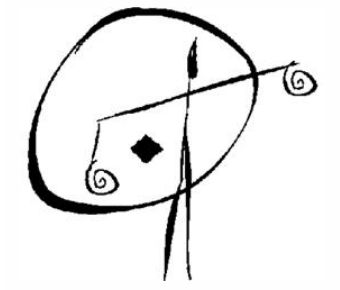

NO PEACE WITHOUT JUSTICE

LAWYERS' GUIDE
TO THE SPECIAL COURT FOR SIERRA LEONE

DRAFT FOR REVIEW

No Peace Without Justice wishes to acknowledge the financial assistance of the European Community and the Open Society Initiative – West Africa to its programs. The views expressed herein are those of No Peace Without Justice and therefore in no way reflect the official positions of the European Commission or OSI-WA.

Lawyers' Guide to the Special Court for Sierra Leone

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No Peace Without Justice (NPWJ) undertook the production of the Lawyers' Guide to the Special Court for Sierra Leone in order to provide a sophisticated introductory resource that would assist lawyers and others in understanding the Court's proceedings. To achieve this aim, NPWJ enlisted a team of people, without whose dedication this Guide would not have been possible.

This publication was undertaken under the direction of Niccoló Figá-Talamanca, NPWJ's Programme Director, and the editorial supervision of Alison Smith, NPWJ's Country Director-Sierra Leone. John Stompor, NPWJ's Deputy Country Director and Coordinator of its Legal Profession programme in Sierra Leone, served as the primary editor and coordinator.

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Preface

The Lawyers' Guide to the Special Court for Sierra Leone is a publication of No Peace Without Justice (NPWJ) undertaken as part of NPWJ's Legal Profession programme in Sierra Leone.

NPWJ is an international non-profit organisation working for the establishment of an effective international criminal justice system and in support of accountability mechanisms for war crimes, crimes against humanity and genocide, with a view to strengthening democracy and the rule of law worldwide.[1]

NPWJ's involvement in Sierra Leone began with the secondment of experts in international criminal law to the Government of Sierra Leone in June 1998 on the occasion of the Rome Diplomatic Conference that adopted the Statute of the International Criminal Court. Since 2000, NPWJ-seconded experts have been working in Freetown and New York, within the Mission of Sierra Leone to the United Nations and the Office of the Attorney-General and Ministry of Justice, to assist the Government of Sierra Leone in relation to the Special Court for Sierra Leone.

Since 2001, NPWJ has also been engaged in a wide-ranging field-based outreach and public information campaign on the Special Court, in cooperation with Sierra Leonean grassroots organisations and civil society groups. In 2002, after the Special Court came into existence, NPWJ's Sierra Leone project considerably expanded both its scope of activity (and its expenditure) to include a conflict mapping programme and a legal profession programme.

NPWJ's most recent Sierra Leone programme, which ran from July 2002 to October 2003, included four principal components:

1. *The Judicial Assistance programme*, namely the secondment of expert personnel to the Government of Sierra Leone in Freetown and New York to assist in responding to requests for assistance and other requests by the Special Court and to build the capacity of the relevant government departments to deal with these requests, as well as to provide advice on issues relating to international law in general;

2. *The Outreach programme*, namely cooperation with local grassroots organisations to conduct public information and education campaigns on the Special Court and on accountability mechanisms in general, in order to facilitate a sense of ownership of these mechanisms and increase reliance on the rule of law and the mechanisms of democracy;

3. *The Conflict Mapping programme*, namely the reconstruction of the chain of events during the ten-year war through the scrupulous selection and debriefing of key individuals throughout the country whose profession, role in their community or in the forces involved in the conflict placed them in a position to follow events as they unfolded; and

[1] For information about NPWJ's activities worldwide, see Appendix I.

