

# **SECOND INTERIM REPORT ON THE SPECIAL COURT FOR SIERRA LEONE**

**"BRINGING JUSTICE AND ENSURING LASTING PEACE"  
SOME REFLECTIONS ON THE TRIAL PHASE AT  
THE SPECIAL COURT FOR SIERRA LEONE**



Sierra Leone's national courthouse and the historic Cotton Tree, Freetown, Sierra Leone

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**30 March 2006**

**By Michelle Staggs**

<b>1.</b>	<b>INTRODUCTION</b>	<b>3</b>
<b>2.</b>	<b>REPORT OBJECTIVES</b>	<b>4</b>
<b>3.</b>	<b>TRIAL CHAMBER I: UNDER THE SWAY OF THE INDICTMENT</b>	<b>5</b>
3.1	Trial Timetable	6
3.2	Trial Management	6
3.3	Approach of the Chamber: Indictment-oriented	7
3.4	Brief Overview of the CDF and RUF trials	10
3.5	The CDF Trial: Politics, Religion and the Trial Process	11
3.6	Brief Overview of the Prosecution’s Case in the CDF trial	12
<b>4.</b>	<b>TRIAL CHAMBER II: INTERVENTIONISM, EXPEDIENCY AND THE RIGHT TO WITHDRAW AS COUNSEL</b>	<b>14</b>
4.1	Trial Management	14
4.2	Initial Incident and Background to Counsel’s Request to Withdraw	15
4.3	Decision Allowing Counsel to Withdraw	16
4.4	Decision on the Motion Requesting Counsels’ Reappointment	17
4.5	Appeals Chamber’s Decision	19
4.6	Brief Overview of the Prosecution’s Case in the AFRC Trial	20
<b>5.</b>	<b>THE SPECIAL COURT’S LEGACY: SOME REFLECTIONS ON “BRINGING JUSTICE AND ENSURING LASTING PEACE”</b>	<b>21</b>
5.1	Rule of Law and Accountability	22
5.2	Human Rights and International Humanitarian Law	23
5.3	Developing the Capacity of the National Legal Profession	24
5.4	Civil Society	25
<b>6.</b>	<b>CONCLUSION</b>	<b>26</b>

## **1. INTRODUCTION**

“Today is a most momentous occasion and an important day for international justice, the international community and above all, the people of Sierra Leone. The indictee Charles Taylor has today been safely secured...His presence sends out the clear message that no matter how rich, powerful or feared people may be – the law is above them.”<sup>1</sup>

The Special Court for Sierra Leone is at a crucial stage in its history. Over two and a half years have passed since former Head of State of Liberia, Charles Taylor, went into exile in Nigeria to escape his indictment at this international tribunal. After lengthy negotiations that have seen piecemeal, yet growing international and regional support for Taylor’s transfer, the final pieces of the diplomatic puzzle were finally put into place: upon request from democratically-elected Liberian President Ellen Johnson-Sirleaf to “bring the Taylor issue to closure”<sup>2</sup> this March, the Nigerian government invited the Liberian government to take delivery of Mr Taylor whenever it wished to do so. Taylor has subsequently attempted to flee Nigeria and was apprehended by the Nigerian police while heading towards the border of Cameroon.<sup>3</sup> He was subsequently handed over to the Liberian government and arrived at the Special Court detention centre via helicopter on 29 March. The stage is now set for Taylor, who is being charged under seventeen counts of war crimes and crimes against humanity, to be brought to justice. Given the security concerns surrounding Taylor’s detention in Freetown, speculation surrounds whether the trial will be conducted in The Hague instead.<sup>4</sup>

At the Special Court itself, the trials of the nine accused allegedly forming part of the high command of the Armed Forces Revolutionary Council (the “AFRC”), the Civilian Defence Forces (the “CDF”) and the Revolutionary United Front (the “RUF”) continue. In the CDF case, arguably the court’s most controversial detainee, Chief Samuel Hinga Norman, recently abandoned his stance to remain absent from the proceedings and returned to Trial Chamber I to take the stand.<sup>5</sup> Norman’s return heralded a shift in the focus of the trials, as the Chambers move from assessing the claims of the accuser to those of the accused in two out of three cases.<sup>6</sup> This shift in focus has been accompanied by a general scaling down of the prosecution’s staff and a number of key personnel changes at the Office of the Prosecutor, the most notable being the former Deputy Prosecutor, Desmond de Silva, replacing David Crane as Prosecutor in July 2005. As several of the prosecution’s trial attorneys leave Freetown, they take with them much of the institutional knowledge of the case against the accused, but this seems not to perturb the new Prosecutor: it is consistent with the prosecution’s strategy to require fewer, more experienced attorneys to conduct cross-examination of the defence’s witnesses at this stage of the trial.<sup>7</sup>

Surprisingly, corresponding shifts increasing the defence teams’ budgets have not been forthcoming, with a massive decrease in the projected defence budget for 2005/06 of 70 per cent.<sup>8</sup> This corresponds with an overall decrease in funding for the Court: as at 30 September 2005, the Court did not have assured funding for more than USD9.8 million for the forth coming year, less than half its anticipated annual budget.<sup>9</sup> Without adequate fiscal support from the United Nations and the backing of the international community, the momentum required to sustain the trials to completion will largely be undermined, as many begin to question the relevance of the Court as a whole, if not to fulfil the aims broadly articulated under Resolution 1315.<sup>10</sup> Strong leadership is needed – both at the supra-structural and internal level - through the post-trial and legacy phases of its completion strategy in order for the Court to endeavour to fulfil its mandate credibly “to bring justice and ensure lasting peace”<sup>11</sup> in Sierra Leone. It is hoped that a renewed sense of support for the court will follow the much anticipated and sought after transfer of Taylor, given he is largely perceived to have fuelled the conflict in Sierra Leone.

## **2. REPORT OBJECTIVES**

This report is the second in a series of interim analysis reports issued as part of a permanent international monitoring programme at the Special Court for Sierra Leone in Freetown.<sup>12</sup> The international monitoring team comprises recent graduates, academics and lawyers who monitor the trials and conduct research on behalf of The War Crimes Studies Center for The University of California, Berkeley. The first of the analysis reports was issued by Sara Kendall and Michelle Staggs in April 2005. The international monitoring team also issues weekly monitoring reports, giving readers an overview of the proceedings at trial. At present, Alison Thompson is writing weekly reports covering the CDF and RUF trials underway in Trial Chamber I. Trial Chamber II has currently adjourned proceedings in the AFRC trial. However, the decision regarding the “Motions for Judgment of Acquittal” in the AFRC trial is being handed down on 31 March 2006. All the reports produced by the team for the Center can be accessed on-line at: <http://ist-socrates.berkeley.edu/~warcrime>.

The purpose of this second interim analysis report is to provide the reader with a snapshot of the trials currently underway at the Special Court, a short synopsis of some of the issues raised during the last year in the Court’s history and a brief overview of the Court’s current hopes for its legacy and the progress it is making in moving towards it. The report engages in an analysis and critique of the proceedings at the Court and in this sense, does not adopt the more neutral reportage-style of the weekly reports. As such, the reader should bear in mind that, unlike the weekly reports, the critique of both the trials and the approaches adopted by the Chambers in this report includes the opinions of the author. The reader is therefore encouraged to review this report in light of the weekly reports referred to in the footnotes, as well as the court’s own website, should she wish to attain a broader, more objective understanding of the issues canvassed herein.

The report is divided into three sections, which comprise a review of some of the more significant decisions relating to the proceedings in each of the two Trial Chambers and a brief review of the cases (in the first two sections) as well as a discussion of the Court’s current hopes for its legacy and the progress it is making in moving towards it (in the third section). As a result, the report looks both retrospectively and prospectively.

In its retrospective assessment, as the prosecution has closed its case in the CDF and AFRC trials, a brief analysis of the prosecution’s case in each of these trials is also included. An analysis of the prosecution’s case in the RUF trial will be included in the next interim analysis report. Any assessments made of the prosecution’s case or the Chamber’s approaches represent the views of the author and should not be attributed to the interviewees cited in it unless specifically stated as such. For ease of reference, the three trials currently underway at the Special Court will be referred to as the CDF trial, the RUF trial and the AFRC trial, making reference to the alleged groups of armed forces for which each group of co-accused on trial are said to be members.

In its prospective assessment, the report looks more specifically at the hopes that the Court has for its legacy by canvassing some ideas that may become the subject of its “Legacy White Paper” – a document currently being produced by the Registry that acts as a work in progress for the Court’s aspirations in this regard. While the Legacy White Paper itself has not been disclosed to The War Crimes Studies Center, the themes discussed in it have been. These are: the rule of law and accountability; human rights and international humanitarian law; civil society; and developing the capacity of the national legal profession. These thematic priorities and the form they may take are therefore discussed in this final section.

### **3. TRIAL CHAMBER I: UNDER THE SWAY OF THE INDICTMENT**

Trial Chamber I began the trial phase of proceedings in June 2004. Since that time it has concurrently heard the CDF trial and the RUF trial which, since November of that year, have been running on a six weeks on, six weeks off basis.<sup>13</sup> The prosecution closed its case in the CDF trial on 17 July 2005, after hearing from a total of 75 witnesses. The defence case in that trial began on 19 January 2006.<sup>14</sup> The prosecution is approximately halfway through its case in the RUF trial, having heard 47 of an estimated 102 witnesses as at the end of the last trial session of 2005. According to the Special Court's Completion Strategy issued in May 2005, it was anticipated that the CDF trial may be completed by early 2006 and the RUF trial by the end of 2006.<sup>15</sup> These estimates appear optimistic and are likely to be revised, given the defence team for Norman alone in the CDF trial currently anticipates hearing 77 witnesses, likely to comprise hearings in at least a further three trial sessions, and the prosecution in the RUF has heard, on average, nine witnesses per trial session so far.<sup>16</sup> It seems more likely that the trial phase at the Special Court will be completed in early 2007 at the very earliest. Given the political sensitivity surrounding the Court, which came into being at the request of the current president (who will not stand for re-election), the security of the staff, the detainees and the witnesses will need to be seriously considered if the trials continue into the period during which the Sierra Leonean presidential elections are held, currently slated to be held in May of that year. Indeed, given the recent detention of former President of Liberia, Charles Taylor, security issues at the court are likely to be of significant concern even before this, if Taylor's trial is conducted in Freetown.

#### **3.1 Trial Timetable**

The Special Court was established with expeditiousness in mind, with the United Nations opting to give the Court a limited period of operation and a smaller budget in an attempt to "correct the perceived excesses of the *ad hoc* tribunals and shrink the enforcement of international criminal justice to a manageable and sustainable size"<sup>17</sup>. Added to the perceived significance of expeditiousness that led the Security Council to adopt the particular model of the Special Court is a more general concern to safeguard the right of the accused persons to a trial without undue delay, a right enshrined under Article 17 of the Court's Statute. Indeed, when proceedings lag, they can affect not only the accused persons, but the witnesses due to testify, who may be subject to lengthy disruptions in their personal lives as they are called to come to the Court on a number of occasions, only to be told that they are unable to take the stand. These concerns combine to make the pace of proceedings one of the most significant factors affecting the trials, and the judges are under constant pressure to ensure that the proceedings are conducted in a timely and efficient manner.

As a result, both Chambers at the Special Court are under pressure to release trial time-tables well in advance of trial, to ensure that the prosecution is able to prepare witnesses appropriately and that international defence counsels are able to plan their trips in and out of Sierra Leone and balance their domestic work commitments. To date, there has been general dissatisfaction expressed by members of both the prosecution and the defence with regards to the lack of notice relating to fluctuations in trial timetabling. In particular, an unexplained delay in trial scheduling that was announced less than a week before the trial was due to start in Trial Chamber I in October 2005 was met with serious criticism by international defence counsel. The delay meant the RUF trial rested from early August until 1 November 2005 (when the status conference was held), rather than starting on 18 October as anticipated. However, during that period of time, the Chamber was still working on its "Decision on Motions for Judgment of Acquittal Pursuant to Rule 98" in the CDF case, which was delivered on 21 October 2005.<sup>18</sup>

Trial Chamber I has been most recently criticised for creating conditions at trial that allow for a general slowness in the pace of proceedings. In particular, the Chamber has been characterised as a less interventionist chamber than Trial Chamber II.<sup>19</sup> At least one judge – namely, Judge Thompson - seems to have made it clear that he has adopted a prudent approach to intervention: in his opinion, the role of the judiciary does not include telling counsel how to run their cases.<sup>20</sup>

Criticism of the Chamber in this regard should, however, be viewed in light of the onerous task that it faces. The judges of Trial Chamber I are managing twice the workload of Trial Chamber II and yet they are being asked to perform to the same efficiency levels. As this is the first time in an international tribunal that this kind of case management is being attempted, the judges have had no guidance or precedent to determine how best to structure the timetable. While their peers at the *ad hoc* tribunals may have to manage multiple caseloads, they also have the benefit of rotating between morning and afternoon sessions and are afforded far greater infrastructure and support from the United Nations than the judges at the Special Court.

### **3.2 Trial Management**

As has been indicated above, the Chamber has adopted a prudent approach to controlling or reprimanding counsel for both the prosecution and the defence: it tends to exercise extreme caution before asking counsel to expand or refrain from lines of enquiry. The bench will, however, intervene to clarify the record if the evidence is unclear or confusing. The Chamber seems particularly sensitive to ensure that each co-accused has the right to full and fair representation by its counsel and that the joint trial process does not compromise his rights. While the judges may query a particular line of enquiry being pursued by defence counsel, they are generally reluctant to prohibit defence counsels from pursuing questions (even if these questions have been asked by previous counsels) until it can be shown unequivocally that these questions elicit irrelevant or repetitive testimony from the witness.<sup>21</sup>

The Chamber's cautious approach to defence counsel means that cross-examination can be extremely lengthy at times, especially in the RUF trial. Statistics released to the War Crimes Studies Center relating to the CDF and the RUF trial sessions from July 2004 to August 2005 show that, on average, the Chamber has spent approximately thirty per cent more time hearing cross-examination than direct examination in the CDF trial as opposed to approximately sixty per cent more time hearing cross-examination than direct examination in the RUF trial.<sup>22</sup> This should, however, be viewed in light of the lengthy nature of cross-examination and the relative complexity of the trials and the charges faced by the accused. Generally speaking, extensive translation is required for questions being asked of witnesses by defence counsels and interpreters are often tasked with translating the questions from English to a Sierra Leonean dialect via Krio (the country's *lingua franca*) and then to translate the answers back in the same manner.

While it has been argued that the manner in which the Chamber approaches the proceedings has compromised the efficiency of the trials, on the whole, the primary delays in the eight months have been due to the requirements associated with balancing the dual trial schedule and the needs of each trial. The switch from the four week trial schedule to the six week trial schedule meant that the pace of proceedings in the RUF trial slowed considerably, because (including the Easter break) the trial was not in session for nine-weeks in the first half of 2005 and then subsequently, there was another two month break in the second half of the year. However, at the same time, the prosecution was able to close its case in the CDF trial.

Nevertheless, it seems fair to say that some of the slow pace of the trials can be attributed to the Chamber's approach to the proceedings. This is not so much due to the lack of judicial intervention, as it is to the adoption of certain formalities that tend to cause procedural delays. This has included adopting the practice of issuing a written decision in open session each time the Chamber has decided

to hear testimony in closed session (sometimes after adjourning to deliberate on the written ruling); asking witnesses to spell the names of people and places, sometimes repeatedly (despite the availability of transcripts); and engaging in lengthy discussions about points of law or the language used by counsel which are either not directly related to the proceedings or that seem to focus unnecessarily on less relevant issues that in turn, slow the proceedings.

