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Speaking to Africa – The Early Success of the Special Court for Sierra Leone

Noah B. Novogrodsky *

I. Introduction

After a decade of civil war marked by appalling human rights abuses, Sierra Leone has embraced not one, but two transitional justice experiments – a recently concluded truth and reconciliation commission¹ and a series of criminal prosecutions. The concurrent operation of the truth commission and the international trials has given rise to a significant body of scholarship addressing the problems of sequencing, confusion, objectives and the use of evidence before the two institutions.²

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1. The truth and reconciliation commission was established with the goal of creating an "impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone." *See The Truth and Reconciliation Commission Act 2000 art. 6(1), Feb. 10, 2000, available at* <http://www.sierra-leone.org/trcbook-TRCAct.html>.
2. The phenomenon of a criminal tribunal operating alongside a truth commission and the potential role for each instrument has been addressed by the commission and various legal scholars. *See* Elizabeth M. Evenson, *Truth and Justice in Sierra Leone: Coordination Between Commission and Special Court*, 104 COLUM. L. REV. 730 (2004) (exploring the operation challenges associated with each institution). *See also* William A. Schabas, *The*

Far less attention has been paid to the actual operation of the two entities. The focus of this article is the legacy of three early decisions of the Special Court for Sierra Leone and their potentially transcendent impact on other African conflicts. Between March and June 2004, the Special Court for Sierra Leone issued a trinity of jurisdictional opinions addressing the recruitment of child soldiers, the effect of a domestic amnesty on subsequent international prosecutions, and the status of head of state immunity.³ A hybrid tribunal established by the United Nations and the Government of Sierra Leone, the Court was created to try those who "bear the greatest responsibility" for serious violations of international humanitarian law committed during the country's civil war after November 1996.⁴ The Special Court employs individual criminal accountability as a means of promoting transitional justice and the rule of law in Sierra Leone. Whether by fortune or design, however, the Special Court's early decisions have particular resonance for Africa as a whole and echo well beyond the modest effort unfolding in Freetown, Sierra Leone.

This paper argues that the Special Court is fashioning a new institutional model that draws on the strengths of internationalized proceedings while maintaining local relevance and legitimacy. By addressing the crimes of Sierra Leoneans and foreigners alike, the Special Court has mediated international and local imperatives to create a hybrid entity that, while speaking predominantly to foreigners, blends local, regional and international dimensions.

Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone, 25 HUM. RTS. Q. 1035 (2003); Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE HUM. RTS. & DEV. L.J. 139, 154-55 (2003); Marieke Wierde, Priscilla Hayner & Paul van Zyl, *Exploring the Relationship Between the Special Court and the Truth and Reconciliation Commission of Sierra Leone*, 2002 INT'L CTR. FOR TRANSITIONAL JUST., available at <http://www.ictj.org/images/content/0/8/084.pdf>.

3. Recruitment is defined in Article 4 of the Statute of the Special Court for Sierra Leone as "[c]onscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities." The implication of this Article is that a child under the age of fifteen cannot meaningfully consent to enlist or participate in armed conflict. The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, annex, delivered to the Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter *Special Court for Sierra Leone*].
4. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, available at <http://www.sc-sl.org/scsl-agreement.html>.

II. Background

Already desperately poor and badly misgoverned, Sierra Leone erupted in a full fledged civil war in March 1991 when guerillas calling themselves the Revolutionary United Front (RUF) invaded the country from neighboring Liberia.⁵ RUF leader Foday Sankoh had met then-Liberian rebel commander Charles Taylor in Libya and the two leaders coordinated attacks, exchanged weapons and shared tactics that would redefine brutality in West Africa.⁶

The ensuing war was characterized by grave human rights abuses committed by rebels and government-affiliated troops alike. Over a ten-year period, armed units in Sierra Leone kidnapped rural populations, extracted forced labor in diamond mines and created more than a million refugees.⁷ Before the war was over, the RUF and Government forces were joined in the conflict by the Armed Forces Revolutionary Council, mercenary armies – including the South African headed firm “Executive Outcomes” – several regional and UN peacekeeping collections and a militia known as the Civilian Defence Forces.⁸ In all, more than 50,000 people were killed.⁹ Thousands more were abducted and forced into sexual slavery, unwanted marriages and domestic servitude.¹⁰ Countless children were killed in the fighting; many who survived were severely damaged by their

5. The Sierra Leone Truth and Reconciliation Report blamed past misgovernance for the instability that augured the worst human rights violations. See Priscilla Hayner, *The Sierra Leone Truth and Reconciliation Commission: Reviewing Its First Year*, 2004 INT’L CTR. FOR TRANSITIONAL JUST., available at <http://www.ictj.org/images/content/1/0/100.pdf>.
6. Jamie O’Connell, *Here Interest Meets Humanity: How to End the War and Support Reconstruction in Liberia and the Modest Case for American Leadership*, 17 HARV. HUM. RTS. J. 207 (2004). Taylor is believed to have supported the invasion of Sierra Leone to gain access to Sierra Leonean diamonds, to increase his influence in the subregion and because he condemned the Economic Community of West Africa States (ECOWAS) for using Sierra Leone as a base for its armed support of the National Unity Government in Liberia that Taylor was bent on destroying. See INT’L CRISIS GROUP, *SIERRA LEONE: TIME FOR A NEW MILITARY AND POLITICAL STRATEGY*, at ii (2001), available at <http://www.crisisgroup.org/home/index.cfm?id=1491&l=1>.
7. See generally PAUL RICHARDS, *FIGHTING FOR THE RAIN FOREST: WAR, YOUTH AND RESOURCES IN SIERRA LEONE* (1996).
8. *Sowing Terror: Atrocities Against Civilians in Sierra Leone*, 10 HUM. RTS. WATCH (1998), available at <http://www.hrw.org/reports98/sierra/>; “We’ll Kill You If You Cry”: *Sexual Violence in the Sierra Leone Conflict*, 15 HUM. RTS. WATCH (2003), available at <http://hrw.org/reports/2003/sierraleone/sierleon0103.pdf>.
9. BBC, *Report on War in Sierra Leone*, http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1061561.stm.
10. See *Child Soldiers Newsletter: Sierra Leone: War-Related Sexual Abuse*, 3 COAL. TO STOP THE USE OF CHILD SOLDIERS 2 (2002), available at http://www.child-soldiers.org/document_get.php?id=677.

experiences.¹¹

Desperate to quiet the conflict, the Government of Sierra Leone entered into a short-lived agreement with the warring factions in 1996 in Abidjan. The failure of that accord was followed by an agreement between the Government and the RUF signed in Lomé, Togo on July 7, 1999. That agreement sought to end the war and called for the creation of a truth and reconciliation commission to address past crimes. Significantly, the Lomé Accord provided a blanket amnesty for perpetrators of the atrocities committed in the course of the war.¹² Foday Sankoh,¹³ received an individual pardon in the Lomé Agreement as well as the position of Minister for Mining in the future government of Sierra Leone.¹⁴ International observers, represented by the United Nations, the Commonwealth, ECOWAS and the Organisation of African Unity endorsed the accord as "moral guarantors," although, the United Nations Secretary-General's Special Representative appended a reservation to his signature insisting that amnesty could not apply to crimes against humanity and war crimes.¹⁵

