Special Court for Sierra Leone (Draft, September 2003, on file with author).

<sup>84</sup> *See id.* part III, art. 11(2).

<sup>85</sup> See Jess Bravin, Peace vs. Justice: A Prosecutor Vows No Deals For Thugs In

Sierra Leone War, WALL ST. J., July 28, 2003, at A1.

<sup>86</sup> Interview with Binta Mansaray, *supra* note 66; Interview with Alfred Carew, head of the National Forum for Human Rights, Freetown, (July 15 2004).

<sup>87</sup> Interview with Alfred Carew, *supra* note 86 (pointing out that many Sierra Leoneans belong to Secret Societies that have such rituals to address past harms); see also Aude-Sophie Rodella, Justice, Peace, and Reconciliation in Post-Conflict Societies: The Case of Sierra Leone (MALD thesis, Fletcher School, Tufts University, May 2003, on file with author).

<sup>88</sup> See Schocken, supra note 19, at 437.

<sup>89</sup> See 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.

<sup>90</sup> Interview with Robin Vincent, Registrar of the Special Court for Sierra Leone, in Freetown, (July 12, 2004).

<sup>91</sup> Interview with Robin Vincent, *supra* note 90; Interview with Binta Mansaray, *supra* note 66.

<sup>92</sup> Interview with Robin Vincent, *supra* note 90.

<sup>93</sup> Interview with Robin Vincent, *supra* note 90.

<sup>94</sup> Even human rights groups skeptical of the court have expressed the hope that the Court's exclusion of the death penalty as an option will assist in the campaign to eradicate it domestically. Roundtable with Human Rights Clinic, Fourah Bay College, University of Sierra Leone.

<sup>95</sup> Interview with Crane, *supra* note 23; Interview with Derek Smith, Second Secretary, Press and Public Affairs, British High Commission, in Freetown (July 13, 2004). This is a benefit imputed by many to the court, even its greatest skeptics.

<sup>96</sup> Interview with Robin Vincent, *supra* note 90.

<sup>97</sup> According to Bert Theuermann, the Special Representative of the Secretary General of the UN for Liberia, Jacques Paul Klein, has incidentally suggested that jurisdiction might be so extended. Interview with Theuermann, UNAMSIL's Child Protection Adviser, in Vienna, Austria (July 1, 2004). Others speculated, not for attribution, that a Liberian court might use the SCSL facilities. Interviews with UN and NGO staff, not for attribution, in Freetown (July 2004).

<sup>98</sup> Interviews with human rights and other NGOs, not for attribution, in Freetown (July 2004).

<sup>99</sup> Interviews with western diplomat, and human rights and other NGOs, not for

attribution, in Freetown (July 2004).

<sup>100</sup> Interviews with western diplomats and human rights NGOs, not for attribution, in Freetown (July 2004).

<sup>101</sup> Interview with Court staff member, not for attribution, in Freetown (July 16,

2004).

<sup>102</sup> For a skeptical view that nonetheless recognizes the accomplishments of

UNAMSIL, see Clifford Bernath & Sayre Nyce, Refugees International,

UNAMSIL—A PEACEKEEPING SUCCESS, LESSONS LEARNED (2002),

http://www.refugeesinternational.org/files/3050\_file\_RIUNAMSIL.pdf; see also

Molloy, The DDR Process in Sierra Leone, supra note 65.

<sup>103</sup> Interview with Molloy, *supra* note 70.

<sup>104</sup> Interviews with NGOs, in Freetown, Sierra Leone (July 2004).

<sup>105</sup> Interview with Crane, *supra* note 23.

<sup>106</sup> Interviews with NGOs and UN officials, not for attribution, in Freetown (July

2004).

<sup>107</sup> Interviews with UN officials, not for attribution, in Freetown (July 2004).

<sup>108</sup> CNN World Report, broadcast, (Nov. 9, 2004); Interviews with NGO staff, not

for attribution, in Freetown (July 2004).