### **3.3 Approach of the Chamber: Indictment-oriented**

The Chamber has made it clear that the indictments for each of the CDF and RUF trials frame the contours of the cases and form the basis for their approach to both the admissibility of evidence and the disclosure obligations of the prosecution. As noted by Judge Itoe in a recent decision regarding the admissibility of evidence:

“The indictment is the foundation on which every prosecution stands, in fact, the agenda on which criminal proceedings are based. It is the instrument by which the prosecution informs the accused promptly and in detail of the nature and the cause of the charge against him or her and in so doing, *limits the number and nature* of offences on which it has decided to base its prosecution”.<sup>23</sup> [Emphasis added].

Similarly, Judge Thompson has opined that, both in the context of the disclosure of witness statements by the prosecution to the defence and in determining what evidence should be admissible at trial, the Chamber should, at all times, ensure that the “building blocks” of the indictment form the basis for allowing disclosure or admitting evidence.<sup>24</sup> In this regard, the approach adopted towards both the disclosure regime and the admissibility of evidence can be seen as “indictment-oriented” or “indictment-centric”: that is, an approach which strictly adheres to a “black letter” view of the indictment, allowing for a wide ambit of evidence relating to the charges plead to be admitted, and a narrow ambit of evidence to be admitted that could be permissible under a cumulative charging regime.

While this is procedurally consistent with established principles applied in the national and the international trial context, this “black letter” approach to the indictments does not necessarily achieve the aim of limiting the scope of the case against the accused, as is intended by the majority of the Chamber. The approach has been applied to issues raised by the prosecution in the CDF trial and the defence in RUF trial in very different contexts, but which, when viewed together, illustrate this point.

#### **3.3.1 The CDF case: Precluding Sexual Violence Testimony**

In the CDF case, the prosecution sought to include evidence of sexual violence under Counts 3 and 4 (Physical Violence and Mental Suffering), a proposition supported by the jurisprudence at the *ad hoc* tribunals.<sup>25</sup> The prosecution argued that the particulars contained in the indictment were “of an inclusive nature and do not exclude the broad range of unlawful acts which can lead to serious physical and mental harm.”<sup>26</sup> The defence argued, *inter alia*, that this was an attempt by the prosecution “to create a free amendment to the indictment by coming up with virtually anything they can to put in evidence under the rubric of ‘Other Inhumane Acts’”.<sup>27</sup> The Chamber’s majority decision concluded that evidence relating to sexual violence should be rendered inadmissible, on the grounds that the prosecution had not *specifically* plead counts of sexual violence (namely, rape, sexual slavery or forced marriage) under the indictment.

In his dissenting opinion, Judge Boutet distinguished between facts, which should be plead in the indictment, and evidence by which the facts will be proven, which may be included in pre-trial discovery. The Presiding Judge then found that witness statements disclosed to the defence in the pre-trial stages were adequate to indicate that the accused “have been on notice since before the start of trial that evidence of sexual violence would be elicited at trial...to establish the allegations set forth in Counts 3 and 4”.<sup>28</sup>

However, according to the majority of the Chamber, including the evidence would fundamentally breach the accused's due process rights under Article 17 of the Special Court Statute, because the evidence was new and the accused had not been on notice of these counts under the indictment. The majority of the judges came to this conclusion, despite the accused being on notice in both the pre-trial brief and early witness statements of the allegations of sexual violence against them. In this regard, the Chamber seemed to reject the prosecution's argument that it should adopt the practice of "cumulative charging" which has been adopted at the *ad hoc* tribunals, and which would support the evidence being admissible on the grounds that numerous counts in respect of the same conduct could be alleged.<sup>29</sup> Instead, the majority of the Chamber found that whether acts of sexual violence fall within the proscriptive ambit of "other inhumane acts" was a non-issue and determined that the indictment "as the fundamental accusatory instrument, must be framed in such a manner as not to offend the rule against multiplicity, duplicity, uncertainty or vagueness".<sup>30</sup>

### **3.3.2 The RUF case: Supplementary Witness Statements**

Consistent with the majority's "black letter" approach to the indictment, the judges have also unanimously determined that supplementary witness statements that contain allegations which are "germane to the general allegations" of the indictment should be allowed to be disclosed to the defence.<sup>31</sup> In other words, witness statements that relate to any count specifically plead under the indictment can and should be disclosed to the defence, regardless of the effect this may have on the nature of the case against the accused. The issue first arose in the CDF trial, but has since been raised in a number of motions and oral submissions plead by the defence in the RUF trial that the Chamber has ruled upon.<sup>32</sup> The defence argues that supplementary witness statements issued by the prosecution contain allegations that increase the extent to which the accused is culpable far beyond what was initially envisaged in the pre-trial documents.<sup>33</sup> Most recently, counsel for the first accused has argued that "It is impossible to conceive of any alleged crime in Sierra Leone in this period that would not be germane to this indictment, which is wider (both temporally and in terms of multiple modes of liability) and is less particularised than any indictment in any of the *ad hoc* tribunals to date."<sup>34</sup>

In response to this claim, the prosecution asserts that it is following an established procedure in the other international criminal tribunals and that the proofing of witnesses is a necessary and well-established practice in war crimes trials.<sup>35</sup> It argues that extensive proofing of witnesses is needed, given war crimes trials typically take place over a period of time and witnesses may be called upon to testify about multiple events separated in time by years. Furthermore, it notes that the complaints about the defect of the form of the indictment should have been raised at the pre-trial stages and not in terms of the disclosure regime once the trial has begun and new information that emerges throughout the trial, be it exculpatory or inculpatory, should be disclosed.<sup>36</sup>

The Chamber has adopted the approach that when supplemental statements contain evidence which was not previously disclosed, the appropriate remedy is an extension of time to allow the defence to prepare adequately for its case, rather than to exclude the evidence.<sup>37</sup> This approach is procedurally consistent with the approach adopted at the *ad hoc* tribunals. In both the *Blagojevic* and *Mrskic* cases before the International Criminal Tribunal for the Former Yugoslavia, the Trial Chambers determined that new information should be admissible but that the defence should be allowed adequate time to prepare for the new disclosure.<sup>38</sup> However, this approach has not considered the disclosure regime in the context of the distinct conditions under which witness statements have been documented at the Special Court. In certain instances, witness statements have to be written in multiple languages, or are verbally translated from the language of the witness via an interpreter into English prior to being produced in written form. Given Sierra Leone's people speak over thirteen tribal dialects, many of which have no standardised written form, the witness statements given at the outset of the trial may be decidedly different from the statements that are made years after that date.

### **3.3.3 Chamber's Approach and Alternative Approaches**

Despite the majority view being consistently indictment-oriented in both cases, the effect of this approach has demonstrated that interpretations of the guarantees afforded by Article 17 as a meaningful protection for the rights of the accused can become decidedly malleable. On the one hand, the Chamber has precluded testimony from being heard, in an effort to safeguard the rights of the accused, despite the accused being on notice of the charges against him in pre-trial documents issued before the proceedings began. On the other, the case against the accused is arguably allowed to expand throughout the course of the proceedings, as supplementary witness statements taken by the prosecution further implicate the accused in crimes committed for which he was not previously notified.

In the former case, the decision to focus on the indictment seems to have unnecessarily fettered the prosecution's capacity to lead evidence on information that was previously disclosed to the defence. As has been argued elsewhere, the prosecution had notified the defence in its pre-trial discovery that the evidence of sexual violence would be heard under the counts of Physical Violence and Mental Suffering. Despite the detailed allegations in the pre-trial brief, the majority of the Chamber asserted, "nothing in the records seems to support the Prosecution's assertion that the evidentiary material under reference had been disclosed to the Defence 'in some form' over 12 months ago".<sup>39</sup>

In the latter case, the focus on the indictment seems to have precluded the Chamber from assessing the merits of the continuous disclosure regime at the Special Court, in light of the unique context within which the Court finds itself. This, in turn, may have led them to a different assessment about the effect this regime is having on the rights of the accused. An alternative approach to the latter case would have been to explore the exigencies and difficulties associated with the disclosure regime at the Special Court and to determine whether there was any alternative to allowing for the evidence to be admitted once it has been disclosed. While the Chamber's approach to the disclosure regime is consistent with that of the *ad hoc* tribunals, given it has chosen to depart from the precedent of those tribunals in other instances (including in relation to the practice of cumulative charging), an alternative approach of the disclosure regime, while unprecedented, may not seem entirely unwarranted. An analysis of the continuous disclosure regime under the Rules as adopted by the Chamber could take into account a number of procedural and cultural factors related to proofing witnesses in the international tribunal context. This includes: the extent (if any) to which the judges should limit the number of proofings of witnesses the prosecution (and subsequently, the defence) undertakes, the language barrier that exists between the witnesses and those taking their statements, the fluidity of memory and the psychological effects of that the trauma of war has on remembering, and the extent to which witnesses feel comfortable giving witness statements at the time when they are given and how this may change over the course of the case. Some of these considerations were the subject of the prosecution's recent motions in response to the defence, but were not considered in the Chamber's decision on the subject.<sup>40</sup> While these considerations are not strictly legal, they ultimately effect the interpretation of the procedures articulated under the Rules and therefore bear some significance on any contextualised legal analysis of those Rules.

In terms of the legal regime itself, the Chamber could have also look at what alternatives the prosecution has regarding multiple proofing sessions with witnesses (if any) and assessed what implications the disclosure regime, as currently applied at the Special Court, has on the nature and proliferation of the case against the accused.<sup>41</sup>

### **3.3.4 Effect of the approach on the treatment of witnesses at trial**

The effect that these determinations have had on the witnesses themselves should also be further considered when assessing the merits of the Chamber's indictment-oriented approach. The nine

witnesses due to give evidence of sexual violence were proofed by the prosecution months in advance of the date on which they were due to testify. Proofing requires that the witness be asked to recount their statements and hence, to a certain extent, to relive the trauma of the events that they have suffered. The Chamber had indicated to the prosecution that evidence of sexual violence was inadmissible through comments from the bench during the trial. Since its decision had not been issued before the witnesses were due to testify, however, the prosecution proceeded on the basis that acts related to sexual violence were admissible. However, lengthy objections from the defence at trial once they came to testify meant that, in certain instances, the witnesses were told they could not continue with parts of their testimony or were removed from the Court proceedings altogether. The cumulative effect of these events could prove harmful for the witnesses and may result in re-traumatization, yet there was no discussion at trial of the psychological impact that these events were likely to have on them.

Furthermore, this approach to hearing witness testimony seems inconsistent with the Chamber's earlier ruling regarding evidence of cannibalism. During the course of earlier proceedings in the CDF trial, the defence raised objections to evidence of cannibalism being admitted due to its prejudicial effect on the accused, on the grounds that cannibalism was not alleged under the indictment. In that instance, the Chamber reminded counsel that they were not participating in a jury trial: the bench opined that judges are trained in the process of evaluating evidence and can therefore make determinations as to whether the evidence had probative value.<sup>42</sup> It is difficult to see why the case of sexual violence testimony led the Chamber to adopt such a fundamentally different approach to hearing the testimony of the witnesses in question.

Conversely, in the RUF trial, lengthy stays in the proceedings to allow the defence time to prepare for cross-examination following the receipt of supplementary witness statements has meant that witnesses have, in some instances, come to the Court on numerous occasions only to have their testimony postponed. In particular, Witness TF1-141, a former child combatant, was asked to attend Court proceedings on three separate occasions, upon which he was told that he was unable to testify. The witness did subsequently testify in the trial's fourth session. However, prior to this, being called to the Special Court in this manner meant that the witness missed a number of weeks of his schooling and was taken away from his family and community for extended periods of time. While the Court's Witness and Victims Support Unit did, during that time, endeavour to ensure that the witness was given adequate tutoring while in Freetown, this does not detract from the fact that the witness may have undergone some psychological anxiety from being separated from his family and friends. Although the judges may have taken this into account and determined it was simply part of the trial process, the issue was not publicly assessed by the Chamber. This is regrettable, given the effect of the trial on the witnesses seems a relevant and pertinent consideration that requires further consideration and assessment and one which is likely to be of interest to the public.

While the approach of the majority of the Chamber to the exclusion of evidence of sexual violence and the admission of allegedly "new" evidence under the disclosure regime is consistent in its indictment-centrism, it has arguably led the majority to very different conclusions about the significance of the rights of the accused when determining whether or not evidence should be admissible at trial. As a result, the "rights of the accused" has become the justification for ensuring procedural outcomes that do not so much seem to limit the number and nature of the offences for which the accused are being prosecuted, but rather serve to restrict the *kind* of evidence which can be led at proceedings.

### **3.4 Brief Overview of the CDF and RUF trials**

Apart from the symmetry of each trial trying three accused persons, the CDF trial and the RUF trial bear very little resemblance to one another and have been compared by the Presiding Judge of the Chamber to being "like night and day".<sup>43</sup> This is perhaps not surprising, given the extent of the charges being brought in the two trials, with the prosecution alleging eight counts of war crimes and crimes

against humanity in the CDF trial, as opposed to a significantly weightier eighteen counts in the RUF trial. While both indictments allege charges of unlawful killings, physical violence, looting and burning, and the novel charges of terrorizing the civilian population<sup>44</sup>, collective punishments and the use of child soldiers, the RUF indictment includes further counts of sexual violence, abductions and forced labour and attacks on UNAMSIL personnel – the United Nations Peacekeeping Force in Sierra Leone. The complexity of the RUF case is further compounded by the fact that four out of the ten additional counts have never been tried before in an international criminal tribunal.<sup>45</sup>

These differences are further compounded by the temporal and geographical ambit of the evidence being presented: approximately one third of the witnesses in the prosecution’s case against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa in the CDF trial have given crime-base evidence relating to the period between late 1997 and early 1998 in the south-eastern districts of Bo and Kenema. Insider witness testimony has tended focus on key meetings held by the three accused at “Base Zero”, alleged to be the CDF headquarters at Talia Yawbecko in the Bonthe District.<sup>46</sup> The defence’s cross-examination has focused on the relationship between the accused and the War Council (the administrative wing of the CDF alleged to have been sidelined by Hinga Norman in March 1998)<sup>47</sup>, which they argue is the real epicentre of command and control in the organisation.

The concentration of events in time and place and the presence of a more defined military structure are contrasted against the more sprawling evidence of the RUF trial and a focus on shifting command and control positions held by guerrillas in a rebel army. The prosecution’s case against Issa Sesay, Morris Kallon and Augustine Gbao spans a time period that reaches as far back as 1987, where connections were allegedly made in Libya between President Muammar Qaddafi, the former head of state of Liberia, Charles Taylor and the founder of the RUF movement, Foday Sankoh.<sup>48</sup> The testimony of key insider witnesses has dominated the prosecution’s case thus far. Their testimony often spans the entire period of the indictment and pertains to the intricacies of personality politics that dominated the movement throughout that time. Although deceased, Sam Bockarie is omnipresent at trial, and his name is consistently mentioned in witness testimony as the commander orchestrating the RUF’s operations for much of the latter half of the conflict.<sup>49</sup> As such, much of the direct examination and cross-examination in the RUF proceedings has focussed on exploring the nuances of the relationships between the upper echelons of the command structure: the relationship between Charles Taylor and Bockarie, Bockarie and the accused and the accused and other senior commanders in the RUF<sup>50</sup> has been explored in depth, and both the *de jure* and *de facto* positions of authority held by the accused are consistently challenged.