Almost immediately, the cease-fire recognized in the Lomé Accord fell apart and fighting resumed. The RUF and other groups attacked UN peacekeepers in Sierra Leone and in 2000, armed combatants took nearly 500 foreign troops hostage.¹⁶ In May 2000, British Special Forces, acting at the request of the Government of Sierra Leone, freed the hostages and arrested Foday Sankoh.¹⁷ Notwithstanding the domestic amnesty of the previous year, the Government of Sierra Leone then wrote to the UN Secretary-General requesting the establishment

11. *Sowing Terror: Atrocities Against Civilians in Sierra Leone*, *supra* note 9; see also *Sierra Leone: Childhood – A Casualty of Conflict*, 2000 AMNESTY INT'L 11-14 available at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR510692000ENGLISH/\\$File/AFR5106900.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR510692000ENGLISH/$File/AFR5106900.pdf).
12. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. IX, July 7, 1999, U.N. Doc. S/1999/777, available at <http://www.sierra-leone.org/lomeaccord.html> [hereinafter Lome Accord].
13. *Id.* at art. IX. Foday Sankoh was a leader and founder of the Revolutionary United Front (RUF), which started the Sierra Leonean civil war in which between 50,000 and 200,000 people were killed. Sankoh was indicted on 17 counts for various war crimes, including crimes against humanity, rape, sexual slavery and extermination, but died in 2003 while awaiting trial at the Special Court. Obituary, *Sierra Leone Rebel Leader Dies*, BBC NEWS, July 30, 2003, <http://news.bbc.co.uk/2/hi/africa/3109521.stm>.
14. Lome Accord, *supra* note 13, at arts. VII., IX.
15. The Secretary-General, *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, ¶ 7, delivered to the Security Council, U.N. Doc. S/1999/836 (July 30, 1999).
16. Laura R. Hall & Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT'L L.J. 287, 289 (2003); Evenson, *supra* note 3, at 737-38.
17. Evenson, *supra* note 3, at 738.

of an international tribunal to bring RUF leaders to trial.¹⁸ Security Council Resolution 1315 recalled the reservation of the Special Representative at Lomé and authorized the Secretary-General to begin negotiations to establish a Special Court for Sierra Leone.¹⁹ On January 16, 2002, the United Nations and the Government of Sierra Leone entered into an agreement to establish the Special Court to prosecute “persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.”²⁰

III. Three Jurisdictional Rulings

A. Amnesty

The first, and perhaps most politically controversial, of the Court’s jurisdictional decisions concerned the potentially preclusive effect on the Special Court of prior amnesties provided to Morris Kallon²¹ and Brima Bazzy Kamara.²² Kallon and Kamara’s counsel filed preliminary motions arguing that the Government of Sierra Leone was bound to observe the amnesty agreement it entered into with the RUF in July 1999 and, alternatively, even if the Court could

18. *Letter from the Permanent Representative of Sierra Leone to the President of the Security Council*, Aug. 9, 2000, annex, U.N. Doc. S/2000/786 (Aug. 10, 2000) [hereinafter Letter].

19. S.C. Res. 1315, ¶ 1, U.N. Doc. S/RES/1315 (2000).

20. *Special Court for Sierra Leone*, *supra* note 4, at ¶ 1.

21. “Morris Kallon, aka Bilai Karim, alleged to have been a former commander of the Revolutionary United Front of Sierra Leone, was indicted on March 7, 2003, on a 17-count indictment for crimes against humanity, violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law (an 18th count was later added).” Summary of Charges against the RUF Accused – Special Court for Sierra Leone, <http://www.sc-sl.org/RUFcasesummary.html> (last visited Aug. 13, 2006); *see* Prosecutor v. Sessay, Case No. SCSL-2004-15-PT, Amended Consolidated Indictment (Mar. 13, 2004), *available at* <http://www.sc-sl.org/RUF.html> (follow “first” part and “second” part hyperlinks under “Indictment”).

22. “Brima Bazzy Kamara, aka Ibrahim Bazzy Kamara, aka Alhaji Ibrahim Kamara, is alleged to have been a senior member of the Armed Forces Revolutionary Council. He was indicted on 28 May 2003 on a 17-count indictment for crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (commonly known as war crimes), and other serious violations of international humanitarian law (an 18th count was later added; four counts were subsequently dropped).” AFRC Accused Case Summary – Special Court for Sierra Leone, <http://www.sc-sl.org/AFRCcasesummary.html> (last visited Aug. 13, 2006); *see* Prosecutor v. Brima, Case No. SCSL-2004-16-PT, Further Amended Consolidated Indictment (Feb. 18, 2005), *available at* <http://www.sc-sl.org/AFRC.html> (follow “Indictment” hyperlink under “Indictment”).

examine pre-1999 activity, it would be an abuse of international legal process to do so.²³ Fellow accused Moinina Fofana and Augustine Gbao intervened in support of the motions.²⁴

Because Kallon and Kamara were indicted on charges alleging the commission of grave abuses before July 1999, the Court was immediately confronted by a direct challenge to the adjudication of half of its temporal mandate.²⁵

The Court's decision pivoted on its characterization of Article IX of the Lomé Agreement and the related finding that the Special Court is an international tribunal. Paragraph three of Article IX to the Lomé Agreement provides that:

To consolidate peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations since March 1991, up to the signing of the present Agreement.²⁶

The defendants argued that the purpose of the Lomé Agreement was inherently incompatible with the existence of the Special Court. Specifically, counsel for Kallon and Kamara sought to hold the Government of Sierra Leone to its previous bargain and argued that it was arbitrary and illegal of the UN and the Government of Sierra Leone to appear to honour the earlier Abidjan Peace Agreement (by founding the Special Court's temporal jurisdiction on the date of that accord) but not the Lomé Agreement. The defense claimed that because the Government of Sierra Leone was a party to both the Lomé Agreement and the treaty creating the Special Court, it could not void its previous commitment.

The Court disagreed and found that Article IX of the Lomé Agreement addressed and could have legal force with respect to the national courts of Sierra Leone only. "The Lomé Agreement cannot be characterised as an international instrument," the Court declared.²⁷ Accordingly, the Court held that (i) "the

23. Summary of Decision to on Challenge to Jurisdiction - Lome Accord Amnesty -13 March 2004 - Special Court for Sierra Leone, <http://www.sc-sl.org/summary-SCSL-04-15-PT-060.html> (last visited Aug. 13, 2006).