4. *The Legal Profession programme*, namely the promotion of the role of the Special Court within the legal profession in Sierra Leone and the role of the Sierra Leonean legal profession within the Special Court, in order to enhance the relevance of the Special Court in the lives of legal professionals and the potential of the Special Court for leaving a legacy of respect for the law and knowledge of international human rights standards.[2]

Each programme, while distinct in its specific aims, was intended to reinforce the other programmes and thereby increase the contribution of each programme to the project's overall aim of strengthening the ability of Sierra Leone society to address violations of human rights and humanitarian law. The most striking example of this was the close cooperation between the Outreach and Conflict Mapping programmes. While the Outreach programme trained villages and towns on the Special Court, through "Training the Trainers" sessions and community events, these same communities continued to participate in accountability efforts by providing the Conflict Mapping programme with their own views on and experiences of the conflict, by being consulted on the events and by directly taking part in the gathering of the information.

In addition, the programme as a whole operated so as to maximise the participation of Sierra Leoneans in decision-making processes both in relation to policy as well as the design, implementation and follow-up for activities. This was premised on the belief that for Sierra Leone's accountability mechanisms to make a meaningful impact and achieve their goals, there must be ownership of the processes by Sierra Leoneans. It is also underpinned by the notion that, as a matter of policy, Sierra Leoneans are best placed to know what activities and approaches would be the most effective to reach the people of Sierra Leone.

The Lawyers' Guide to the Special Court for Sierra Leone, which provides a sophisticated introduction to the substantive and procedural framework of the Court, is intended to provide Sierra Leoneans and other interested persons with another tool for understanding the Special Court and becoming involved in its activities. It also is hoped that the Guide may serve as a culmination of the teaching and learning that has taken place in Sierra Leone under the auspices of NPWJ's Legal Profession programme.

[2] For more information about NPWJ's Sierra Leone programmes, see Appendix II.

Introduction

The Special Court for Sierra Leone is a unique institution in the field of international criminal justice that stands apart from its predecessors, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The Special Court's establishment was requested by Sierra Leone, and the Court is located in Sierra Leone, where the crimes with which it is concerned took place. Under an agreement between Sierra Leone and the United Nations on the establishment of the Court, Sierra Leone also appointed several of the Court's officials and has provided continuing assistance to the Court. These circumstances have promoted strong interest in the Special Court on the part of the people of Sierra Leone, including Sierra Leonean lawyers. Indeed, many members of the Sierra Leone Bar already act as prosecution or defence counsel at the Special Court. These circumstances also have interested lawyers from outside of Sierra Leone, and inspired curiosity with regard to whether the Special Court might serve as a model for administration of justice in other post-conflict situations.

Most lawyers, however, lack extensive experience in the specialised field of international criminal law, and thus face the daunting task of educating themselves about the field in a short time in order to participate effectively in the Special Court's proceedings or in debates about the Court's relevance for other situations. This task is compounded by the fundamental ways in which the Special Court differs from its predecessors. For example, it is an agreement between the Government of Sierra Leone and the United Nations – not a resolution of the Security Council – that established the Special Court. In addition, the jurisdiction of the Special Court not only encompasses crimes under international law but also includes certain crimes under Sierra Leone law. Further differences can be seen when comparing the statutes and rules of the ICTY and ICTR with the Statute of the Special Court for Sierra Leone (hereinafter, the Statute) and the Rules of Procedure and Evidence of the Special Court for Sierra Leone (hereinafter, the Rules).

The many differences between the Special Court and its predecessors also mean that lawyers with experience at the ICTY or ICTR share in this challenge. Moreover, materials produced to aid lawyers at the ICTY or ICTR are of incomplete assistance to lawyers appearing before the Special Court.

To fill the need for a sophisticated introductory resource that would assist lawyers and others in understanding the proceedings at the Special Court, No Peace Without Justice undertook the production of the Lawyers' Guide to the Special Court for Sierra Leone as part of its Legal Profession programme. Discussions regarding the Guide with members of the Sierra Leone legal community began in early 2003, and interested Sierra Leonean lawyers and international law experts were invited to contribute to the Guide. In particular, contributions of research and writing were sought from those who participated, either as teachers or students, in the other activities of the Legal Profession programme. These contributions were then shaped through a rigorous process of review and editing into the current Guide.