Hence, although the testimony that emerges from each trial tells a distinct narrative about the conflict, the testimony of the CDF trial almost emerges as a story within the story: the rise of the Kamajor society takes place within the wider context of rebel insurgency in Sierra Leone. This is primarily due to the allegation that the Kamajor society gained strength as a tribal fighting force only in response to the armed conflict that broke out when the members of the Revolutionary United Front crossed the border from Liberia in 1991.<sup>51</sup>

### **3.5 CDF Trial: Politics, Religion and the Trial Process**

Of the three trials, the CDF trial is seen to be the most politically sensitive, largely due to the first accused, Chief Sam Hinga Norman’s sustained attempts to retain access to his constituency from within detention at the Special Court. Due to Norman’s efforts to issue “unauthorised communications” to his supporters primarily based in South Eastern Sierra Leone, the Registrar has prohibited Norman from having visitors on two occasions.<sup>52</sup> Norman has most recently challenged the legitimacy of the newly elected leader of the Sierra Leonean People’s Party (SLPP), by filing a writ of summons in the Supreme Court contesting his election. This challenge is said to have sparked mixed reactions from SLPP

supporters, some seeing Norman's actions as efforts to tear the party apart, others seeing it as his constitutional right to fight for the leadership of the party, given he has dedicated his life to its service.<sup>53</sup>

The political sensitivities of the trial are further compounded by the presence of prominent members of the Sierra Leonean political scene acting as defence counsels for the first and third accused. Counsel for Kondewa, Charles Margai, has had a long-standing relationship with the political arena. He is the son of former president, Albert Margai, who gained leadership of the country after his brother, Sir Milton Margai, died in 1964. Charles Margai is a former MP of the SLPP and was Interior Minister of Internal Affairs between 1998 and 2002, alleged by a key prosecution witness to be the Ministry in charge of the CDF at that time.<sup>54</sup> Shortly after losing leadership of the SLPP to Solomon Berewa last year, Mr Margai founded his own political party, the Peoples Movement for Democratic Change. Despite the fact that the party is yet to be registered with the National Electoral Commission, a formal requirement in order for it to be able to participate in the 2007 elections, the Sierra Leonean press reports it has already been gaining wide spread support from the youth, particularly in the country's south-eastern provinces.<sup>55</sup>

The overt political associations of both the legal counsel for the defence and Hinga Norman himself places continuing pressure on the Chamber to be perceived as neutral to national politics in the eyes of the public, adding a further dimension to the proceedings that the judges have to grapple with. While early commentators have argued that the preclusion of politics from the trial is, in some senses, artificial, the Chamber has endeavoured to ensure that justice and politics remain in discrete and separate spheres. Even so, it seems that domestic political pressures and concerns continue to play out, both implicitly and explicitly, in the trial process.<sup>56</sup>

### **3.6 Brief Overview of the Prosecution's Case in the CDF trial**

The prosecution closed its case in the CDF trial in July 2005, after a total of five full trial sessions after calling 75 witnesses. Its case has endeavoured to tell the story of three top military commanders who began by leading a legitimate war effort that very quickly fell into demise and disrepute, as a sustained attack on the RUF/AFRC rebel forces that entered Sierra Leone in the early 1990s gave way to a "liberation effort fuelled by both by an intent to kill and the killing of civilians labelled as sympathisers, collaborators or supporters and involving the destruction and looting of towns with large civilian populations".<sup>57</sup>

The prosecution alleges that the three accused were at the epicentre of the power base that orchestrated this liberation effort and shared a revered status within the CDF and the Kamajor society. At points, witnesses have described this reverence in quasi-religious terms. One key insider witness described the accused as the "Holy Trinity of leadership" of the CDF at Base Zero<sup>58</sup> placing Norman at the pinnacle as God, Fofana as the Son, and Kondewa (as High Priest and chief of initiation rites in the Kamajor society) as the Holy Spirit. Metaphysical (and thus, unverifiable) notions of the sacred have also been prevalent throughout the other witnesses' testimony. Many witnesses have described an elaborate system of rituals undertaken by the combatants, stating that they were immunised from bullets by adhering to dietary requirements and wearing charms provided to them by their initiators. Combatants would also engage in ritualistic sacrifices to prepare themselves for war, which included some acts of cannibalism.<sup>59</sup>

Rather than attempting to secularise or fit these notions to the legal framework in which they are working, the prosecution has attempted to show that this further proves the guilt of the accused. In particular, the "mystical powers" of the third accused, Allieu Kondewa, are alleged to contribute to proving his culpability, because the prosecution maintains that a nexus existed between the accused's oversight of initiation rites for the Kamajor society and the war effort itself. The prosecution argues further that the accused's role as "the chief architect and grand master of the morale and psychological

components of the CDF military strategy and operations” made him a “pivotal operational and tactical component of the Kamajor militia.”<sup>60</sup> There has been a tacit acceptance by the Chamber of evidence of a spiritual or religious nature throughout the proceedings, despite it being anathema to the secular, fact-finding exercise of the trial itself.

Contrary to this, the defence has asserted that the actions of the accused were part of furthering the “goal of restoring democracy and protecting the lives of the civilians during a devastating time in the country’s history”.<sup>61</sup> Any deviation from this goal is then characterised by the defence as an unintentional and unfortunate consequence or bi-product of the war effort, rather than being the result of a common plan, purpose or design by the three accused and their subordinates specifically to target the civilian collaborators of the RUF/AFRC, as the prosecution alleges.

The prosecution has adopted a novel approach to the use of the Joint Criminal Enterprise doctrine. In all three indictments, the prosecution appears to be criminalizing the act of going to war itself or the act of seizing power in the territory of Sierra Leone. As one early commentator (previously employed by the Defence Office) noted, “When a nation goes to war, it is foreseeable that war crimes will be committed, but that does not make the act of war, in itself, criminal.”<sup>62</sup> Perhaps due to this novel approach, at points, the evidence led at trial relating to the alleged Joint Criminal Enterprise tends to be unclear regarding what constitutes criminal activity or a criminal enterprise. In relation to the CDF case, the former Chief of Prosecution at the Special Court argued that while the defence of the country was not criminal, the way in which that defence was carried out was.<sup>63</sup> Yet while there has been some evidence led that implicates the accused in both the ordering and commissioning of crimes, it should be noted that there have been instances at trial where the prosecution seems to have stopped short of establishing the requisite nexus between the accused, the goals of the war effort and the alleged criminal activity. For example, at various points in the trial proceedings, witness testimony regarding meetings is said to be evidence of the alleged guilt of the accused, even if the evidence does nothing more than establish that the accused attended a meeting at which matters relating to the CDF war effort were discussed.<sup>64</sup> Similarly, at other points during the trial, planning or instigating attacks against rebel and junta forces has been led as evidence against the accused, without clearly distinguishing how these attacks related to the alleged attacks on the civilian population.<sup>65</sup>

The indictment against the accused is structured such that the penultimate counts – the charges of terrorising the civilian population and collective punishments – are incorporated into the previous five counts of burning, looting, killing, physical violence and mental suffering. As such, the prosecution is endeavouring to prove that the accused lead the CDF in a campaign of terror launched against suspected collaborators and sympathisers of the RUF/AFRC forces. Evidence was led throughout the prosecution’s case suggesting that this campaign of terror included targeting ethnic groups in Sierra Leone who were perceived to be opponents of the CDF, with the Kamajors committing disproportionate levels of violations against people of Temne and Limba tribal origin.<sup>66</sup> The geographical location of these tribes is another factor that is alleged to have played into the terrorisation, with the Kamajors largely targeting non-military participants who were not from their predominantly Mende south-eastern homeland and who therefore were perceived as outsiders.<sup>67</sup> Members of the police force were allegedly targeted, as they were thought to form the bureaucratic support structure enabling the junta government to sustain its control of the territories in Sierra Leone after the Armed Forces Revolutionary Council took control in May 1997.<sup>68</sup> According to the prosecution, the scope of terrorizing the civilian population is broad and encompasses not only violence, but threats to violence. This can be “demonstrated by evidence of the psychological state of civilians at the relevant time”, including the civilian population’s way of life during the period and the short-term and long-term psychological impact of the actions comprising the terror.<sup>69</sup>

The prosecution also alleges that Norman, Fofana and Kondewa exercised authority, command and control over all subordinate members of the CDF.<sup>70</sup> The defence have vigorously disputed these

claims. Among other things, all three defence teams rely on the unique jurisdictional mandate of the Special Court, arguing that their clients are not the persons bearing the greatest responsibility for the counts in question.<sup>71</sup> Norman’s defence team argue that the prosecution have proved nothing more than the fact that Norman was “a civilian administrator, albeit a popular and well-known one with a military background, involved with the administrative leadership of the Kamajor and CDF operations”.<sup>72</sup> Counsel for Fofana argue that their client was no more than “an occasional conduit for messages to Mr Norman...at most an amateur aide de camp” and compare Fofana’s role in the conflict to one of the prosecution’s key insider witness, Albert Nallo, arguing that Mr Nallo’s criminal culpability exceeds that of their client. The prosecution disputes this allegation on the grounds that it offends the *tu quoque* principal in international law.<sup>73</sup> Kondewa’s defence centres on, among other things, the separate and distinct nature of initiation ceremonies. His defence team argues there is no nexus between the accused’s role as High Priest and Chief Initiator of the Kamajor society and the CDF’s actions in battle.<sup>74</sup> The fact that both the second and third accused are allegedly illiterate has also been used to justify their inability to understand or comprehend military reports or written orders.

In support of its claim that the accused were liable under Article 6(3) of the Statute for command responsibility of subordinates in the CDF, the prosecution has recently alleged that the evidence shows each accused had “knowledge of the general context within which his acts occurred and of the nexus between those acts and the context”.<sup>75</sup> Of the three accused, Samuel Hinga Norman appears at present to be the most widely and directly implicated: Norman has been identified by several witnesses as exercising command and control over the CDF and by some witnesses as ordering or commissioning crimes. In particular, insider witnesses have testified to the accused’s ordering of attacks at Tongo Field and Bo. The prosecution has also relied heavily on the testimony of one witness to substantiate the claim that Norman commissioned attacks against police officers, and the evidence of this witness has apparently gone unchallenged.<sup>76</sup> In contrast, the evidence against second accused is less expansive, although he is implicated as having had knowledge of several of the orders given by Hinga Norman.<sup>77</sup> Evidence specifically against the third accused, Allieu Kondewa, appears to centre around his association with the CDF Death Squad, whom he has alleged to have actively favoured, his extortion of funds from civilians, and his participation in initiations.<sup>78</sup>

The Chamber recently issued its decision regarding the defence’s motions for judgment of acquittal, in which it found that, for the purposes of satisfying the standard set out in Rule 98 of the Rules, the prosecution had brought sufficient evidence to show that the accused could be convicted under all the charges in the indictment, but that in certain instances, the charges were not made out with respect to specific geographical locations.<sup>79</sup> The Chamber made it clear that the decision in respect of Rule 98 motions did not “envisage a judicial pronouncement on the guilt or innocence of the accused” requiring instead that the Chamber deliver a “determination as to whether the evidence adduced by the Prosecution...is legally capable of supporting a conviction on one or more of the counts in the indictment”<sup>80</sup>.

The defence case for the CDF began on 19 January. The prosecution’s case in the RUF trial resumed in Trial Chamber I on 2 March 2006.

#### **4. TRIAL CHAMBER II: INTERVENTIONISM, EXPEDIENCY AND THE RIGHT TO WITHDRAW AS COUNSEL**

##### **4.1 Trial Management**

Trial Chamber II began hearing proceedings in the case against the three accused in the Armed Forces Revolutionary Council (the “AFRC”) on 7 March 2005. The Chamber has been credited for its efficiency at trial, and, in particular, for its interventionist approach, which has ensured that the bench holds a firm grip over the pace of the proceedings. This has proved to be to the benefit of the trial in

several instances with the judges intervening to ensure that counsels' lines of enquiry remain relevant, often adopting a more assertive approach to repetitive lines of questioning than Trial Chamber I.

The Chamber has also implemented a system for decision drafting and has imposed time limits on its practices to ensure that decisions are issued promptly. Despite the rate at which decisions were delivered slowing in the earlier part of last year, largely due to an increased volume of motions during the period between April and May, the Chamber has, on average, issued its decisions in a very timely manner. A survey of the decisions issued by the Chamber between September 2005 and February 2006 shows that it has taken a minimum of three days and a maximum of five weeks to determine the outcome of motions submitted to it.<sup>81</sup>

Despite these efforts to maintain efficiency in decision drafting, the Appeals Chamber has recently urged both Trial Chambers to avoid the regrettable practice of issuing concurring or dissenting opinions after the related majority decision has been rendered, a practice that "casts uncertainty on the opinion of the judges in important legal issues".<sup>82</sup> The Appeals Chamber has ruled that dissenting (or separate and concurring) opinions that are issued after the majority decision will be disregarded on appeal.<sup>83</sup>

While the Chamber's interventionist approach to the trial has generally ensured an efficient momentum is maintained during proceedings and has no doubt increased their overall pace, it has also had a wider impact on the conduct of the trial as a whole. This impact has recently met with some criticism from the Appeals Chamber, in relation to the Chamber's determinations relating to two defence counsel – namely, lead counsels for Alex Tamba Brima and Brima Bazzy Kamara. In May of 2005, mere weeks into the trial, the majority of the Trial Chamber (Sebutinde J dissenting) granted a request that these counsel be permitted to withdraw, a right afforded to defence counsel only in "the most exceptional circumstances".<sup>84</sup>

Highlighting one of the many complexities experienced due to the *in situ* status of the Special Court, the majority of the Chamber noted that this was a novel request, and they were unable to draw from precedent from either the other international tribunals or from the Special Court to deal with the issue. Almost immediately after the motion was granted, the accused persons brought a separate motion requesting that their counsel be reappointed. The Chamber was then asked to determine whether there were any merits to the claim that the accused could compel their counsel to return to their case, shortly after their counsel had requested a withdrawal. In a decision issued in June 2005, the majority of the Chamber (Sebutinde J dissenting) determined that the accused's request was "frivolous and vexatious"<sup>85</sup>. The accused persons appealed this decision and leave to appeal was granted by the Chamber in August 2005. A dissenting decision relating to the reappointment of counsel was issued by Judge Sebutinde in July, but due to its tardiness, was unable to be considered on appeal.

The decisions in question relate to two significant and interrelated issues that are important for international criminal trials as a whole: the right of counsel to withdraw from proceedings and the right (if any) of an accused person to have counsel assigned (or reassigned) to him of his or her own choosing. They are also of particular significance to the Special Court, because, as Justice Robertson of the Appeals Chamber pointed out in his separate and concurring opinion, they highlight the "novel ethical problems that can arise when defending defendants that do not wish to be defended in a war crimes court sitting in what was, until recently, a war zone."<sup>86</sup>

## **4.2 Initial Incident and Background to Counsel's Request to Withdraw**

The issue which precipitated the withdrawal of lead counsel for the first and second accused arose shortly after the Chamber opened in March 2005, when a protected witness announced that she had been threatened by four women - the three wives of the accused and a fourth friend of the accused – and felt unable to continue testifying. As a result of the incident, the defendant's wives and the friend,

along with a defence investigator accused of informing the women of the witness’s identity, were the subject of an independent investigation.<sup>87</sup> The independent investigator found grounds on which to proceed with contempt proceedings against all five contemnors. The defendant’s wives were barred from attending the proceedings and the defence investigator was suspended, pending the outcome of the investigation and their trials. The contempt proceedings were subsequently held in Trial Chamber I, with Judge Boutet presiding as the single judge in the cases. The three wives and the friend pleaded “guilty” to the charge of contempt against them and were consequently sentenced to a conditional discharge, while the defence investigator was found “not guilty”.<sup>88</sup>

The accused persons were distressed by the incident and sought to withdraw instructions from their counsel. They argued that being prohibited the right to see their wives at trial was a fundamental violation of their human rights and expressed deep concern at not being able to see them.<sup>89</sup> The matter escalated as the accused became increasingly vexed by their wives non-appearance in the public gallery. Subsequently, counsel for Brima and Kamara, Mr Kevin Metzger and Mr Wilbert Harris, respectively, requested that the Chamber allow them either to withdraw from their positions as lead counsel, a right afforded to them under the Rule 45(E) “only in the most exceptional circumstances” or to make any other order it deemed appropriate.<sup>90</sup>

#### **4.3 Decision Allowing Counsel to Withdraw: “The Most Exceptional Circumstances” Test**

Lead counsels’ application to withdraw was granted by the Chamber in an oral ruling issued by the majority on 12 May 2005. A written decision was published on 20 May 2005. The majority of the Chamber further ordered that the Principal Defender assign another counsel as Lead Counsel to Alex Tamba Brima and Brima Bazzi Kamara. The decision stated that Judge Sebutinde would be delivering a separate dissenting opinion. That opinion was issued almost two and half months later, on 8 August 2005.