24. *Id.*

25. The Statue of the Special Court for Sierra Leone grants the Tribunal temporal jurisdiction over crimes committed since November 30, 1996. Statute of the Special Court for Sierra Leone art. 1, Aug. 14, 2000, available at <http://www.sc-sl.org/documents.html> (follow hyperlink "Statute of the Special Court, annexed to the Agreement (16 January 2002)") [hereinafter Statute of the Special Court].

26. Lome Accord, *supra* note 13, at art. IX, ¶ 3.

27. Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lome Accord Amnesty, ¶ 42 (Mar. 13, 2004), available at <http://www.sc-sl.org/RUF.html> (follow "Decisions" hyperlink under "Decisions").

amnesty granted by Sierra Leone cannot cover crimes under international law that are the subject of universal jurisdiction,"²⁸ and (ii) that it did not bind future international criminal bodies. States cannot use domestic legislation, the Court found, to bar international criminal liability.

The Court's amnesty decision is rooted in the ICTY's decision in *Prosecutor v. Furundzija*, in which the Yugoslav Tribunal found that a domestic amnesty law does not prevent prosecution for the *jus cogens* offense of torture before the ICTY or indeed in any other foreign jurisdiction.²⁹ Applied to this case, the Court suggested that Article IX of the Lomé Accord was a part of the municipal law of Sierra Leone but had no effect on the Special Court. Just as *Azapo v. President of the Republic of South Africa*³⁰ confirmed the validity of amnesties provided by the South African Truth and Reconciliation Commission with respect to the domestic laws of South Africa, the Kallon Court acknowledged a role for the Lomé Agreement while limiting its impact on the Special Court.

In deciding the case on the grounds of universal jurisdiction for certain crimes, the Kallon Court eschewed primary reliance on either the positivist argument that it had jurisdiction because the Court's statute so provides,³¹ or the claim that the SRSG's disclaimer invalidated part of the Lomé Agreement.

Equally important, the Court offered an historical analysis of the conflict and divided its characterization of the Sierra Leonean civil war into three phases: (i) a period of armed conflict, (ii) a peace agreement phase, and (iii) a justice phase which involved "separating what is in the exclusive domain of the municipal authority to be resolved under municipal law from what is in the concurrent jurisdiction of that authority and other international community to be resolved by application purely of international law."³² In order to strengthen its role in the so-called third phase, the Court cited President Ahmad Tejan Kabbah's letter of 12 June 2000 to the President of the Security Council in which he observes that "Lately, [the RUF leadership] have abducted over 500 United Nations peacekeepers and seized their arms, weapons and uniforms, and even killed some peacekeepers. This is in spite of a provision in the Lomé Peace Agreement itself requiring both my Government and the RUF to ensure the safety of these

28. *Id.* at ¶ 71.

29. *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Dec. 10, 1998).

30. *Azanian People's Org. (AZAPO) v. President of the Republic of S. Africa* 1996 (4) SA 671 (CC) (S. Afr.).

31. Statute of the Special Court, *supra* note 26, at art. X.

32. *Prosecutor v. Kallon*, *supra* note 26 at paras 16-19.

peacekeepers.”³³

B. The Recruitment of Child Soldiers

The second of the Court’s rulings addresses the criminality of recruiting child soldiers under customary international law. The decision in the case of Sam Hinga Norman finds that Norman may be prosecuted for the crime of enlisting children under the age of fifteen into armed forces or groups and of using them to participate actively in hostilities.³⁴

Norman, who is among the first defendants to appear before the Special Court, is the former leader of the Civil Defence Forces, a pro-government militia group comprised predominantly of traditional hunters known as *Kamajors*. The Indictment issued against Norman and others accuses him of systematically pressing small boys into armed combat.

In that, the Indictment reflects a defining feature of the decade-long Sierra Leonean civil war in which more than 10,000 children served as child soldiers in the country’s three major armed forces: the Revolutionary United Front, the Armed Forces Revolutionary Council, and the CDF.³⁵

Norman challenged the Court’s subject matter jurisdiction by moving to dismiss the charges relating to child recruitment on the grounds that recruiting child soldiers was not a crime under customary international law at the times relevant to the indictment (between 1996 and 2001).³⁶ Norman submitted that while international instruments, such as Additional Protocol II to the Geneva Conventions and the Convention on the Rights of the Child, may have prohibited the recruitment of child soldiers, these instruments did not affix any criminal responsibility to such activity.³⁷ Furthermore, Norman argued, if child recruitment ever amounted to an international crime, it would only be after the Rome Statute of

33. Letter, *supra* note 19, at annex.

34. Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allicu Kondewa, Case No. SCSL-2004-14-PT (11-21), Amended Indictment, Count 8 (Feb. 5, 2004). For more detailed analysis of the Norman decision, see Noah Novogrodsky & Mathew Goldstein, *Small Steps: Prosecuting The Recruitment of Child Soldiers – the Case of Sam Hinga Norman*, 15(3) INTERIGHTS’ BULL., May 2006.

35. Special Representative of the Secretary-General, *Annex to the Protection of Children Affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, ¶ 131, delivered to the General Assembly, U.N. Doc. A/54/430 (1999).

36. Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-PT, Defense Preliminary Motion Based on Lack of Jurisdiction: Child Recruitment, at 3, available at [http://www.scs-sl.org/Documents/SCSL-04-14-AR72\(E\)-131-7383.pdf](http://www.scs-sl.org/Documents/SCSL-04-14-AR72(E)-131-7383.pdf).

37. *Id.*

the International Criminal Court of 1998 – not before.³⁸

In a three to one decision, the Special Court rejected Norman's preliminary motion.³⁹ The Court held that the offence under Article 4(c) of its Statute, "[c]onscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities ("child recruitment")," does not violate the international legal prohibition on retroactive criminal liability (*nullum crimen sine lege*), and that Norman was properly charged with a grave breach of humanitarian law.⁴⁰ The Court found that the prohibition against recruiting child soldiers had crystallized into a crime under customary international law before November 1996, and that, accordingly, individuals may be prosecuted for this offence at any time under the temporal jurisdiction of the Special Court⁴¹. In dissent, Judge Robertson distinguished conscription from enlistment, arguing that individual criminal responsibility did not attach to the offense of enlistment until the Rome Treaty of the International Criminal Court was adopted in July 1998.⁴²

The impact of the majority's decision in *Norman* is profound. The jurisdictional ruling provides content to customary law norms, attaches individual criminal sanctions to the practice of recruiting child soldiers and applies the newly crystallized rule retroactively to capture a defining feature of the war. In that, *Norman* invokes the Nuremberg precedent through which the International Military Tribunal found that:

The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from general principles of justice applied by jurists, and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world.⁴³

38. See generally *id.*

39. Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), at 7383-409 (June 14, 2004).

40. *Id.* at ¶ 17.