As is noted in the majority decision, apart from arguing that they were experiencing a significant amount of difficulty with their clients (a situation not unknown to counsels both at the Special Court and the *ad hoc* tribunals)<sup>91</sup> and that continuing to act for the accused may conflict with the rule of their municipal Bar, counsels also submitted that there was a significant danger of threat to both themselves and their families in the conduct of their clients’ defence.<sup>92</sup> Counsels stated that the threats they faced were communicated to them from different sources and that they preferred for those sources to remain confidential. The threats included overseas telephone calls that implied danger to one of the counsel’s families, as well as local calls threatening him personally.<sup>93</sup>

The majority of the Chamber determined that, while the difficulties lead counsels were facing with their clients did not alone amount to the most exceptional circumstances<sup>94</sup>, when considered together with the “threats hanging over their heads”, the cumulative effect placed counsels under an impossible burden warranting their withdrawal from the case.<sup>95</sup> In coming to this conclusion, the judges further noted that they were unable to say that the “perception of the counsels that they and their families were being threatened was wrong”.<sup>96</sup> The basis for the majority’s determination, therefore, rests on the assessment that counsel’s perception of a threat, when considered in light of the difficulties they were experiencing with their clients, made the cumulative burden of the circumstances such that they satisfied the “most exceptional” circumstances test.

In her dissenting opinion, Judge Sebutinde asserted that the claims of both counsels, while submitted together, should be assessed individually and on their merits. She noted that there were four separate “threats” alleged, two of which were not substantiated at all by either counsel. She noted further that some of the claims seemed to be speculative and prospective, rather than actual.<sup>97</sup> Furthermore, in light of the high threshold required by Rule 45(E) of the Special Court’s Rules, Judge Sebutinde determined that, before a threat can constitute the most exceptional circumstances, “the applicant must demonstrate

not only *actual and present* danger to life and limb, but *in addition* must show that the relevant security organs of the court had failed to investigate the threats and remedy the situation”[Emphasis added]<sup>98</sup>. As such, in order for a claim to reach the high threshold required by the Rules, further action needed to be taken to attempt to remedy the situation before the request for withdrawal could be granted.

There appears to be substantial merit to the argument advanced by Judge Sebutinde. Given the gravity of abandoning a client charged with a very serious crime, an independent investigation by the security organs of the court into the threats counsel were facing may have been an appropriate remedy to the circumstances. Such a request would not have had to challenge the veracity of the claims made or the relationship between counsel and the court: while counsels’ may have perceived the threat to have been real, whether or not the threat could be removed was still open to further investigation.

Following on from this assessment, the majority of the judges determined that the peculiar elements of counsels’ request to withdraw would make it probable that there is “no reasonable likelihood of similar situations arising in the future”.<sup>99</sup> On the basis of the defence submissions outlined in the majority decision, with due respect, the situation did not appear particularly peculiar. While this may have been the first time that defence counsels had argued that this confluence of circumstances required that they withdraw, given the court’s geographical location, similar arguments – relating to perceived security threats and difficulties with defendants – could very well be submitted by counsels in the future. However, as the counsels’ applications were filed *ex parte*, confidential and under seal, it may be that there were peculiar circumstances not discussed in the decision that formed part of counsels’ submissions. The majority of the Chamber noted further, however, that each case would need to be decided on its individual merits, and that threats made to counsel would not necessarily, in every case, satisfy the “most exceptional circumstances” test. In this regard, the Chamber may interpret what constitutes the most exceptional circumstances differently in future instances that arise at trial.<sup>100</sup>

#### **4.4 Decision on the Motion Requesting Counsels’ Re-Appointment**

Shortly after the decision granting the request to withdraw was issued, the accused persons – Brima and Kamara - filed a motion requesting the reappointment of their lead counsel. They submitted that the Registrar’s decision not to reappoint their counsel was made “without legal or just cause”<sup>101</sup> and therefore should be set aside. The Chamber determined that the argument was fallacious, on the grounds that the Registrar was merely exercising his duty to uphold an order of the Trial Chamber allowing counsel’s application to withdraw.<sup>102</sup> The motion further requested that “the Justices that re-confirmed the order not to appoint” their counsel recuse themselves, because the “potential bias and potential conflicts of interest were so palpable” they felt their rights would be prejudiced if those judges did not do so.<sup>103</sup> The motion also failed on this ground, as the majority of the Chamber determined that there was no order made in the Trial Chamber refusing the re-appointment of counsel *per se*: the orders sought in the original application were for leave for counsel to withdraw from the case.<sup>104</sup>

The majority judges issued their decision on the accused’s motion in June of 2005. Judge Sebutinde again issued her dissent separately, approximately one month later on 11 July 2005. The majority decision contains a succinct discussion regarding an accused’s right (if any) to appoint counsel of his or her own choosing under Article 17(4)(d) of the Special Court’s Statute. In making its determination, the judges looked primarily at the jurisprudence of the *ad hoc* tribunals and the European Court of Human Rights. Drawing from the statements made in the brief submitted by lead counsel for Kanu, they further noted “the right of an accused to counsel ‘can be subject to certain restrictions, such restrictions should of course be interpreted in the perspective of the overall right of the accused to have a fair trial.’”<sup>105</sup> They found that while the accused persons had an absolute right to legal assistance assigned to them, that right did not carry with it an absolute right to any counsel.<sup>106</sup> In this regard, Trial Chamber II departed from Trial Chamber I’s earlier determination in the *Brima* case.<sup>107</sup> From a survey

of the jurisprudence relating to this issue it would seem that Trial Chamber II's statutory interpretation of Article 17(4)(d) is more aligned to the international jurisprudence relating to this point. As was articulated by the Appeals Chamber in the *Bagosora* case at the ICTR, "the right to free legal assistance by counsel does not confer the right to choose one's counsel. The present practice of assigning counsel is simply to accord weight to the accused's preference, but that preference may always be overridden if it is in the interests of justice to do so."<sup>108</sup>

#### 4.4.1 Alleged Bad Faith on Behalf of Defence Counsels

In the decision, the Chamber also determines that this motion is an attempt by the accused, their counsel and the Deputy Principal Defender to reverse their earlier decision.<sup>109</sup> In fact, they allege that, when viewing the history of the case, the Deputy Principal Defender has "gone out of her way to undermine their [earlier] decision".<sup>110</sup> As well as this, the majority judges find that the accused "do not genuinely wish to be represented by those particular counsel"<sup>111</sup> and that the motion was "not founded on *bona fide* motives".<sup>112</sup> They further contend that defence counsel were behaving improperly and were, in fact "not sincere in their reasons" for bringing the original motion to withdraw, which they never expected to succeed.<sup>113</sup>

There appeared to be some evidence to support the assertions relating to the motives of the accused and their counsel. The accused persons' motion to have their counsel reassigned emanated from a letter the accused wrote to the Chamber almost immediately after their counsels' request to withdraw had been granted. The closeness of the timing of these two events could suggest that, at least in relation to the arguments regarding the difficulties they faced with their clients, either the accused persons were not being sincere in their refusal to give their counsels instructions, or that the defence counsels were not entirely sincere in wanting to withdraw, or both. However, the determinations regarding the actions of the Deputy Principal Defender considered in the decision seem less clearly to point to a direct attempt to undermine the Chamber's order: while the Chamber notes that she had not made any attempt to appoint new lead counsel, it was arguable that she thought she should wait for the outcome of the motion for reappointment prior to doing so. As has been pointed out by Judge Sebutinde in her dissenting opinion, there were no fixed time frames ordered by the Chamber in which the Deputy Principal Defender had to instigate this reappointment.<sup>114</sup>

If the majority of the Chamber believed the two counsels in question were behaving unprofessionally or insincerely, or that the Deputy Principal Defender sought to undermine their order, it seems only fair that those counsels and the Deputy Principal Defender should have been given the right to answer to this claim. As was expressed by Judge Sebutinde in her dissenting opinion:

"In the absence of hard evidence that the two motions are related in any way, there is no justification for treating the present motion with suspicion and perceiving it as some kind of vexatious or underhanded scheme by the Accused persons in connivance with their former counsel (and perhaps the Deputy Principal Defender) to 'go behind the Trial Chamber's earlier decision' or to abuse court process or to avert the course of justice. To do so would, in my humble opinion, be a serious error of judgment and would amount to an abdication of our judicial duty to protect and uphold the statutory rights of the accused as guaranteed by Article 17(4)(d) of the Statute."<sup>115</sup>

In this regard, the allegations of *mala fide* motives in the majority decision detract unnecessarily from the other findings. It was sufficient that the judges found the Registrar's actions were in full compliance with their orders and that the accused persons' motion should be dismissed on this ground: they did not have to make further determinations regarding the motives of the parties, and doing so did not appear to serve any clear purpose. Furthermore (and with the benefit of hindsight) a determination to fully and publicly explore the claims of defence counsels may have had the added benefit of saving the court both time and expense, given the interlocutory appeal relating to the matter generated over 1,000 pages of evidence and argument.<sup>116</sup>

The majority of the Chamber also considered separately its right to review its earlier decision granting counsel the right to withdraw. They determined that because the motion sought to reverse an order granting the relief sought, the motion itself was frivolous and vexatious. Furthermore, they opined that they did not have the jurisdiction to revisit an earlier decision they had made.<sup>117</sup> It should be noted, however, that in relation to the merits of the substantive claim regarding counsels' reappointment, the majority of the Chamber found it had not been presented with direct evidence from counsel that their circumstances had changed. As a result, even if they had determined that they had jurisdiction to hear the claim, it seems unlikely that they would have reversed their original order.<sup>118</sup>

#### **4.5 Appeals Chamber's Decision**

The accused persons sought leave to appeal, which was granted in August 2005. The Defence Office added its own submissions in support of the motion as well as further additional grounds and arguments. The Registrar responded to each of these claims.<sup>119</sup> The decision of the Appeals Chamber was handed down at the end of last year, in which the Chamber delivered a majority opinion and three separate and concurring opinions. The accused submitted seven separate grounds of appeal, the majority of which were denied. Three grounds of appeal are particularly noteworthy: namely, the grounds relating to the Registrar's action not to reappoint counsel, the majority of Trial Chamber II's findings regarding the interrelationship between the two decisions it issued and the majority of Trial Chamber II's findings regarding its right to review its own decisions.

The majority of the Appeals Chamber determined that the Trial Chamber was correct to judicially review the Registrar's decision not to re-assign counsel and that their decision rightly dismissed the accused persons' request to declare the Registrar's decision null and void. In this regard, the majority of the Appeals Chamber supported the view adopted by Trial Chamber II, that an accused's right to counsel of his own choosing is not absolute, relying on the decision in *Maysit v Russia* in the European Court of Human Rights to support its finding.<sup>120</sup>

Regarding Trial Chamber II's findings on the interrelationship between the two decisions (which the accused persons alleged were not connected), the majority of the Appeals Chamber observed that the findings and considerations regarding the sincerity of the application to withdraw were findings of fact. They found that while the Applicants had submitted that the Chamber erred in law and/or in fact in finding the motion to re-appoint their counsel was a continuation of the motion to withdraw, they had not challenged the Chamber's conclusions as regards the sincerity of counsels' application to withdraw. As a result, applying the test laid down in the *Semanza* case at the International Criminal Tribunal for Rwanda, the Chamber found that the Appellants failed to demonstrate the findings could not have been reached by a "reasonable trier of fact or were wholly erroneous".<sup>121</sup> Therefore, the appeal was dismissed in this ground. In this regard, the appeal launched by the Applicants seemed misconceived: had they presented sufficient evidence to prove that they and their counsels were acting with *bona fide* motives, the Appeals Chamber may have found grounds upon which they had to consider whether the Trial Chamber's determinations in this regard were correct.

Finally, in relation to the Chamber's findings regarding its right to review its own decisions, the Appeals Chamber determined that the Trial Chamber erred in law in coming to the conclusion that the accused persons' motion was "frivolous and vexatious" on the grounds that the motion sought review of the Chamber's previous decision. The majority of that Chamber found solid bases from a variety of sources to substantiate the view that the possibility to seek review of a previous decision issued by a Chamber is broadly admitted at the international level, where the circumstances relating to that decision have changed or where the interests of justice require it.<sup>122</sup>

The separate and concurring decisions issued by Judge Robertson, Judge King and Judge Ayoola give further analysis and insight into both the issues that formed the basis of the appeal motion and the surrounding events and disputes that ensued between the various parties during the period in which the Trial Chamber was making its determinations. Judge Robertson’s decision also includes an analysis of the “most exceptional circumstances” test contained in Rule 45(E) that tends to support the view that further evidence could have been reasonably required by the Chamber prior to allowing the defence counsels to withdraw. His judgment also clearly summarizes the events occurring between the 12 May and 20 May, looking at correspondence between the Defence Office and the Registrar and the Registrar and the judges that puts the decision of 20 May into context.<sup>123</sup>

Judge King notes that the discordant matters raised in this interlocutory appeal “if not nipped in the bud”, could “end up adversely affecting, if not undermining, the administration of justice at the Special Court”.<sup>124</sup> While this comment seems (with due respect) somewhat alarmist, it could highlight the judge’s own feeling regarding the significance of the tensions between the parties in this instance. All the decisions, when read together, seem to bring to the fore some of the significant difficulties faced by legal and administrative participants in an international criminal trial whose geographical location in the country where the conflict occurred makes them confront unique circumstances. It is primarily for this reason, and due to the consideration of the rights of the accused and their counsels, that these decisions have warranted lengthy consideration in this section of the report.

It should be noted, however, that the Chamber has issued a number of other decisions since the trial began that also make determinations regarding significant issues worthy of consideration, the discussion of which will be included in future reports. In this regard, the decisions discussed here should not be seen to detract from the achievements of the Chamber over the past year and its ability to deliver timely and succinct decisions over that period (as was pointed out at the beginning of this section): there are some sixty decisions that the Chamber has issued during that time, some of which also deal with novel and complex issues and many of which are available on the Special Court’s web site.

#### **4.6 Brief Overview of the Prosecution’s Case in the AFRC trial**

The prosecution closed its case in the AFRC trial in late November of last year, after calling a total of fifty-nine witnesses. The case against the accused was presented in a circumlocutious motion, beginning where it ended with the invasion (and subsequent expulsion) of the AFRC/RUF combatants from Freetown on 6 January 1999, a period during which the violence against civilians is alleged to have intensified. It traces the alleged sinister aspirations of a former Sierra Leonean Army football team, who plotted to overthrow the democratically elected government in May 1997. The seventeen original coup-plotters subsequently formed the Supreme Council of the AFRC, the sole governing body in Sierra Leone throughout the junta period. The three accused – Alex Tamba Brima (aka “Gullit”), Brima “Bazzy” Kamara and Santigie Borbor Kanu (aka “Five-five”) – have been named as holding key positions in the Supreme Council, though the nature of these political positions (and the *de jure* responsibility each accused held as a result) has been vehemently contested by the defence.