41. Under author's direction, the University of Toronto Faculty of Law International Human Rights Clinic (IHRC) submitted an amicus brief in the *Norman* case in November 2003, available at http://www.law.utoronto.ca/visitors_content.asp?itemPath=5/12/3/0/0&contentId=879. The IHRC's submission will soon be published in 7 SAN DIEGO INT'L L.J. (forthcoming), and is currently available online.

42. See generally Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E) at 7413-47. In Robertson's view, indicting Norman for actions committed before July 1998 violated the principle of *nullem crimen sine lege*.

43. See Trial of German Major War Criminals (Goering et al.), International Military Tribunal (Nuremberg), Judgment and Sentence, Sept. 30 and Oct. 1, 1946 (Cmd 6964, HMSO,

Applying the blueprint through which Nuremberg criminalized crimes against humanity to the recruitment of child soldiers, *Norman* thus begins to align international criminal law with general international human rights protections and common law domestic provisions regarding the abuse of children.⁴⁴

C. Head of State Immunity

The Special Court's third foundational decision concerns head-of-state immunity (HOSI). On May 31, 2004, the Special Court rejected former Liberian President Charles Taylor's preliminary motion⁴⁵ to the Court seeking an order to quash his indictment on immunity grounds.⁴⁶ Taylor's counsel had deposited the motion with the Special Court on July 23, 2003, some weeks after Chief Prosecutor David Crane had "unveiled" the indictment and circulated an international arrest warrant while Taylor, then still Liberia's Head of State, was in nearby Ghana. (Taylor was in Ghana ostensibly to attend peace talks aimed at securing a cease-fire between belligerents in Liberia's own civil war.). The Special Court indictment accused Taylor of war crimes, crimes against humanity and other serious violations of international humanitarian law for his role in supporting the Revolutionary United Front's activities in Sierra Leone.⁴⁷

London); Judgment of the Nuremberg International Military Tribunal, 1946, 41 A.J.I.L.172, 172-333 (1947).

44. Customary international law explicitly affirms an individual's right to liberty and security. The Universal Declaration of Human Rights states "everyone has the right to freedom of movement and residence within the borders of each State." (Article 13). Domestic provisions punish child abductors the world over. *See, e.g.* The Criminal Procedure Act, 1965 (Sierra Leone) (as amended), the Prevention of Cruelty to Children Act, 1926 (Sierra Leone), and The Malicious Damage Act, 1861 (Sierra Leone). In Canada, kidnapping is made punishable by sec. 279 of the Criminal Code; in the US by 18 U.S.C. § 1201 (2003). Public conscience has been unequivocal in its condemnation of child abuse; in light of such clarity, Norman's claims of a right to recruit child soldiers seem patently unconvincing. For international case law similarly demonstrating the alignment of international human rights protections with domestic prohibitions, *see* Myrna Mack, Case 10.636, Inter-Am. C.H.R., Report No. 10/96 and *Velasquez Rodriguez* Case (Gov't of Hond.), Judgment of July 29, 1988, Inter-Am. C.H.R., Report No. 4, Ser. C.
45. Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-I-018 (65-102), Applicant's Motion Made Under Protest and Without Waiving of Immunity Accorded to a Head of State President Charles Ghankay Taylor Requesting that the Trial Chamber Do Quash to Said Approved Indictment of 7th Mar. 2003, *available at* <http://www.sc-sl.org/Documents/SCSL-03-01-I-059.pdf>.
46. Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-I (30314-3039), Decision on Immunity from Jurisdiction (May 31, 2004), *available at* <http://www.sc-sl.org/Documents/SCSL-03-01-I-059.pdf>.
47. *See* Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-I, Indictment (Mar. 7, 2003), *available at* <http://www.sc-sl.org/>.

According to Taylor's motion, his indictment "violat[ed] the criminal immunity of the Head of the Sovereign State of the Republic of Liberia President Charles Ghankay Taylor contrary to customary international law as recognized by the jurisprudence of the International Court of Justice."⁴⁸ Taylor, it is undisputed, was the President of Liberia at all times referenced in the indictment; meaning that he was still 'Head of State' when his counsel deposited the preliminary motion pleading HOSI on his behalf.⁴⁹ Taylor argued that HOSI is relinquished only when a State affirmatively ratifies a treaty such as the Rome Statute that effectively penetrates Heads of State immunity.⁵⁰

The tribunal rejected Taylor's argument and found that the Special Court has proper jurisdiction over him.⁵¹ The *Taylor* decision is rooted in the dual conclusion that jurisdiction was the intention of the Security Council, and that Heads of State are not immune before international tribunals.⁵²

The Indictment naming Taylor surprised no one involved with the Special Court. Indeed, Article 6(2) of the Court's statute was drafted with Taylor in mind and provides simply that "[t]he official person of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."⁵³ The Court succinctly recongized that, by entering into the treaty that created the tribunal, the Security Council imbued the Special Court with the power to try Taylor.

Still, Taylor's motion was buttressed by the precedent enshrined in *Democratic Republic of Congo v. Belgium* ("Yerodia case").⁵⁴ There, the International Court of Justice upheld the immunity of the DRC's Foreign Minister Yerodia in the national courts of another sovereign, Belgium, on the grounds that customary international law afforded no exception to the immunity afforded a sitting Minister, even where that person is suspected of having committed war crimes or crimes against humanity.⁵⁵

The *Taylor* decision departs from *Yerodia* by insisting that the Special Court is

48. *Id.* at 68.

49. *Id.*

50. See generally Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-I-018 (3014-39) available at <http://www.sc-sl.org/Documents/SCSL-03-01-I-059.pdf>.

51. *Id.*

52. This paper will focus on the second part of this decision; the intentions of the Security Council are beyond the scope of the argument presented here.

53. Statute of the Special Court, *supra* note 25, art. 6(2).

54. Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14).

55. *Id.* at sec. 58.

not an organ of Sierra Leone's judiciary, but rather an independent international criminal tribunal.⁵⁶ The *Taylor* Court's reasoning is consistent with the *Kallon* decision and distinguishes between obligations in municipal law and the creation of an international institution. Noting that, although the Special Court was established by an Agreement between the United Nations and Sierra Leone pursuant to Security Council resolution 1315 (2000) rather than the exercise of Chapter VII powers,⁵⁷ the Court found that the Security Council's powers were broad enough to encompass the creation of an international tribunal.⁵⁸ The Court also held that the SCSL "has the characteristics associated with classical international organisations (including legal personality; the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members)."⁵⁹

In so finding, the Court explicitly groups the SCSL with the International Criminal Tribunals for the former Yugoslavia and Rwanda. However, the Special Court's legal authority derives from a considerably different source than that of the International Criminal Tribunal for the Former Yugoslavia's jurisdiction over then Yugoslav President Slobodan Milosevic,⁶⁰ and the International Criminal Tribunal for Rwanda's jurisdiction over former Rwandan Prime Minister Jean Kambanda.⁶¹ The ICTY and ICTR were created by the Security Council under Chapter VII of the United Nations Charter. The Statutes of the ad hoc tribunals provide that official immunity shall not relieve a person of criminal responsibility⁶² and oblige

56. *Prosecutor v. Charles Taylor*, Case No. SCSL-2003-01-I-018 (3014-3039), at paragraph 40; available at <http://www.sc-sl.org/Documents/SCSL-03-01-I-059.pdf>.