Of the three trials, the prosecution’s case to date appears to have presented the greatest amount of evidence of the individual criminal responsibility of the accused in the AFRC case. This has included implicating the accused in some of the most brutal attacks of the conflict: the third accused, Santigie Borbor Kanu, is alleged to have set an example for other combatants during the invasion of Freetown by maiming civilians using methods known as “short-sleeve” and “long-sleeve” amputations, a practice allegedly adopted by the rebel and junta forces as a means of punishing civilians for voting for President Kabbah;<sup>125</sup> the first accused, Alex Tamba Brima (aka Gullit) has been implicated in leading the AFRC in the 6 January 1999 invasion and ordering particularly brutal attacks on Karina (President Kabbah’s hometown) and Bonoya, where over five hundred civilians were killed, three hundred

civilians were amputated and two hundred women were raped;<sup>126</sup> both Kanu and Kamara are alleged to have been present when this attack took place;<sup>127</sup> Brima also allegedly appointed the “Mammy Queen” at Camp Rosos, a civilian labour camp during the conflict, and was responsible for disciplining bush wives who refused to submit to the will of their “husbands”.<sup>128</sup> In many instances, it has been the testimony of key insider witnesses that have been called that substantiate these claims, the testimony of George Johnson (aka “Junior Lion”), former leader of the “West Side Boys”, Gibril Massaquoi, and senior security officers to members of the Supreme Council being among the key examples.

As in the CDF case, perhaps the most difficult part of the case alleged by the prosecution to decipher from the evidence presented has been the allegation of a joint criminal enterprise in existence, in this instance, between the AFRC and the RUF forces. The prosecution alleges in the indictment that the AFRC accused “shared a common plan purpose or design (joint criminal enterprise) to gain and exercise political control over the territory of Sierra Leone”.<sup>129</sup> Again, the element of criminality appears to be missing: unlike the Milosevic indictment, which alleges the *forcible removal* of the Croat and other non-Serb population from approximately one third of the territory of the Republic of Croatia,<sup>130</sup> the indictments in all three cases before the Special Court criminalise the military objectives of the war itself, rather than naming a distinct criminal enterprise. This appears to have extended to the prosecution’s lines of enquiry at trial, which have centred more around establishing joint military operations in existence between the two groups rather than focussing on determining that the groups were collaborating towards a criminal end. The defence in the AFRC trial have noted the vagueness of the prosecution’s theory in this regard in their recent submissions alleging the prosecution has not made out a case against the accused.<sup>131</sup> They have assumed that the prosecution is attempting to establish evidence of extended joint criminal enterprise (or JCE III) under which it must prove that the crimes committed by the accused were a “foreseeable consequence” of the execution of the enterprise agreed upon between the accused and all other co-perpetrators and, with knowledge of this foreseeable consequence, that the accused took the risk to participate in that enterprise. They note further that the prosecution has both failed to prove the existence of a “common plan” and to create a nexus between the espousal of a plan and the perpetration of the individual crimes alleged.<sup>132</sup>

The AFRC trial in Trial Chamber II is currently adjourned, although the Chamber recently announced that it would hand down its decision regarding the defence’s motions for judgment of acquittal under Rule 98 of the Special Court’s Rules on 31 March 2006.

## **5. THE SPECIAL COURT’S LEGACY: SOME REFLECTIONS ON “BRINGING JUSTICE AND ENSURING LASTING PEACE”<sup>133</sup>**

From the outset, there seemed no doubt that the Security Council was attempting to implement an ambitious project in agreeing to establish the Special Court for Sierra Leone. As has been noted, “Its architects hoped that the SCSL would establish a credible system of justice and accountability, end impunity, contribute to national reconciliation and help restore and maintain peace.”<sup>134</sup> It became clear very quickly that the Court would be constrained – both financially and politically – in the extent to which it would be able to achieve these aims: fearing a repeat performance of the *ad hoc* tribunals, now estimated to account for at least ten per cent of the United Nations annual budget, the United Nations opted instead for a voluntary contributions scheme (rather than assessed member contributions) whereby donor states would pledge funding for the Court, and limited the scope of the Court’s personal and temporal jurisdiction and its period of operation. Furthermore, it was determined that the Prosecutor would only try those alleged to bear the greatest responsibility. This mandate that has led the prosecution to adopt the method of co-opting witnesses who are among the comrades of (and some argue, have equal culpability to) the accused, making it on the one hand, have to make difficult choices about the choice of the accused based on their command authority rather than the discrete heinousness of any particular crime and on the other, to “dance with the devil” in order to increase the chance of implicating the indictees in the atrocities that occurred.<sup>135</sup>

Five and a half years on from the time the Security Council passed Resolution 1315, the Court is now actively working towards its legacy, and has produced a “Legacy White Paper”, one of the last documents approved by the Court’s outgoing Registrar. The Legacy White Paper summarizes the four thematic priorities of the Court’s legacy: namely, rule of law and accountability; human rights and international humanitarian law; developing the capacity of the national legal profession and civil society.<sup>136</sup> As a white paper is, by definition, a work in progress, it is currently not available to the public. However, given the significance that these themes are likely to play in the future of the Court, it is worth exploring the extent to which they have been developed and can be developed at this juncture in the Court’s history.

### **5.1 Rule of Law and Accountability**

As has been articulated in the previous paragraphs, the initial project the Security Council embarked upon to “bring justice and secure lasting peace”<sup>137</sup> in Sierra Leone was almost immediately curtailed in its scope by the financial and political constraints placed on the Special Court. Bearing this in mind, the extent to which the Court will be able to have an impact upon the Sierra Leonean legal system or assist in establishing the rule of law at the national or local level in Sierra Leone seems extremely limited. Nevertheless, limited impact does not necessarily have to equate to insignificant impact, and the efforts of the staff at the Court to achieve these aims should be encouraged, rather than being simply dismissed as lofty and idealistic impossibilities.

Yet to date, the United Nations has made no real effort to integrate the work of the Special Court into a wider justice reform project in Sierra Leone. This is regrettable, but almost predictable, given the short attention span of the international community and the Court’s reliance on voluntary funding. As one commentator has noted, in order for a voluntary funding mechanism to work, a country must be garnering constant high profile attention or be placed on security alert: Sierra Leone has already been eclipsed in significance by Afghanistan and Iraq, and the continuing troubles in Cote D’Ivoire and Liberia mean that Sierra Leone is not even the most urgent problem in West Africa.<sup>138</sup> One could now add the Democratic Republic of Congo, Uganda and Sudan to that list just in Africa alone.

Perhaps more encouraging is the fact that the British government’s Department for International Development (DFID) has embarked on a project in this regard, through its five-year USD50 million Justice Sector Reform Programme. A representative of the British High Commission in Sierra Leone has commented that the work of DFID will seek to dovetail off the progress made and the work undertaken by the Special Court.<sup>139</sup> No examples were given as to how this could occur, but one potential avenue for collaboration in a very tangible sense would be for the physical complex of the Court to be used by DFID as a training facility after the trials have reached completion. The site will, at that stage, be given to the Government of Sierra Leone, but the Government has already indicated that it will not have the means to maintain it.<sup>140</sup> Depending on whether DFID’s funding allocations have already been assigned (and to what extent these assignments are malleable), this may be an avenue through which the British Government both assists in the long-term viability of the site and saves the United Nations from intense and on-going embarrassment, given the eyesore that the dilapidating spaceship-like structure of the Court is likely to become will not be easily hidden in the decade that follows.

In a more procedural sense, however, the Special Court can and does seek to set an example of a transparent and accountable judicial mechanism within Sierra Leone - one that adheres to international standards when administering justice. Generally speaking, the Court has achieved this transparency throughout the proceedings, although there have been a couple of noteworthy exceptions. Appeals Chamber Judge Robertson recently reminded trial Chamber II that a decision to agree to implement a system of confidential filings should have been reviewed by the Chamber (in light of the content of the

submissions) once they had been filed. His Honour goes on to state that “henceforth, confidential filings should explain, at the outset, their reasons for confidentiality and Chambers must give judgments – in open court as far as possible – upholding or rejecting the claim.”<sup>141</sup> Furthermore, Trial Chamber I has on occasion, taken to requesting that evidence which is inadmissible be struck from the record, a practice which seems to fetter unnecessarily the public’s right to know what is happening at trial.<sup>142</sup> Despite these instances, the Chambers have been consistently mindful of the accused’s right to a public trial and have endeavoured to limit the amount of closed session testimony that they have heard wherever possible.

This culture of transparency is cultivated throughout the organs of the Court as well and Court staff members are generally available and open to giving interviews. Independent monitors, for example have been granted interviews with members of the judiciary and the Registry (including the former Registrar) on several occasions. This level of accessibility is commendable, given the incredibly busy schedules of many of the senior staff at the Court. The Office of the Prosecutor has become increasingly more accessible since Desmond de Silva, QC, took over as Prosecutor. The Defence Office, on the other hand, seems to have become less accessible recently, with the new Principal Defender confiscating the cassette of an unauthorised interview with one of his staff members from an unsuspecting academic observer (perhaps only coincidentally) after a report criticising his actions at trial was released on the Internet.

The extent to which the Court is able to act as a credible accountability mechanism will no doubt be the subject of future academic papers and international journal articles, given the controversy surrounding the “greatest responsibility” mandate and the policy considerations it necessarily forces the Court to consider in its administration of justice. The former Prosecutor of the Special Court, David Crane, was quick to defend the mandate as a political compromise, arguing that a broader mandate could easily become untenable, given it could result in as many as ten times the number of indictees. In reality, however, the mandate has left the prosecution indicting, in many instances, neither the senior most commanders, many of whom are either deceased, nor some of the commanders alleged to have committed the most heinous of atrocities, some of whom have been co-opted as insider witnesses<sup>143</sup>. Yet difficult choices regarding prosecution are no doubt the norm in international criminal trials: the ambit afforded to the *ad hoc* tribunals, asked to try those “most responsible”, no doubt meant the prosecution in those trials undertook to make inherently political considerations as well. The defence in both the CDF and AFRC trials have argued that the mandate should place clear limits on the prosecution, limits which it has breached in the course of indicting their clients. They argue both: that the burden explicitly restricts the prosecution to try those who played a leadership role; and that the criterion of prosecuting those who bear the greatest responsibility should not solely be left to prosecutorial discretion but is a component of personal jurisdiction. As a result of both these constraints, the mandate should be narrowly construed to include trying only those at the highest rank of authority in the militia groups concerned.<sup>144</sup> In both instances, the defence argue that their clients are not the highest-ranking authorities and therefore cannot be held accountable. This has led to the controversial subpoena of President Tejan Kabbah in the CDF trial, given Hinga Norman served under Kabbah during the latter half of the conflict and at the time of indictment, was the Minister of Interior Affairs in the Kabbah government.

While civil society activists close to the Court still believe that it will have the potential to deter future combatants from committing war crimes and crimes against humanity, others argue that the establishment of the Court in fact had the effect of further fuelling the conflict in Liberia, as many combatants joined the L.U.R.D. resistance forces across the border in order to escape indictment and prosecution in Sierra Leone.<sup>145</sup> Many now await with baited breath the transfer of former Liberian president Charles Taylor, in the hope that this will both bring an end to impunity and be a ringing endorsement of the Court’s legitimacy in the eyes of the political leaders of the region. It is hoped that this in turn will promote further stability in West Africa.

## **5.2 Human Rights and International Humanitarian Law**

The novelty of the Special Court – both as an institution and in terms of the novel charges the judiciary are being called upon to adjudicate – mean that it stands to make an unprecedented impact upon the emerging system of international criminal law in the post-World War II era. Unlike the *ad hoc* tribunals or the International Criminal Court, the latter of which will operate under a system of complementarity whereby trials will only be undertaken where governments are “unwilling or unable” to try the perpetrators themselves<sup>146</sup>, the “hybrid” nature of the Special Court and its widely perceived success as an international institution places it at the forefront of the United Nations’ experiments in government-partnered (or state sanctioned) international criminal justice. In this regard, the institutional knowledge of those who have worked at the Court is likely to be drawn upon by the Extraordinary Chambers in Cambodia, who will undoubtedly need assistance in the administration of its activities in Phnom Penh.

Aside from the structural distinction that the “hybrid” nature of the institution provides the Court, the judgments rendered by it also stand to set precedents for future cases. In particular, the Chambers’ determinations regarding the use and recruitment of child soldiers in armed conflict are likely to give the judgments at the Court “*Tadic*”-like significance: given the prevalence of the use of children in armed conflict in African states, this charge is likely to be brought again in future cases before the International Criminal Court. It may be the case, however, that the Court’s own brand of “symbolic” justice<sup>147</sup> may render it too distinct to have any application outside the context of Sierra Leone: as discussed above, the shift from personal jurisdiction that includes those “most responsible” to those who bear the “greatest responsibility” places the Court’s judgments within a discrete category that may be criticised by future lawyers for the defence as presupposing the culpability of the accused in the application of the doctrine of command responsibility. However, given the Security Council has alluded to the adoption of this same mandate in relation to a Special Chamber to be established in Burundi, it may be that the Special Court’s judgments have a wide and far-reaching impact: at least in the case of that jurisdiction, it seems likely that the court’s decisions will be used as precedents.<sup>148</sup>

The effect that the Court will have on the implementation of Human Rights law in Sierra Leone seems even less assured than the impact it will have on jurisprudence internationally. The former presiding judge of Trial Chamber II notes that there has been a general resistance from local lawyers to introducing concepts from human rights treaties into domestic cases. During her time as a Judge in the national courts system (as a seconded judge from the Commonwealth Secretariat) prior to being appointed to the Special Court, she issued progressive judgments that included analyses of how other domestic jurisdictions had interpreted their commitments to human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women and the International Convention on the Rights of the Child, both of which Sierra Leone has ratified.<sup>149</sup> These decisions, however, were met with scepticism: that the reaction of local lawyers to the suggestion that Sierra Leone’s commitment to these treaties should be honoured was generally that such treaties hadn’t been adopted by parliament into domestic law. Perhaps drawing from the traditions of its colonial past, they seemed reluctant to subvert the separation of powers between the legislature and the judiciary when arguing before the courts. Yet given the archaisms that still exist within Sierra Leone’s statutes, this leaves little room for the judiciary to effect social change until parliament makes a serious commitment to law reform.

## **5.3 Developing the Capacity of the National Legal Profession**

The Court has undertaken to employ several Sierra Leonean lawyers, both in the prosecution and the defence of the cases currently before it. Many at the Special Court – including the national lawyers themselves - believe that hiring lawyers from the national system will play a large part in skills transference into the national sector: the national lawyers working at the Special Court speak positively

about their experience and agree that it has assisted them to enhance their advocacy skills and to improve in their case management. Some also argue that being involved in the process of international criminal justice in their own country has been a personally fulfilling experience, given they were in Sierra Leone during the period of the conflict: as one local lawyer noted, “As lawyers the real question was, will we be able to account for this period, especially for our children and our children’s children who come after us?” The Special Court, it is believed, will enable them to answer in the affirmative.<sup>150</sup> However, whether this will translate into these lawyers having a tangible effect on the national legal profession is still anyone’s guess. For a start, several of the lawyers employed by the Court belong to the Sierra Leonean diaspora and will continue to live and work abroad once the trials are over. Others are likely to build upon their experience at the Special Court and work at other international tribunals, rather than going back to local practice. This has already occurred in at least one instance: a lawyer formerly working at the Defence Office has recently taken up a position at the International Criminal Court. While not to detract from the achievements of Sierra Leonean lawyers working internationally, the fact that these lawyers will have little or no impact on the national legal profession is likely to mean that the impact of those that remain will be limited. Added to this is the criticism levelled by some that local lawyers at the Special Court primarily see their time in office as a money-making exercise, rather than having any real ideological commitment to using the experience to foster the rule of law in Sierra Leone. Yet, to be fair, the same could be said of many of the international staff working at the Court, and imposing an obligation on local staff to engage with the process differently may be seen as unfounded. Yet if it is the case that the Court is seen as no more than an opportunity to generate income, it could potentially be further entrenching an elite class of Sierra Leoneans that remain immune to the abject poverty that is experienced by almost eighty per cent of the population, rather than generating any real agenda for reform amongst them.