57. S.C. Res. 1315, U.N.Doc. S/RES/1315 (Aug. 14, 2000).

58. In *Prosecutor v. Tadic*, the International Criminal Tribunal for Yugoslavia determined that not only was the Security Council able to create an International Criminal Tribunal, but also that such a move was "an entirely appropriate reaction to a situation in which international peace is clearly endangered." *Prosecutor v. Tadic*, Case No. IT-94-I-I, Decision on the Defence Motion on Jurisdiction, sec. 27 (Aug. 10, 1995). As authorized by Chapter VII of the UN Charter, specifically article 39, the Security Council may "determine the existence of any threat to peace, breach of peace, or act of aggression and ... decide what measures shall be taken ... to maintain or restore international peace and security." *Id.* § 21.

59. *Prosecutor v. Charles Taylor*, Case No. SCSL-2003-01-I (30314-3039), Decision on Immunity from Jurisdiction, sec. 41(b) (May 31, 2004).

60. *Prosecutor v. Milosevic*, Case No. IT-99-37-I, Decision on Review of Indictment and Application for Consequential Orders, sec. 2 (May 24, 1999).

61. *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence (Sept. 4, 1998).

62. Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia and Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda both read: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility

all states to cooperate with, assist and comply with requests of the two tribunals.⁶³ As Mora Johnson has observed, the coercive powers of Chapter VII require States to disregard any potential legal prohibition under customary international law against the arrest and surrender of Heads of State, given that Articles 25 and 103 of the U.N. Charter compel States to carry out decisions of the Security Council, even when these conflict with other obligations under international law.⁶⁴ Ghana's refusal to arrest Taylor underscored the fact that, unlike the Chapter VII progeny, the Special Court lacks the authority to compel third parties to effectuate its arrest warrants since non-State Parties to a treaty are generally not bound by its provisions.

The *Taylor* decision recognizes that the treaty between the United Nations and the Government of Sierra Leone, creating the Special Court pursuant to a Security Council resolution, confers international characteristics on the tribunal. As a non-domestic tribunal, the Special Court joins a new category of institutions, including the International Criminal Court,⁶⁵ whose statutes provide that official capacity (including that of a Head of State) shall not exempt a person from individual criminal responsibility.⁶⁶

Plainly, the fact that the Government of Sierra Leone contracted with the United Nations — as opposed to another state or a regional organization — influenced the *Taylor* Court. The tribunal finds that the treaty creating the Special

nor mitigate punishment." Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(2), May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY]; Statute of the International Criminal Tribunal for Rwanda, art. 6(2), Nov. 8, 1994, 33 I.L.M. 1602 [hereinafter ICTR].

63. ICTY, *supra* note 63, art. 29; ICTR, *supra* note 63, art. 28.

64. Many scholars have argued that consent was obtained by Yugoslavia and Rwanda "indirectly" for the ICTY and ICTR respectively when these States acceded to the U.N. Charter, at which time they agreed to respect binding decisions of the Security Council. Conversely, Mora Johnson argued that consent is not necessarily required by countries to try their war criminals - including Heads of State (Unpublished article on file with author.)

65. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002, [hereinafter Rome Statute].

66. Article 27 of the Rome Statute reads: "(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State ... shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law shall not bar the Court from exercising its jurisdiction over such a person." *Id.* art. 27. See also Article 6(2) of the Statute of the Special Court for Sierra Leone, which reads, "The official person of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment." Statute of the Special Court, *supra* note 26, art. 6(2).

Court includes the United Nations as the embodiment of the international community.⁶⁷ "The Agreement between the United Nations and Sierra Leone," the Court noted "is thus an agreement between *all* members of the United Nations and Sierra Leone."⁶⁸ The Chamber's finding that the Special Court is an international institution is supported by the reality that the tribunal is funded entirely by foreign sources, and by the fact that its statute explicitly confronts the possibility of prosecuting United Nations peacekeepers.⁶⁹

As precedent, the Court's finding also repudiates Taylor's argument that Head of State immunity is *erga omnes*, that it exists in *all* fora, including international tribunals, and can be penetrated only if the State of which the accused is Head consents in some manner.⁷⁰ Just as the trial of Milosevic confirmed that international criminal law no longer recognizes absolute head of state immunity before international fora, the *Taylor* decision contributes to the demise of that defense before *hybrid* institutions as well.

IV. A Message To Africa

Taken together, these three cases contain particular resonance for Africa.

The Sierra Leonean experiment in transitional criminal justice operates in a context familiar to many African states: a violent civil war involving local and foreign actors, an underdeveloped post-colonial judiciary, big man or cult-figure politics, abject poverty and a history of impunity for state-sponsored persecution. Past failures to deliver justice or the perception of justice have eroded the rule of law and the domestic legal order remains ill-equipped to address the nation's violent history. Article 5 of the Special Court's statute, for instance, imports the 1926 Sierra Leonean law on sexual assault creating three categories of offenses corresponding to the age of the victim – a vestige of outmoded thinking related to sexual maturity that is seen as so flawed that the Prosecutor has refused to indict

67. Prosecutor v. Charles Taylor, SCSL-2003-01-I (30314-3039), Decision on Immunity from Jurisdiction, ¶ 38 (May 31, 2004).

68. Compare *id.* and Prosecutor v. Morris Kallon, Case No.SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 42 (Mar. 13, 2004), available at <http://www.sc-sl.org/Documents/SCSL-04-15-PT-060-I.pdf> and <http://www.sc-sl.org/Documents/SCSL-04-15-PT-060-II.pdf>. (The Court's determination in *Taylor* contrasts with its finding in the *Lomé Accord Amnesty* case which finds that the Lomé Agreement constituted a peace accord between two domestic factions that had force and effect solely in the domestic courts of Sierra Leone.)