While it seems highly likely that there is a discrepancy in the amount lawyers are paid at the Court as opposed to what they would earn in the national system, this has been disputed. One lawyer suggested that she would need to undertake at least ten to fifteen cases at the local courts per month in order to match the salary she was earning at the Special Court, but that this was a fairly normal caseload. However, she agreed that she has the benefit of not having to pay overheads for her office space at the Court, nor having to concern herself with generating further cases in order to sustain her practice.<sup>151</sup> It should be noted that many Sierra Leonean lawyers at the Court have spoken passionately about ensuring that the project of transitional justice undertaken by the United Nations and the Government of Sierra Leone brings lasting peace to their country. It is difficult for an outside observer even to begin to imagine the impact the war is likely to have had on their lives and their psyche, and any criticism of their motives, therefore, should be tempered by the admission of ignorance and a hope that these criticisms are proven to be unfounded in the years to come.

#### **5.4 Civil Society**

The Special Court’s outreach activities have centered extensively on engaging the interest and imagination of civil society activists in Sierra Leone. The Court’s outreach activities have been seen as generally far more successful than the limited efforts made in this regard by the *ad hoc* tribunals, whose geographical distance from the countries where the conflicts occurred have meant that there has been little or no engagement with community activists and civil society actors.<sup>152</sup> However, tensions between the Special Court and the Truth and Reconciliation Commission that developed in the nascent part of the Court’s history may mean that the Court will continue to be met with distrust by some local activists. Unlike the Special Court, whose origins are inherently political given it was inaugurated by agreement between the Government of Sierra Leone and the United Nations, the Truth and Reconciliation Commission was credited with “multiparty” legitimacy (and hence, is considered more politically neutral), having been conceived and provided for in the Lomé Peace Agreement signed on 7 July 1999.<sup>153</sup> The Court’s establishment, at the behest of the Sierra Leonean government during the fragile years of Sierra Leone’s disarmament, demobilisation and reintegration process, was seen by

some activists as an attempt essential to thwart the peace process rather than to enhance or add to it. The government's own motive at the time is seen as being to eliminate the top strata of the RUF/P (the political arm of the RUF) and its wide use of emergency powers to incarcerate over two hundred members of the RUF/P in Freetown is cited as proof of its own lack of commitment to respecting human rights. Many of these detainees remain incarcerated in Pademba Road prison today, most of which were never lawfully detained in the first place.<sup>154</sup>

As has been pointed out by International Crisis Group, UN-monitored peace can be fearfully deceptive: the progress made in a formerly failed state such as Sierra Leone during the years in which the peace-keeping mission was present may give it the appearance of having recovered, but as a "shadow state" it remains vulnerable to relapse. It should be noted that many of the economic and social conditions which were existence when the conflict began are still in existence today: in 1991, foreign aid to Sierra Leone was US\$105 million, nearly equivalent to the total internal revenue the government generated itself and Sierra Leone was classed as the world's second poorest country. Today, Sierra Leone is still classed as the world's second poorest country. There is a real fear that a cyclical dynamic exists in Sierra Leone and Liberia that means these countries oscillate between shadow state and failed state and that the country is effectively re-creating the conditions that will push it back towards civil war.<sup>155</sup> A shift in focus in outreach activities based in commemoration and amelioration to ones based in advocacy and action is clearly required if the Court is to have any role in effecting lasting peace in Sierra Leone, as was clearly the intent of the Security Council under Resolution 1315.

Until now, the Court's outreach activities have had a clear focus on responding to the victims of the conflict, with a series of Victims Commemoration Conferences held nationwide being among one of the larger projects undertaken by the Registry. There has also been a concerted effort to create awareness about the Court itself and what it seeks to achieve as an accountability mechanism. Yet given its commitment to a legacy that makes an impact (albeit limited) on human rights reform, perhaps what is required as the Court enters the final stages of trial is further engagement with civil society activists to lobby the government to look at its own practices and human rights record. Ways in which it can undertake a serious commitment to implementing domestic legislation which honours Sierra Leone's obligations under the international human rights treaties could be suggested at this stage, to ensure that the commitment it undertook in establishing the Special Court leads to further review of the legislation which currently prevents any lasting reform from taking place.

## 6. CONCLUSION

Amidst the activity of the trials currently underway, international commentators on the Special Court have tended to focus on the Court's adherence to international standards of justice and its effectiveness as an international mechanism of accountability and deterrence in West Africa. This report has endeavoured to add to this discussion, by giving its readers an overview of the issues that currently face both Trial Chambers. In particular, it has focused on the significance of the indictment in Trial Chamber I, and the way in which a desire to see the indictment, at some points, as divorced from the context of the proliferation of evidence disclosed to the defence, and at others, as a means of excluding evidence of sexual violence at trial, has tended to preclude the Chamber from engaging in a more nuanced understanding of the context of the proceedings as a whole. This is because the lack of engagement with the unique conditions facing the trials at the Special Court – namely, the language barrier faced by the witnesses, many of whose languages are not documented or standardised; the effect of the trial on the witnesses themselves, which take place in their home country; and the effect of the trauma of war on the statements made by the witnesses (and how these have changed over time) given the physical proximity of the Court to the atrocities that occurred – have not been considered in light of this indictment-oriented approach. It has also looked at the approach of Trial Chamber II and challenged the merits of expediency and interventionism in one instance that took on some significance during the

course of the trial last year. It analysed in particular two of the issues raised as a result of two decisions delivered by the Chamber: namely, the right of defence counsels to withdraw from trial and subsequently, to be reappointed by the accused persons. In both discussions, the report has attempted to critique the effect these determinations had both on the rights of the accused and, where appropriate, on the witnesses and on the trials as a whole during the conduct of the proceedings.

In its discussion of the trials themselves, this report has solely canvassed the prosecution's case in the CDF and the AFRC trials because, in both these instances, the prosecution's cases are now completed. Discussion of the prosecution's case in the RUF trial will be reserved for when that case is complete. It has, however, looked at the ramifications juggling two trials has had on Trial Chamber I and has looked briefly at the RUF trial in comparison to the CDF trial.

Finally, this report has considered the court's legacy, in light of the "Legacy White Paper". It has endeavoured to canvass some of the issues that arise when considering what impact the court will have on bringing justice and ensuring lasting peace in Sierra Leone, as was the intention of the Government of Sierra Leone when it requested that the Security Council establish the court.

It seems befitting, given the stage at which the Court has reached in its history, that commentators would currently be interested in the progress of the trials, or "justice in motion", as it has been described most succinctly by Human Rights Watch. However, further comment and debate surrounding the implications of the Court in Sierra Leone is needed if the Court is to have a sustained impact on the society that it seeks to serve. In particular, its ability to garner sustained domestic support for the adoption of the human rights norms that it seeks to exemplify need to be teased out. If any real bridge is to be created between the international and domestic notions of justice that surround the lauded "hybridity" the United Nations sought to achieve in its establishment, then this conversation should be between both the international and domestic communities of activists, policy-makers and advocates. As a result, at this stage in the proceedings, rigorous analysis from human rights organisations regarding the effectiveness of the Court to "bring justice and ensure lasting peace" in Sierra Leone would no doubt be welcomed. The final section of this report attempts to add to the beginning of that conversation – one that hopefully will continue in the international arena in the months (and the years) to come.

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<sup>1</sup>Statement by Special Court Prosecutor Desmond de Silva, QC, announcing the arrival of Charles Taylor at the Special Court for Sierra Leone, Press Release from the Office of the Prosecutor, Freetown (29 March 2006).

<sup>2</sup>President Johnson-Sirleaf was quoted in the media as saying "I asked the African (Union) leadership to bring the Taylor issue to closure." See "Liberia seeks to end Taylor exile ", Friday 17 March 2006, BBC world news. Available on-line at: news.bbc.co.uk/1/hi/world/frica/4817106.htm .

<sup>3</sup>As per reports on All Africa news on 29 March 2006 at [www.allafrica.com](http://www.allafrica.com).

<sup>4</sup>"Taylor trial may be out of Africa", Thursday, 30 March 2006, [www.news.bbc.co.uk](http://www.news.bbc.co.uk)

<sup>5</sup>Norman has been absent from trial since October 2004 when he protested to the prosecution's practice of shielding witnesses from the public's view, a practice that he argued encouraged them to lie.

<sup>6</sup>The prosecution closed its case in the trial of the three accused alleged to form part of the high command in the Armed Forces Revolutionary Council at the end of 2005. Trial Chamber II is currently reviewing the defence's Rule 98 Motions for Judgment of Acquittal in that case.

<sup>7</sup> Interview with Desmond de Silva, Freetown (November 2005).

<sup>8</sup> Interview with the Principal Defender, Freetown (November 2005).

<sup>9</sup> Interview with Special Assistant to the Deputy Registrar, Freetown (November 2005).

<sup>10</sup>14 August 2000, S/RES/1315 (2000). (Hereafter, *Resolution 1315*). Resolution 1315 is the Security Council Resolution which called for the inauguration of the Special Court.

<sup>11</sup>Paragraph 9 of *Resolution 1315* states: “*Recognising further* the desire of the Government of Sierra Leone for assistance from the United Nations in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace”.

<sup>12</sup>The author was stationed at the Special Court for Sierra Leone from September 2004 to August 2005. She has subsequently followed the trials closely and continues to read the decisions issued by the Chambers and edit the reports of the monitors that have since been stationed at the Court.

<sup>13</sup>Prior to that time, the trial ran on a one month on, one month off basis. See Kendall, S. and Staggs, M. “*Interim Report on the Special Court for Sierra Leone*”, War Crimes Studies Center, 11 April 2005, at page 5. Available on-line at: [http://ist-socrates.berkeley.edu/~warcrime/SLSC\\_Report.pdf](http://ist-socrates.berkeley.edu/~warcrime/SLSC_Report.pdf). (Hereafter, *Interim Report No.1*).

<sup>14</sup>As per the calendar on the Special Court’s website. Available online at [www.sc-sl.org](http://www.sc-sl.org).

<sup>15</sup>“Special Court’s Completion Strategy” (18 May 2005) (annexed to A/59/816-S/2005/350 Identical letters, 26 May 2005, from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council) at page 10, paragraphs 30 and 31. Estimates are based on actual witness hearing time and actual figures.

<sup>16</sup>Estimate of the number of witnesses heard per session calculated by dividing the number of witnesses by the number of trial sessions as at the end of the August 2005 trial session.

<sup>17</sup>Beth K. Dougherty “Right-sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone” *International Affairs* 80, 2 (2004) 311 – 328 at page 311 (Hereafter *Right-sizing*).

<sup>18</sup>Interview with the Presiding Judge, Trial Chamber I, 15 November 2005.

<sup>19</sup>“Justice in Motion: The Trial Phase at the Special Court for Sierra Leone” (2 November 2005) Human Rights Watch, Vol.17 No. 14(A) at page 12. (Hereafter *Justice in Motion*).

<sup>20</sup>“Procedural Issues: Defence Argues for a More Interventionist Bench”, Special Court Monitoring Program Update No.62 (11 November 2005).

<sup>21</sup>See Special Court Monitoring Program Update No. (26 November 2004). The second occasion during a closed session in the RUF trial July, 2005.

<sup>22</sup>Internal statistics calculated by the Registry, based on statistics comparing examination in chief and cross examination from the period 8 July 2004 – 31 July 2005. For the CDF trial, the ratio of direct examination to cross examination is 138.65 hours : 178.65 hours or 1 : 1.3 over the entire period. For the RUF trial, the ratio direct examination to cross examination is 125.55 : 205.50 or 1: 1.6 over the entire period.

<sup>23</sup>*The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, (Case No. SCSL-03-14-I) “Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence” issued on 22 June 2005 and backdated to 24 May 2005 at paragraph 25.

<sup>24</sup>See *The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, (Case No. SCSL-03-14-I) “Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence” issued on 22 June 2005 and back-dated to 24 May 2005 at paragraph 19(i) (Hereafter *Reasoned Majority Decision on the Admissibility of Evidence (Sexual Violence)*) and *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Case No. SCSL-04-14-PT) “Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 dated respectively, 9 October, 2004, 19 and 20 October 2004, and 10 January 2005” at paragraph 22(v) (4 February 2005). The ruling is unanimous. (Hereafter, *Ruling on Application for the Exclusion of Statements of Witness TF1-141*). See also *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Case No. SCSL-04-14-T) “Ruling on Application for the Exclusion of Certain Supplemental Witness Statements of Witness TF1-361 and TF1-122” (1 June 2005) (Hereafter *Ruling on Application for the Exclusion of Statements of Witness TF1-361*).

<sup>25</sup>See in particular, *The Prosecutor v Delalic et al (Celebici)* IT-96-21-T “Trial Judgment” 16 November 1998 paragraph 131 and *The Prosecutor v Krstic* IT-98-33 “Trial Judgment” 2 August 2001 paragraphs 507 – 514 and 516, Both these judgments are available on-line at [www.un.org/icty](http://www.un.org/icty).

<sup>26</sup>*The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, (Case No. SCSL-03-14-T) “Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence” (15 February 2005) at paragraph 31.

<sup>27</sup>*The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, (Case No. SCSL-03-14-T) “Response of First Accused to Prosecution’s “Urgent Prosecution Motion for Ruling on Admissibility of Evidence” and Objection to Other Crimes Evidence” (18 February 2005) at paragraph 10.

<sup>28</sup>*The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, (Case No. SCSL-03-14-T) “Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence” issued on 22 June 2005 and back-dated to 24 May 2005 at paragraph 10. See also Kendall, S. and Staggs, M. “Silencing Sexual Violence: Recent Developments in the CDF case at the Special Court for Sierra Leone” (War Crimes Studies Center, 28 June 2005) at page 21. (Hereafter *Silencing Sexual Violence*).

<sup>29</sup>See *The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, (Case No. SCSL-03-14-T) “Prosecution Reply to ‘Response of the Second Accused to Urgent Prosecution Motion for Ruling on the Admissibility of Evidence’” (2 March 2005) at paragraph 3. See also *Prosecutor v Delalic*, ICTY Appeals Chamber, “Judgment”, 20 February 2001 at paragraph 400.

<sup>30</sup>*Reasoned Majority Decision on the Admissibility of Evidence (Sexual Violence)* at paragraphs 17 and 18.

<sup>31</sup> *Ruling on Application for the Exclusion of Statements of Witness TF1-141* at paragraph 22(i).

<sup>32</sup> *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Case No. SCSL-2004-15-T) “Ruling on Oral Application for the Exclusion of ‘Additional’ Statement for Witness TF1-060” (23 July 2004), “Ruling on the Oral Application for the Exclusion of Part of the Testimony of Witness TF1-199” (26 July 2004), *Ruling on Application for the Exclusion of Statements of Witness TF1-141, Ruling on Application for the Exclusion of Statements of Witness TF1-361*; “Decision on Defence Motion for Exclusion of Evidence (as indicated in Annex A) Arising from the Additional Information Provided by Witness TF1-113, TF1-108, TF1-041 and TF1-288” (27 February 2006) and “Decision on Defence Motion Requesting the Exclusion of Evidence Arising From Supplementary Statements of Witness TF1-168, TF1-165 and TF1-041” (20 March 2006).

<sup>33</sup> In some instances, they argue that the statements have differed to such a degree from the original witness statements served on the defence that “the new statement of the witness effectively confronts the Defence with a new witness”. *Ruling on Application for the Exclusion of Statements of Witness TF1-141* at paragraph 12.