69. See Statute of the Special Court, *supra* note 26, at art. 1.

70. See Prosecutor v. Charles Taylor, SCSL-2003-01-I (30314-3039), ¶ 17 (citing the *amicus curiae* submission by professor Phillippe Sands from Oct. 23, 2003).

suspects under the Article.⁷¹

What role then does the Special Court's jurisprudence play for societies that have virtually no experience with competent courts, much less organized judicial reckoning for mass crimes? In recent years, advocates for criminal accountability have made three broad claims in support of trials. First, they argue that trials send a signal to would-be perpetrators that they will be held individually accountable for their actions. Justice for past crimes, advocates for international prosecutions reason, supplies the legal foundation needed to deter future atrocities.⁷² Second, trials are meant to strengthen the rule of law "by teaching all segments of society that the appropriate means of resolving conflict is through impartial justice."⁷³ Third, criminal trials emphasize the guilt of individuals and destigmatize ethnic groups or state agents as a whole, thereby defusing the potential for future cycles of violence.⁷⁴

The Special Court's pivotal achievement has been the interpretation and adaptation of these justifications for the Sierra Leonean context. Specifically, the Court has (i) focused its attention on the subjects of child soldiers, amnesties and head of state immunity – all issues that plague modern African states, (ii) disrupted traditional power relations by offering a form of selective retribution, and (iii) employed comparative case law and the tribunal's hybrid structure to internationalize the Court's legacy while strengthening the capacity of Sierra Leone's judiciary.

A. Addressing Africa's Problems

To begin, the Court's early decisions encapsulate human rights dilemmas central to many African states. In countries like Zimbabwe, Nigeria and Burundi, to say nothing of Sudan, the Democratic Republic of Congo and Uganda – where the ICC has commenced investigations – the Special Court's findings on the plague of child soldiers, the effect of amnesties and head of state immunity may have significant legal and political application.

Sierra Leone, like many other African states, experienced the widespread and

71. See Statute of the Special Court, *supra* note 26, at art. 5.

72. See Human Rights Watch: International Justice, <http://hrw.org/justice/about.htm> (last visited Aug. 27, 2006).

73. RUTI G. TEITEL, TRANSITIONAL JUSTICE 28-30 (2000).

74. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, INTERNATIONAL SECURITY, 17 (2004) (citing Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS., 127 (1997)).

systematic use of child soldiers in armed conflict. At a time when child soldiers are routinely conscripted into military service in numerous countries⁷⁵ and many non-governmental organizations dedicate programs to stopping the use of child soldiers in armed conflict,⁷⁶ the *Norman* decision creates the possibility of the first international conviction associated with this practice. The timing of the Special Court's decision is particularly fortuitous because the International Criminal Court's (ICC) first state referral relates to crimes committed in Northern Uganda by the Lord's Resistance Army (LRA) and other fighting forces, many of which involve grave human rights abuses by and toward children.⁷⁷ According to human rights reports, the LRA has institutionalized the practice of kidnapping children, turning victims into victimizers and permanently destroying the fabric of family life.⁷⁸ Article 8 subsections (2)(b)(xxvi) and (e)(vii) of the ICC's Rome Statute bring the crime of conscripting or enlisting children under fifteen within the subject matter jurisdiction of the ICC.⁷⁹ The vehement condemnation of the practice in the Special Court's holding provides an authoritative interpretation of the crime at the time of the ICC Prosecutor's investigation. As case law, the *Norman* decision now aligns international criminal precedent with a host of international treaties that prohibit the practice of recruiting child soldiers.⁸⁰

75. See, e.g., HUMAN RIGHTS WATCH, CHILD SOLDIER USE 2003: A BRIEFING FOR THE 4TH UN SECURITY COUNCIL OPEN DEBATE ON CHILDREN AND ARMED CONFLICT (Jan. 2004), available at <http://hrw.org/reports/2004/childsoldiers0104/childsoldiers.pdf>.
76. E.g., the Coalition to Stop the Use of Child Soldiers, which unites national, regional and international organizations and networks in Africa, Asia, Europe, Latin America and the Middle East and "works to prevent the recruitment and use of children as soldiers, to secure their demobilization and to ensure their rehabilitation and reintegration into society." See Coalition to Stop the Use of Child Soldiers, <http://www.child-soldiers.org/> (last visited Aug. 27, 2006).
77. See Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), available at http://www.icc-cpi.int/pressrelease_details&id=16.html.
78. See HUMAN RIGHTS WATCH, STOLEN CHILDREN: ABDUCTION AND RECRUITMENT IN NORTHERN UGANDA 2, Mar. 2003, available at <http://hrw.org/reports/2003/uganda0303/uganda0403.pdf>; AMNESTY INT'L, "BREAKING GOD'S COMMANDS": THE DESTRUCTION OF CHILDHOOD BY THE LORD'S RESISTANCE ARMY, Sept. 18, 1997, available at [http://web.amnesty.org/library/pdf/AFR590011997ENGLISH/\\$File/AFR5900197.pdf](http://web.amnesty.org/library/pdf/AFR590011997ENGLISH/$File/AFR5900197.pdf).
79. Incremental legal developments of this kind are welcomed and anticipated by Article 10 of the ICC statute which states that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Rome Statute, *supra* note 66, at art. 10.
80. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609; The Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Rome Statute, *supra* note 66, at art. 21(1)(b); Convention Concerning the

Similarly, the Special Court's *Kallon* decision limits the effect of domestic amnesties and will embolden future African prosecutors to charge suspects with *jus cogens* offenses, notwithstanding domestic guarantees. Amnesties, of course, are a defining piece of the transitional justice landscape and the pursuit of justice and reconciliation in the wake of violent conflict is frequently constrained by the outgoing regime's grant of amnesties and pardons to perpetrators.⁸¹ In such circumstances, it would be exceedingly dangerous for the successor regime to disrupt the amnesty as the new leaders in Chad, Mozambique and elsewhere have discovered.

Kallon offers a way out of this predicament by suggesting that future international or hybrid prosecutions are not necessarily impeded by domestic political decisions. Equally important, *Kallon* joins *Azapo* as a considered deliberation on the validity of African amnesties. In *Azapo*, a group of prominent victims – including Stephen Biko's family – argued that amnesty violated the constitutional right to have "justiciable disputes settled by a court of law."⁸³ There, the South African Constitutional Court accepted the principle of conditional amnesties (the perpetrator's testimony in exchange for a promise not to prosecute) as a path to reparations for victims and as a basis for promoting the truth. The Court reasoned that the "carrot and stick" approach of amnesty and prosecution provided an important incentive to admit past violations which might otherwise remain unknown, stating "[w]ith that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order."⁸² Additionally, the South African Truth and Reconciliation Commission (SATRC) was designed to provide victims with an opportunity to discover the truth regarding past abuses and to promote a dialogue aimed at converting individual anger and grief into a national understanding necessary for reconciliation.

The truth commission envisioned in the Lomé Accord offered few of the guarantees contained in the SATRC and was widely viewed as a tool for securing peace at the expense of justice. Juxtaposed with *Azapo*, the Special Court's

Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (I.L.O. Convention 182), June 17, 1999, 38 I.L.M. 1207; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/263 (2000).

81. See, e.g., LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS* (1990); Priscilla B. Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994); MARSHALL FREEMAN HARRIS, *MAKING JUSTICE WORK: THE REPORT OF THE CENTURY FOUNDATION/TWENTIETH CENTURY FUND TASK FORCE ON APPREHENDING INDICATED WAR CRIMINALS* (1998).

82. *Id.* at 39.

decision in *Kallon* provides an illustration of an amnesty process insufficient to bar subsequent international prosecution and helps to define the criteria for amnesties that will be honored.⁸³

Lastly, the Special Court's jurisdictional decision in *Taylor* offers hope to Africans living under despotic rule that their leaders are not above the law. Human Rights Watch reports serious human rights abuses committed by the leadership in no fewer than thirteen African states.⁸⁴ The Special Court's decision is the clearest expression to date of the new criminal law principle that sitting heads of state enjoy no immunity for violations of international humanitarian law.

The implications for Zimbabweans living under Robert Mugabe's tyranny are uncertain. However, to the extent that the Pinochet proceedings and the trial of Saddam Hussein stand for the proposition that former head of state status no longer offers immunity from domestic criminal prosecution, *Taylor* joins the Milosevic precedent in affirming that head of state immunity will not bar prosecution before international tribunals.⁸⁵ In so doing, the decision forecloses the perverse legal calculus that abusive leaders may avoid prosecution by refusing to relinquish power.⁸⁶

B. The Power and Limits of Punishment

The cumulative message of the Special Court's jurisdictional decisions is that the tribunal exists to prosecute individuals, determine guilt and imprison convicted human rights abusers. Neither the *nullem crimen sine lege* arguments offered by Norman's counsel, the domestic amnesty excuse nor the head of state immunity defense stands as a bar to prosecution. The expressive value of these cases defines a place for criminal sanctions bounded by the rule of law and within an emerging

83. For Sierra Leone final truth commission report, see Official Website of Sierra Leone's Truth & Reconciliation Commission Report, <http://www.tresieraleone.org> (last visited Apr. 15, 2006).

84. HUMAN RIGHTS WATCH, WORLD REPORT 2006: EVENTS OF 2005, 74 - 154 (2006), available at <http://www.hrw.org/wr2k6/wr2006.pdf> (referring specifically to Angola, Burundi, Democratic Republic of Congo, Côte d'Ivoire, Eritrea, Ethiopia, Liberia, Nigeria, Rwanda, Sierra Leone, Sudan, Uganda, and Zimbabwe).

85. Prosecutor v. Milosevic, Case No. ICTY-99-37 (Kosovo); Prosecutor v. Milosevic, Case No. ICTY-01-50 (Croatia); Prosecutor v. Milosevic, Case No. ICTY-01-51 (Bosnia).

86. See *Tachiona v. United States*, 386 F.3d 205, 221 (2nd Cir. 2004) (affirming the dismissal of a civil suit against Robert Mugabe and other senior Zimbabwean government officials under the Alien Tort Claims Act for reasons of diplomatic immunity but declining to reach the question of whether Head of State Immunity applies to Mugabe under the terms of the Foreign Sovereign Immunities Act).

tradition of transitional justice.⁸⁷ As Ruti Teitel acknowledges, conventional understandings of punishment and individual accountability are adapted in transitional circumstances and often hinge on selective and largely symbolic prosecutions of individuals.⁸⁸ The Special Court's first cases have found a wholly appropriate group of defendants to fulfill that function.

Africa does not lack for criminal punishment. What is missing, all too often, is a sense of constrained, impartial justice that acts to identify certain conduct as worthy of criminal sanction. Built on a foundation provided by a statute and rules of procedure that ensure the presumption of innocence and due process,⁸⁹ the Special Court's first decisions confirm both the resolve and the limits of the of the tribunal's reach. Taylor is indictable because he stands as one of the *kakautua* and because the Court was designed to prosecute such figures,⁹⁰ not because he's readily arrestable.

To be sure, the Special Court's clarity of mission was aided by the parallel operation of a truth commission. Likewise, the United Nations Mission for Sierra Leone, not the court, addresses the goal of restoring order and preventing future atrocities. Contrary to the experience of the ICTY, the Special Court has avoided unwarranted "mission creep" by pledging to prosecute only "those who bear the greatest responsibility" for the abuses committed in Sierra Leone.⁹¹ This built-in limit is dictated by budgetary realities but it is consistent with the emerging doctrine of command responsibility.⁹² Likewise, the limited number of accused will ensure that the theatre of prosecution is reserved for the worst offenders. This concentrated focus serves to manage expectations, a process reinforced by the Special Court's exhaustive outreach efforts which aim to educate the people of Sierra Leone about the power and limits of the Special Court. To date, the Office of the Prosecutor has publicly indicted only eleven persons, grouping nine of them

87. For more on the expressive function of law, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2023 (1996).

88. See generally TEITEL, *supra* note 74.

89. SPECIAL COURT FOR SIERRA LEONE, RULES OF PROCEDURE AND EVIDENCE (2005), Rule 33(c), available at <http://www.sc-sl.org/rulesofprocedureandevidence.pdf>.

90. Statute of the Special Court specifically states: "[t]he official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment." Statute of the Special Court, *supra* note 26, at art. 6(2).

91. *Id.* at art. 1.

92. See *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002); Greg Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 YALE J. INT'L L. 89 (2000).

together in three major trials.⁹³

Where cases have advanced, the Court has been careful to limit its reach to the architects of atrocities.⁹⁴ The prosecution of Taylor, Norman, Kallon and Kamara signals the assignment of responsibility to individuals in positions of authority. The arrest of many of these figures provides a form of specific deterrence by removing feared individuals from the post-war political equation. While surely a less robust form of deterrence than the general criminal law threat of sanction, prosecution of individual warlords provides hope that their incarceration will prevent a resumption of war.

Additionally, the prosecution communicates real and symbolic retribution for ghastly crimes.⁹⁵ With the exception of sealed indictments,⁹⁶ virtually every element of the Special Court's work has been public. The Court will attempt to learn from mistakes committed at the ICTR with respect to witness protection and the treatment of victims on the stand,⁹⁷ but like the preliminary motions in *Taylor*, *Norman* and *Kallon*, all hearings will take place at the Special Court's courthouse and are open to the public. The courthouse includes a dock for criminals and the opportunity for victims and their families to see the defendants in person.⁹⁸

93. Indictments against two other persons were withdrawn in December 2003 due to the deaths of the accused and Johnny Paul Koroma remains at large. Charles Taylor was indicted on 7 March 2003 on 17 counts of war crimes, crimes against humanity, and other serious violations of international humanitarian law. The indictment was amended on 16 March 2006 to 11 counts. Taylor was taken into custody by the Special Court on 29 March 2006. His initial appearance took place on 3 April 2006. (See Special Court for Sierra Leone website section on Taylor case, available at <http://www.sc-sl.org/Taylor.html>.)