<sup>34</sup> *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, (Case No. SCSL-2004-15-T) “Defence Motion Requesting Exclusion of Evidence (as indicated in Annex A) Arising from the Additional Information Provided by Witness TF1-113, TF1-108, TF1-041 and TF1-288” (10 February 2006) at paragraphs 9 and 10 (Hereafter, *Defence’s Motion Regarding the Exclusion of Evidence of Witness TF1-113 et al.*)

<sup>35</sup> *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Case No. SCSL-04-15-T) “Prosecution Response to Defence Motion Requesting Exclusion of Paragraphs 1,2,3, 11 and 14 of the Additional Information Provided by Witness TF1-117 dated 25,26,27 and 28 October 2005” (hereafter, *Prosecution’s Response to Exclusion of Evidence of Witness TF1-117*).

<sup>36</sup> See *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Case No. SCSL-04-15-T) “Prosecution Response to Defence Motion Requesting Exclusion of Evidence Arising from the Additional Information Provided by Witness TF1-113, TF1-108, TF1-041 and TF1-288” at paragraphs 12 and 13 (Hereafter *Prosecution’s Response to Exclusion of Evidence of Witness TF1-113 et al.*)

<sup>37</sup> *Ruling on Application for the Exclusion of Statements of Witness TF1-361* at paragraph 24.

<sup>38</sup> *Prosecution’s Response to Exclusion of Evidence of Witness TF1-113 et al* at paragraphs 16 and 17.

<sup>39</sup> *Reasoned Majority Decision on the Admissibility of Evidence (Sexual Violence)* at paragraph 19(v).

<sup>40</sup> *Prosecution’s Response to Exclusion of Evidence of Witness TF1-117* at paragraph 9. See the corresponding decision at “Decision on Defence Motion for the Exclusion of Certain Portions of Supplemental Statements of Witness TF1-117” (27 February 2006).

<sup>41</sup> *Defence’s Motion Regarding the Exclusion of Evidence of Witness TF1-113 et al* (10 February 2006) at paragraphs 9 and 10.

<sup>42</sup> Special Court Monitoring Program, Update No.11 (5 November 2004).

<sup>43</sup> Interview with Presiding Judge, Trial Chamber I, Freetown (15 November 2005).

<sup>44</sup> “Infliction of Terror” has been charged once before at an international criminal tribunal. This was in the *Galic* case at the International Criminal Tribunal of the Former Yugoslavia as a Violation of the Laws and Customs of War under Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949. See *The Prosecutor v Stanislav Galic* (Case No. IT-98-29-T) “Indictment”. The indictments against both the CDF accused and the RUF accused charge each accused with “Terrorising the Civilian Population”, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II. See *The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa* (Case No. SCSL-03-14-I) Indictment, 5 February 2004 at paragraph 28 and *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (SCSL-2004-15-PT) Amended Consolidated Indictment, 13 May 2004 at paragraph 44. Trial Chamber I has recently determined that “while the charges in the *Galic* case related to violations of Article 15(2) of Additional Protocol I in the context of an international armed conflict, the Decision might be of assistance in interpreting Article 3(d) of the Special Court’s Statute”. (See *The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa* (Case No. SCSL-04-14-T) Decision on Motion for Judgment of Acquittal Pursuant to Rule 98 and Separate and Concurring Opinion of Justice Bankole Thompson” (21 October 2005) at paragraph 110.

<sup>45</sup> The Prosecution is charging forced marriage as a crime against humanity under Article 2(i) of the Statute and attacks on United Nations peacekeepers (UNAMSIL personnel) as a crime against humanity, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II and a serious violation of international humanitarian law under Articles 2(a), 3(c) and 4(b) of the Statute.

<sup>46</sup> Based on the War Crimes Studies Center’s documentation of the trials, of the 75 witnesses that have testified for the prosecution in the CDF case, 25 witnesses have testified to atrocities alleged to have taken place in Bo and Kenema. A significant number of witnesses also testified to events that occurred in Tongofield and Moyamba.

<sup>47</sup> Testimony of Witness TF2-008, Special Court Monitoring Program Update No. 19 (19 November 2004) and Testimony of Albert Nallo, Special Court Monitoring Program Update No.25 (11 March 2005) (Hereafter, *Testimony of Albert Nallo*).

<sup>48</sup> Testimony of Brigadier General John Tarnue, Special Court Monitoring Program Update No.7 (8 October 2004).

<sup>49</sup> Sam Bockarie indicted by the Special Court but is believed to be deceased. His absence at trial, together with the absence of Foday Sankoh, who died while in custody, has created the impression among some commentators that the court has been left to try lesser perpetrators.

<sup>50</sup> These include commanders known as Issac Mungo, Dennis Mingu (aka Superman), and Mike Lamin.

<sup>51</sup>According to the Truth and Reconciliation Report (hereafter, *TRC Report*), the armed conflict in Sierra Leone began on 23 March 1991 in Bomaru. The TRC Report states “the Revolutionary United Front (RUF) claimed responsibility for the incursion, with the declared objective to overthrow the corrupt and tyrannical government...” See *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, (2004, Truth and Reconciliation Commission, 2004), Vol.II, Chapter I at page 7, paragraph 1. Available online at: [www.tresierraleone.org](http://www.tresierraleone.org).

<sup>52</sup>The Registrar (and subsequently, the Acting Registrar) prohibited Norman’s actions under Rule 47(A)(5) of the Rules of Detention, which provides that: “The Registrar may...prohibit, regulate, or set conditions for communications...and may prohibit, regulate or set conditions between a Detainee and other persons, if there are reasonable grounds for believing that such communications and visits: (v) could disturb the maintenance and security of good order of the Detention Facility.” (Available online at: <http://www.sc-sl.org/rulesofdetention.pdf>). An order was issued suspending Norman’s rights to receive visitors on 8 November 2004 and again on 6 June 2005, in each instance for a period of 28 days. Norman appealed the second order, requesting that it be reversed, but his appeal was denied. In the second instance, Norman had written a letter addressed “To all South Easterners in Sierra Leone and all Kamajors, Family and Friends”. There was no indication as to whether the letter had been published or how it had come to the attention of the Acting Registrar. See *The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, (Case SCSL-04-14-T) “Decision on Request to Reverse the Order of the Acting Registrar Under Rule 47(A) of the Rules of Detention of 6 June 2005” (29 June 2005).

<sup>53</sup>“SLPP to appear in court within 21 days” Sahr Musa Yamba, *Concorde Times* (Freetown), 2 November, 2005, available online at <http://allAfrica.com/stories/200511020361.html>.

<sup>54</sup>*Testimony of Albert Nallo*.

<sup>55</sup> See “The Berewa Running Mate Issue Gets Serious” *Concorde Times*, Freetown, 22 November 2005 and “Charles Margai: Another Sir Alex Fergussons (sic)?”, *Concorde Times*, Freetown, 9 November 2005 available on-line at [www.allAfrica.com](http://www.allAfrica.com); and “Commentaries: Hear Charles Margai at FM 98.1D in Sierra Leone!” *Awareness Times, Sierra Leone News and Information*, 10 November 2005, available on-line at [http://news.sl/drwebsite/publish/article\\_2005866.shtml](http://news.sl/drwebsite/publish/article_2005866.shtml).

<sup>56</sup>For example, Charles Margai decided to refrain from cross-examining Albert Nallo, the prosecution’s key insider witness, when the witness implicated him as having involvement with the CDF during his time as the Interior Minister for the SLPP in the early part of the new millennium. See *Testimony of Albert Nallo*.

<sup>57</sup>*The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, (Case SCSL-04-14-T), “Public Version of the Prosecution Response to Motion for Judgment of Acquittal for the First Accused Samuel Hinga Norman” (27 September 2005) at paragraph 40 (Hereafter *Prosecution’s Response (Norman)*) “Public Version of the Prosecution Response to Motion for Judgment of Acquittal for the Second Accused Moinina Fofana” (27 September 2005) at paragraph 108 (Hereafter *Prosecution’s Response (Fofana)*) “Public Version of the Prosecution Response to Motion for Judgment of Acquittal for the Third Accused Allieu Kondewa” (27 September 2005) at paragraph 77 (Hereafter *Prosecution’s Response (Kondewa)*).

<sup>58</sup>See in particular the Testimony of Witness Albert Nallo, weekending 11 March 2005 (Special Court Monitoring Program, Update No.25)(Hereafter *Testimony of Albert Nallo*).

<sup>59</sup> See for example Testimony of Witness TF2-021, Special Court Monitoring Program Update No.11 (5 November 2004); *Testimony of Albert Nallo*; and Testimony of Witness TF2-080, Special Court Monitoring Program, Update No.43 (10 June 2005).

<sup>60</sup>*Prosecution’s Response (Allieu Kondewa)*. The prosecution states that Kondewa was “Chief Initiator and attained the status of High Priest because of the mystical powers he possessed, and as such, no Kamajor could go to war without his blessings”[Emphasis added] at paragraph 26. The other two quotations are taken from paragraphs 92 and 94 respectively.

<sup>61</sup>*The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, (Case SCSL-04-14-T), “Kondewa, Motion for Judgment of Acquittal for the Third Accused” (3 August 2005) (Hereafter *Kondewa Motion for Acquittal*).

<sup>62</sup>John R.W.D. Jones, Claire Carlton-Hanciles, Haddijatou Kah-Jallow, Sam Scratch, Ibrahim Yillah, “Notes and Comments – The Special Court for Sierra Leone: A Defence Perspective.” *Journal of International Criminal Justice* (Oxford, April 2004) Volume 2, issue no.1, 211 at page 223.

<sup>63</sup>Interview with former Chief of Prosecution, Office of the Prosecutor, Freetown (November 2005).

<sup>64</sup>*Prosecution’s Response* at paragraph 22.

<sup>65</sup>See in particular, the evidence of Borbor Tucker, Special Court Monitoring Program, Update No.21 (11 February 2005): the orders given by Norman appear to center around legitimate attacks against the junta forces.

<sup>66</sup>See for example Testimony of Witness TF2-154, Special Court Monitoring Program Update No.6 (1 October 2004); Testimony of Witness TF2-067, Special Court Monitoring Program Update No.15 (3 December 2005); and Testimony of Witnesses TF2-048 and TF2-144, Special Court Monitoring Program Update No.23, (25 February 2005).

<sup>67</sup>For further exploration on the nature of the conflict and the Kamajor activities in this regard, see TRC Report, Vol. II Chapter I at paragraphs 29 - 32 and the chapter on the nature of the conflict.

<sup>68</sup>See in particular Special Court Monitoring Program, Update No.5 (24 September 2004).

<sup>69</sup>*The Prosecutor v Stanislav Galic* (Case No. IT-98-29-T) “Judgment” at paragraphs 134 and 137.

<sup>70</sup>Ibid., at paragraph 18.

<sup>71</sup> See *The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, (Case SCSL-04-14-T), “Motion for Judgement of Acquittal for the First Accused” (3 August 2005) at paragraph 15 (Hereafter, *Norman Motion for Acquittal*);

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and “Fofana Motion for Judgement of Acquittal” (4 August 2005) at paragraphs 8 - 12 (Hereafter, *Fofana Motion for Acquittal*).

<sup>72</sup>*Norman Motion Acquittal* at paragraph 41.

<sup>73</sup>*Fofana Motion for Acquittal* at paragraphs 39 – 42.

<sup>74</sup>*Kondewa Motion for Acquittal* at paragraphs 36 and 37.

<sup>75</sup>*Prosecution’s Response (Norman)* at paragraph 17 and *Prosecution’s Response (Kondewa)* at paragraph 22. A similar statement is made at *Prosecution’s Response (Fofana)* at paragraph 20.

<sup>76</sup> See in particular the testimony of the witnesses relating to the Tongofield Crime Base, Special Court Monitoring Program, Updates No.23 and No.24 (weeks ending 25 February 2005 and 4 March 2005) and Testimony of Colonel Iron Special Court Monitoring Program, Update No.44 (week ending 17 June 2005). For the testimony relating to Norman’s commissioning of attacks against police officers, see Testimony of Witness TF2-041, Special Court Monitoring Program, Update No.5, weekending 24 September 2004 and *Prosecution’s Response (Norman)* at paragraph 80.

<sup>77</sup> See in particular the Testimony of Witness Albert Nallo, weekending 11 March 2005 (Special Court Monitoring Program, Update No.25).

<sup>78</sup> In particular, the prosecution relies on the testimony of the following witnesses who testified in closed session: Witness TF2-201, weekending 5 November 2004 (Special Court Monitoring Program, Update No.11); Witness TF2-008 (partial closed session), Witness TF2-068 and Witness TF2-017, weeks ending 19 November 2004 and 26 November 2004 (Special Court Monitoring Program, Updates No.13 and 14); and the following witnesses who testified in open session: Witness TF2-190 (Borbor Tucker), week ending 11 February 2005 (Special Court Monitoring Program, Update No.21); Witness TF2-222, week ending 18 February 2005 (Special Court Monitoring Program, Update No.22; and Witness TF2-188, week ending 3 June 2005 (Special Court Monitoring Program, Update No.41).

<sup>79</sup> Rule 98 of the Special Court Rules currently states that: “If, after the close of the case for the Prosecution, there is no evidence capable of supporting a conviction on one or more of the counts of the indictment, the Trial Chamber shall enter a Judgment of acquittal on those counts”. The Chamber determined that the correct test to be applied in order for a motion for judgment of acquittal to be upheld was “not whether on the evidence as it stands the accused *should* be convicted, but whether the accused *could* be convicted”. This standard was applied in the *Strugar* case at the ICTY: *Prosecutor v Strugar*, “Decision on Defence Motion Requesting Judgment of Acquittal Pursuant to Rule 98” (21 June 2004) Trial Chamber at paragraph 11.

<sup>80</sup>See *The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, (Case SCSL-04-14-T) “Decision on Motion for Judgment of Acquittal Pursuant to Rule 98” (21 October 2005) at paragraph 34.

<sup>81</sup> Based on author’s review of decisions issued by the Chamber between 1 September 2005 and 1 February 2006.

<sup>82</sup> *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (SCSL-2004-16-AR-73) “Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Motion for the Reappointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara” (8 December 2005) at paragraph 23 (Hereafter, *Appeals Chamber Decision on Reappointment*).

<sup>83</sup>*Appeals Chamber Decision on Reappointment* at paragraph 24.

<sup>84</sup> Rule 45(E) of the Special Court Rules of Evidence and Procedure states: “(E) Subject to any order of a Chamber, counsel will represent the accused and conduct the case to finality. Failure to do so, absent just cause approved by the Chamber, may result in forfeiture of fees in whole or in part. In such circumstances the chamber may make an order accordingly. Counsel shall only be permitted to withdraw from the case to which he has been assigned in *the most exceptional circumstances*. In the event of such withdrawal the Principal Defender shall assign another counsel who may be a member of the Defence Office to the indigent accused. [Emphasis added]”.

<sup>85</sup>*The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (SCSL-04-16-T) “Decision on the Extremely Urgent Confidential Joint Motion for the Reappointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II for Clarification of Its Oral Order of 12 May 2005”, 9 June 2005, at paragraph 52. (Hereafter, *Majority Decision on Motion for Reappointment of Defense Counsel*).

<sup>86</sup>See also *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Kanu*, (SCSL-2004 –16-AR73) “Separate and Concurring Opinion of Justice Robertson on the Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara” (8 December 2005) at para.1. (Hereafter, *Appeals Chamber Decision on Reappointment (Robertson J concurring)*).

<sup>87</sup> See Special Court Monitoring Programme, Update No.26 (11 March 2005), Update No.29 (25 March 2005) Update No.33 (29 April 2005) Update No. 36 (13 May 2005) and Update No.54 (23 September 2005).