94. In a much-publicized announcement, Chief Prosecutor David Crane declared that he would not prosecute any suspects who were under the age of eighteen at the time the alleged offenses occurred. As reported by the UN Office for the Co-ordination of Humanitarian Affairs, Crane announced, "[t]he children of Sierra Leone have suffered enough both as victims and perpetrators. I am not interested in prosecuting children. I want to prosecute the people who forced thousands of children to commit unspeakable crimes." Reported by IRINNEWS.ORG, *Sierra Leone: Special Court Will Not Indict Children*, Nov. 4, 2002, available at http://www.irinnews.org/report.asp?ReportID=30752&SelectRegion=West_Africa&SelectCountry=SIERRA_LEONE.

95. Martha Minow refers to the prosecutory impulse in post-conflict societies as a healthy form of vengeance. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* (1998).

96. In June 2003, the Special Court unsealed its indictment of Charles Taylor, sparking a chain of events during the summer of 2003 which culminated in Taylor's resignation and departure from Liberia. *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Indictment (Mar. 7, 2003), available at <http://www.sc-sl.org/Documents/SCSL-03-01-I-75.pdf>.

97. See Samantha Power, *Rwanda: the Two Faces of Justice*, N.Y. REV. BOOKS, Jan. 16, 2003, available at http://www.nybooks.com/articles/article-preview?article_id=15982.

98. For more information about the inner workings of the Special Court, see HUMAN RIGHTS

For the rest of Africa, the trinity of Special Court decisions paves the way for some of Sierra Leone's *kakautua* to be humbled publicly and stripped of their aura of invincibility. The assignment of individual responsibility and the naming of wrongdoers are particularly critical as the legal resolution of a conflict characterized by both informal hierarchies and the power of state-controlled armies. Even as the Special Court stays the hand of vengeance against those who amputated limbs, the early cases reveal a concerted effort to judge, punish and shame several of the worst human rights abusers in modern African history.

C. Balancing the International and the Domestic

The final achievement of the Court's first cases is the effective balancing of international and local elements within an institutional apparatus that promises a fully hybrid structure. The challenge underlying much of the Special Court's work is to reinforce municipal *and* international sources of law, through the work of Sierra Leonean *and* international lawyers and judges. Hybrid processes, sitting in the country where their work is readily apparent to the victims, witnesses and defendants' families, address at least three theoretical concerns associated with purely international or purely domestic processes: problems of legitimacy, capacity-building, and norm development.⁹⁹ The first cases are translating the theory into practice.

Sierra Leone's recent history works in favor of hybrid proceedings. The court's personal jurisdiction encompasses both Sierra Leoneans – the bulk of the defendants – and foreigners, particularly Charles Taylor. And the victims the Court aims to serve include Sierra Leoneans and the 500 U.N. peacekeepers taken hostage toward the end of hostilities.

The crimes of universal jurisdiction the Court sits to adjudicate – torture, crimes against humanity and war crimes – are equally amenable to prosecution in a hybrid tribunal. Indeed, in the absence of a domestic court capable of addressing the magnitude of offenses, a Section VII-authorized tribunal, or the ICC, a hybrid court may be the most appropriate institutional response. For the many African states that are not a party to the ICC – Zimbabwe and Liberia among them – and lack the judicial capacity or political will to for war crimes trials, the Special Court represents international accountability in a domestic setting.

WATCH, JUSTICE IN MOTION: THE TRIAL PHASE OF THE SPECIAL COURT FOR SIERRA LEONE, Nov. 2005, *available at*
<http://hrw.org/reports/2005/sierraleone1105/sierraleone1105wcover.pdf>.

99. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 300 (2003).

Each of the Court's jurisdictional decisions addresses hybridity explicitly or implicitly. *Kallon* and *Taylor* endorse the international character of the Special Court in arenas previously reserved for domestic resolution, the effect of amnesties and the immunity generally afforded one sovereign in the courts of another. By invoking both comparative domestic law and international criminal precedent, the Special Court breathes life into a new category of tribunal.¹⁰⁰ As such, one might suggest that the Special Court is engaged in an increasingly popular form of transnational judicial dialogue.¹⁰¹ Even *Norman*, which is addressed to the impact of international customary law, should act to strengthen Sierra Leone's prohibitions of kidnapping, slavery, sexual assault, and child abuse within the country's Commonwealth common law tradition.¹⁰²

At the level of process too, these decisions are the product of the involvement of both domestic and international (including Pan-African) communities.¹⁰³ In the *Taylor* case, for example, the African Bar Association (ABA) filed an amicus brief addressing the validity of the indictment. Citing *United States of America v. Noriega*, the Pinochet cases, the Milosevic precedent, the Rome Statute and declarations of the 1993 World Conference on Human Rights, the ABA submitted that Taylor cannot enjoy immunity for international crimes alleged to have been committed by him in Sierra Leone.¹⁰⁴

Hybridity – the infusion of foreign resources, expertise and law into the domestic criminal realm – is appealing for poor states in Africa. On a continent characterized by extreme poverty, arbitrary colonial boundaries and

100. Examples of this engagement between international and domestic jurisdictions include the decision on amnesties in the *Kallon* and *Taylor* cases, and the building of international law upon domestic legal foundations with respect to the protection of children in the *Norman* case.

101. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transjudicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 492 (2005) ("[C]ourts are engaging each other out of a developing sense that they are part of a common enterprise").

102. E.g., The Criminal Procedure Act, 1965 (Sierra Leone) (as amended), the Prevention of Cruelty to Children Act, 1926 (Sierra Leone), and The Malicious Damage Act, 1861 (Sierra Leone).

103. Notice, for example, the close resemblance between the Statute of the Special Court for Sierra Leone and the letter sent by Human Rights Watch that makes recommendations for the Special Court. Statute of the Special Court, *supra* note 26; Letter from Peter Takirambudde, Executive Dir., Afr. Div., Human Rights Watch, and Richard Dicker, Dir., Int'l Justice Program, Human Rights Watch, to Laila Stenseng, Second Sec'y, Permanent Mission of Norway to the United Nations (Mar. 7, 2002), available at <http://hrw.org/press/2002/03/sleone0307-ltr.pdf>.

104. See *Prosecutor v. Charles Taylor*, Case No. SCSL 03-01-I-059, Decision on Immunity from Jurisdiction, ¶ 19 (May 31, 2004).

underdeveloped judiciaries, the use of international law to strengthen local or customary institutions will almost certainly assist accountability efforts. In this regard, the Special Court's first cases, issued in a building that will remain in Freetown by a cadre of local staff, remind Sierra Leone that it is not alone.

V. Conclusion

The Special Court is a single accountability mechanism with modest goals. Its value, however, is best measured practically and symbolically. In each regard, the Special Court's first cases speak to the problems of Africa as a whole. By condemning the use of child soldiers, eschewing absolute immunity and limiting the effect of amnesties, the Court has established itself as an indispensable element of transitional justice and an institution capable of shaping the legal future of Sierra Leone as well as its neighbors.