<sup>88</sup>See *Independent Counsel v Defence Counsel for Brima Samura* (SCSL-2005-01) “Judgment in Contempt Proceedings” (26 October 2005) and *Independent Counsel v Margaret Fomba Brima, Neneh Binta Bah Jalloh, Ester Kamara* (SCSL-2005-02) and *Anifa Kamara* (SCSL-2005-03), “Sentencing Judgment in Contempt Proceedings” (21 September 2005).

<sup>89</sup> *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (SCSL-04-16-T) “Decision on the Confidential Joint Defence Application for Withdrawal By Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu” (20 May 2005) at paragraph 26. (Hereafter, *Majority Decision on Defence Application for Withdrawal*). Defence counsel for Kamara (the second accused), Mr Wilbert Harris was subsequently reprimanded by the Chamber for raising this issue with the Sierra Leonean local media. Mr Harris argued somewhat convincingly in

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response that the principle of equality of arms dictated that his right to approach the media should be at least equivalent to that of the Prosecutor, who had on a number of occasions spoken openly to newspapers claiming the culpability of his clients.

<sup>90</sup>*Majority Decision on Defence Application for Withdrawal* at paragraph 6.

<sup>91</sup> The Chamber looked at a number of grounds upon which the counsels in question had asserted they were experiencing difficulty with their clients, the most serious of which was the problem of obtaining instructions from the accused persons. (See *Majority Decision on Defence Application for Withdrawal* at paragraph 34. For further reasons to explain the difficulties defence counsel were experiencing, see paragraphs 41 and 42 of the same judgment). The Chamber then looked at the jurisprudence from *Milosevic* case at the International Criminal Tribunal for the Former Yugoslavia and the *Bagosora* and the *Barayagwiza* cases at the International Criminal Tribunal for Rwanda. In line with the *Barayagwiza* case, the majority of the Chamber found that in the present case, by withdrawing instructions from their counsel, the accused were merely boycotting the trial and obstructing the course of justice, but that this alone could not constitute the “most exceptional circumstances” within the meaning of Rule 45(E). (See *Majority Decision on Defence Application for Withdrawal* at paragraph 39). The accused Samuel Hinga Norman in the CDF trial and Augustine Gbao in the RUF trial have also previously boycotted the proceedings at the Special Court, though this was not referred to in the majority decision.

<sup>92</sup>*Majority Decision on Defence Application for Withdrawal* at paragraph 6.

<sup>93</sup>*Majority Decision on Defence Application for Withdrawal* at paragraph 6.

<sup>94</sup> The difficulties experienced by the lead counsels included: that their clients would not come to court, that their clients would not give them instructions, that there was a deteriorating relationship between themselves and their clients, not helped by the possibility that they may have been called upon to give evidence in the contempt proceedings against their wives, that they saw themselves as acting against the principles of their own Bar Code. (See *Majority Decision on Defence Application for Withdrawal* at paragraph 59).

<sup>95</sup>*Majority Decision on Defence Application for Withdrawal* at paragraph 59.

<sup>96</sup>Ibid. at paragraph 57.

<sup>97</sup>This was in relation to the fact that, in one of their submissions, the counsels alleged that there were threats against “court appointed counsel” at the Special Court, even though counsels themselves were not court appointed at the time.

<sup>98</sup>*The Prosecutor v Alex Tamba Brima, Brima Bazzi Kamara and Santigie Borbor Kanu* (SCSL-04-16-T) “Separate and Dissenting Opinion of Justice Sebutinde in the Decision on the Confidential Joint Defence Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu” (8 August 2005) at paragraph 15. (Hereafter *Sebutinde J’s Dissenting Opinion on the Withdrawal of Defence Counsel*).

<sup>99</sup>*Majority Decision on Defence Application for Withdrawal* at paragraph 62.

<sup>100</sup>Ibid.

<sup>101</sup>*Majority Decision on Motion for Reappointment of Defense Counsel* at paragraph 1(iv).

<sup>102</sup>*Majority Decision on Motion for Reappointment of Defense Counsel* at paragraph 40.

<sup>103</sup>*Majority Decision on Motion for Reappointment of Defense Counsel* at paragraph 8.

<sup>104</sup>*Majority Decision on Motion for Reappointment of Defense Counsel* at paragraph 32.

<sup>105</sup> See *Majority Decision on Motion for Reappointment of Defense Counsel* at paragraphs 45 – 48.

<sup>106</sup>In support of this proposition see *Prosecutor v Martic* (Case No. IT-95-PT-11) “Decision on Appeal Against Decision of the Registry, 2 August 2002”, *Prosecutor v Knezevic* (Case No. IT-95-4-PT, IT-95-8/1 PT) “Decision on Accused’s Request for Review of Registrar’s Decision as to Assignment of Counsel, 6 September 2002.”

<sup>107</sup>In that instance, the Principal Defender sought to have the accused’s interim counsel undergo a medical examination prior to entering into a permanent legal services contract assigning him as counsel for the accused for the duration of the case. The Principal Defender argued that if counsel refused to comply with this condition and was refused the contract, the accused’s rights would not be violated under Article 17(4)(d) because another counsel would be assigned to him. The Chamber found this argument to be “superficial, cosmetic, unimpressive and unconvincing” on the grounds that, *inter alia*, “the Counsel to be assigned to the Applicant may not be of his real choosing, as required by the Statute. [Emphasis added]”. See *The Prosecutor v Alex Tamba Brima, Brima Bazzi Kamara and Santigie Borbor Kanu* (SCSL-2004-16-PT) “Decision on Applicant’s Motion Against Denial By The Acting Principal Defender to Enter a Legal Services Contract for the Assignment of Counsel” (6 May 2004) at paragraph 47.

<sup>108</sup>*The Prosecutor v Bagosora et al*, Case No ICTR-98-41-T, “Decision on Maitre Paul Skolnik’s Application for Reconsideration of the Chamber’s Decision to Instruct the Registrar to Assign Him As Lead Counsel for Gratien Kabiligi” (24 March 2005) at paragraph 21. See also *Appeals Chamber Decision on Reappointment* (Robertson J concurring) at paragraphs 55 - 68.

<sup>109</sup>*Majority Decision on Motion for Reappointment of Defense Counsel* at paragraph 50. The judges determine that that the accused, their Counsel and the Deputy Principal Defender acted with “alacrity” and “sought to go behind the [original] order and seek to reverse it”.

<sup>110</sup>*Majority Decision on Motion for Reappointment of Defense Counsel* at paragraph 61.

<sup>111</sup>*Majority Decision on Motion for Reappointment of Defense Counsel* at paragraph 35.

<sup>112</sup>*Majority Decision on Motion for Reappointment of Defense Counsel* at paragraph 52.

<sup>113</sup> Ibid., at paragraph 48.

<sup>114</sup>*Dissenting Opinion of Judge Sebutinde on Motion for Reappointment*, at paragraph 16.

<sup>115</sup>*Dissenting Opinion of Judge Sebutinde on Motion for Reappointment*, at paragraph 45.

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<sup>116</sup> *Appeals Chamber Decision on Reappointment* (Robertson J, concurring) at paragraph 2.

<sup>117</sup> See *Majority Decision on Motion for Reappointment of Defense Counsel* at paragraph 51. This point is particularly pertinent when considering the overall response of the Chamber to the accused's attempts to assert that their counsel be reappointed. In an earlier instance at trial (prior to the accused submitting their motion), duty counsel for the AFRC case had appeared before the Trial Chamber attempting to table the letter from them. The Presiding Judge noted at the time that the order relating to the withdrawal of counsel had already been made and that "letters, correspondence or documents that seek to go behind that decision cannot be countenanced in this court". While this reaction seems understandable, given the Chamber was in the process of finalising its decision at the time, the later statement in their June 2005 decision may suggest that they believed that they did not, in any event, have the right to reconsider their previous order.

<sup>118</sup> *Majority Decision on Motion for Reappointment of Defense Counsel* at paragraph 48.

<sup>119</sup> This included submissions relating to the relationship between the Defence Office and the Registry. The Registrar responded to both the accused persons motion and the Defence Office's motion (including the Defence Office's additional grounds). In relation to the latter, the Registrar alleged that the additional grounds should not be considered or that the Appeals Chamber leave the Registrar to respond to them. The Registrar's motion in this regard was dismissed in its entirety. See *Appeals Chamber Decision on Reappointment* paragraphs 61 –64.

<sup>120</sup> The Appeals Chamber had to determine whether the Trial Chamber had jurisdiction to review the Registrar's actions and subsequently, whether it was correct in determining that those actions should not be declared null and void as the Accused requested. In relation to the former, the majority of the Appeals Chamber fully concur with the decision of Justice Pillay in the *Prosecutor v Nzirorera* on the need for a juridical review of administrative decisions affecting the rights of the Accused. See *Appeals Chamber Decision on Reappointment* at paragraphs 65 –97 and in particular, paragraphs 69-71 and 89.

<sup>121</sup> *Prosecutor v Semanza*, ICTR-97-20-A, Judgment, 20 May 2005, para 8.

<sup>122</sup> See *Appeals Chamber Decision on Reappointment* at paragraphs 124 - 128.

<sup>123</sup> He also discusses the relationship between the Defence Office and the Registry in detail (and the origins of the proposal for the Defence Office) and for this reason, his decision warrants further consideration in light of the arguments put forth by the Defence Office in its cross-motion on appeal.

<sup>124</sup> *The Prosecutor v Alex Tamba Brima, Brima Bazzi Kamara and Santigie Kanu* (SCSL-2004-16-AR73) "Separate and Concurring Opinion of Hon. Mr Justice George Gelaga King on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion For the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzi Kamara" (8 December 2005) at paragraph 3.

<sup>125</sup> Testimony of Witness TF1-334, Special Court Monitoring Program, Update No.38 (20 May 2005).

<sup>126</sup> Testimony of Witness TF1-033, Special Court Monitoring Program, Update No.38 (15 July 2005).

<sup>127</sup> Testimony of Witness TF1-167 (George Johnson aka "Junior Lion"), Special Court Monitoring Program, Update No.53, 16 September 2005.

<sup>128</sup> Testimony of Witness TF1-334, Special Court Monitoring Program, Update No.39, 27 May 2005.

<sup>129</sup> *The Prosecutor v Alex Tamba Brima, Brima "Bazzi" Kamara and Santigie "Borbor" Kanu* (SCSL-04-16-PT)

"Further Amended and Consolidated Indictment" (18 February 2005) at paragraph 33.

<sup>130</sup> *Prosecutor of the Tribunal v Slobodan Milosevic, Second Amended Indictment*

<sup>131</sup> *The Prosecutor v Alex Tamba Brima, Brima "Bazzi" Kamara and Santigie "Borbor" Kanu* (SCSL-04-16-T)"Joint Legal Part Defence Motion Judgment of Acquittal Pursuant to Rule 98" (13 December 2005) at paragraphs 29 - 33.

<sup>132</sup> See *The Prosecutor v Blaskic* (Appeal Judgement) at para.33; *The Prosecutor v Vasiljevic* (Appeal Judgment) at para 101 and *The Prosecutor v Tadic* (Appeal Judgment) at paragraph 228.

<sup>133</sup> 2000/Res/1315, Security Council Resolution 1315, at paragraph 9.

<sup>134</sup> Right-sizing at page 316.

<sup>135</sup> In particular, the co-option of Gibril Massaquoi, former spokesperson for the RUF, is perceived by some local civil society activists as particularly controversial. They argue that Massaquoi's relationship with both Sam Bockarie and Foday Sankoh and his involvement in many of the alleged crimes made him a prime candidate for indictment. (Interview with a member of the TRC Follow-Up Project, an initiative in Sierra Leone civil society, 20 November 2005). Massaquoi has testified as an insider witness at the Special Court: see Special Court Monitoring Program, Update No. 58 (10 October 2005), available online at: <http://ist-socrates.berkeley.edu/~warcrime/SL-archives.htm>. Other mid-level and fairly senior commanders of note that have escaped prosecution include: Albert Nallo, former National Deputy Director of Operations for the Civilian Defence Forces; Staf Al Haji (or Al Haji Boyoh) of the Armed Forces Revolutionary Council; and Commander Savage, also of the Armed Forces Revolutionary Council. Several witnesses have testified to the particularly heinous crimes committed by Commander Savage, who is alleged to have mutilated over 150 civilians and laid them in a pit known as "the Savage Pit" in Tombodu, Sierra Leone. See in particular, Special Court Monitoring Program, Updates No.6 (1 October 2004), No.17 (14 January 2005) and No.20 (4 February 2005). See also "The Special Court for Sierra Leone: Promises and Pitfalls of a 'New Model'" (International Crisis Group, Freetown/Brussels, 4 August 2003), at page 2.

<sup>136</sup> Interview with Special Assistant to the Deputy Registrar, Freetown (15 November 2005).

<sup>137</sup> *Resolution 1315*, at paragraph 9.

<sup>138</sup> Right-sizing, at page 325.

<sup>139</sup> Interview with official from the British High Commission, Freetown (July 2005).

<sup>140</sup> Interview with Special Assistant to the Deputy Registrar, Freetown (November 2005).

<sup>141</sup> *Appeals Chamber Decision on Reassignment* (Robertson J, concurring) at paragraphs 11 and 12.

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<sup>142</sup>See *Silencing Sexual Violence*.

<sup>143</sup>Supra, note 136.

<sup>144</sup>*The Prosecutor v Alex Tamba Brima, Brima “Bazzy” Kamara and Santigie “Borbor” Kanu* (SCSL-04-16-T) “Joint Legal Part Defence Motion for Judgment of Acquittal Under Rule 98” (13 December 2005) at page 5.

<sup>145</sup>L.U.R.D. stands for “Liberians United for Reconciliation and Democracy” and is the name of an insurgency group that sought to build and sustain a stable democracy in the Republic of Liberia during Charles Taylor’s reign as president. Interview with member of the TRC Follow-up Project, an initiative in Sierra Leone civil society, 20 November 2005.

<sup>146</sup>Article 17(1)(a) of the Rome Statute states that the International Criminal Court shall determine that a case is inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it, unless “the State is unwilling or unable genuinely to carry out the investigation or prosecution”. (Rome Statute of the International Criminal Court, 1998). The text of the Statute is available online at: <http://www.un.org/law/icc/statute/romefra.htm>.

<sup>147</sup>See *Interim Report No.1*.

<sup>148</sup>S/RES/1606 (2005) Resolution 1606 (2005). Paragraph 2 states: “*Convinced of the need*, for the consolidation of peace and reconciliation in Burundi, to establish the truth, investigate crimes, and identify and bring to justice *those bearing the greatest responsibility* for the crimes of genocide, crimes against humanity, and war crimes committed in Burundi since independence...[Emphasis added in the second instance].”

<sup>149</sup>Interview with Presiding Judge of Trial Chamber II, Freetown (November 2005).

<sup>150</sup>Interview with Duty Counsel for the AFRC, Freetown (November 2005).

<sup>151</sup>Interview with AFRC Duty Counsel, Freetown (November 2005).

<sup>152</sup>For a good discussion of the Outreach Activities of the ICTR, see Peskin, V. “Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme” Journal of International Criminal Justice, September 2005 Volume 3, issue no.4, page 950.

<sup>153</sup>Article VI(2) of the Lomé Peace Agreement specifically describes the Truth and Reconciliation Commission as one of several “structures for national reconciliation and the consolidation of peace”. Article XXVI specifically provides for the establishment of the Truth and Reconciliation “to address impunity, break the cycle of violence, provide a forum for both the victims and the perpetrators of human rights violations to tell their story”. See *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Volume 1 (2004, Truth and Reconciliation Commission, 2004).

<sup>154</sup>Interview with a member of the TRC Follow-Up Project, an initiative in Sierra Leone civil society, 20 November 2005.

<sup>155</sup>*Rebuilding Failed States* at page 8. Available on-line at: [www.icg.org](http://www.icg.org).