The Guide consists of the following 12 parts:

- Part I – Legal Basis of the Special Court;
- Part II – Jurisdiction of the Special Court;
- Part III – Role of the Rules of Procedure and Evidence;
- Part IV – Organisation of the Special Court;
- Part V – Cooperation with States;
- Part VI – Investigations;
- Part VII – Pre-Trial Proceedings;
- Part VIII – Trial Proceedings;
- Part IX – Rules of Evidence;
- Part X – Penalties and Sentencing;
- Part XI – Appellate and Review Proceedings; and
- Part XII – Practical Information for Counsel.

Each part provides a thorough introduction in plain language to a particular subject. Effort is taken to explain the relevant issues in each part through reference to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (hereinafter, the Agreement), the Statute, the Rules, practice directions, or directives, not simply to quote these materials. Each part also integrates, where available, the developing case law of the Special Court. Where a decision of the Special Court is not yet available on a significant issue, reference is made to case law from other courts, particularly the ICTY and ICTR.

Furthermore, each part briefly evaluates the subject under consideration in light of the relevant constitutive documents, rules, practice directions, directives and case law. Potential inconsistencies among these sources, and with regard to general international law principles, are noted. Thus, it is hoped that the Guide might also promote continuing development of the Court's substantive and procedural law.

Part I
Legal Basis of the Special Court[+]

The Special Court for Sierra Leone is a unique treaty-based institution established by an agreement between the United Nations and the Government of Sierra Leone. Unlike the ICTY and ICTR,[3] the Special Court has its legal basis in a bilateral agreement between the UN and a member State, Sierra Leone. Also unlike the ICTY and ICTR, the Special Court is located in Freetown, the capital of the State in which the violations occurred. Nonetheless, the Court operates outside of and independently from Sierra Leone's judiciary. The Court thus differs from the proposed Extraordinary Chambers for Cambodia and the Serious Crimes Panels for East Timor, conceived as courts operating with international funding and support within the existing domestic judicial systems.[4]

The particular nature of the Special Court, reflected in all aspects of its operations, was the outcome of the lengthy negotiations on its mandate and structure; the main stages of these negotiations are marked by the Court's fundamental documents.[5] It is the aim of this part to review the most relevant aspects of these documents in order to contribute to the understanding of the process that led to the establishment of the Special Court for Sierra Leone.

A. Letter from the President of Sierra Leone to the President of the United Nations Security Council

On 12 June 2000, H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, addressed a letter to the UN Secretary-General requesting the assistance of the United Nations to establish a special court for Sierra Leone. The letter was subsequently forwarded formally to the President of the UN Security Council and on 10 August 2000, it was issued as a UN document.[6]

In the letter, President Kabbah requests, "[o]n behalf of the Government and people of the Republic of Sierra Leone", that a court be set up in order "to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages." The merit of the court would be, according to President Kabbah, to bring and maintain peace in Sierra Leone

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[+] Part I was prepared thanks to substantial contributions of research and writing from Ambassador Allieu Ibrahim Kanu and Giorgia Tortora. NPWJ remains nonetheless responsible for the views expressed herein as well as any errors or omissions.

[3] The ICTY and ICTR have their legal basis in resolutions adopted by the UN Security Council acting under Chapter VII of the UN Charter.

[4] See *Internationalized Courts*, Oxford University Press, forthcoming, for further reading on this subject.

[5] The negotiations on the establishment of the Special Court started in August 2000 and were officially concluded on 16 January 2002 when the Special Court Agreement was signed. They involved representatives of the Government of Sierra Leone and the UN Secretary-General, members of the UN Security Council and member States of the UN interested in the process and willing to lend political support to its successful conclusion.

[6] Letter from the President of Sierra Leone to the President of the United Nations Security Council, annexed to the Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/786.

and the sub-region through accountability. The Special Court also would remedy the difficulty of Sierra Leone trying the crimes committed during 10 years of conflict in its national courts, due to lack of resources and expertise, the existence of an amnesty and gaps in Sierra Leonean criminal law. It would further ensure that the trials be and be seen as fair, impartial and transparent. President Kabbah invites the Security Council to consider creating a court along the lines of the international tribunals for the former Yugoslavia and for Rwanda.

A framework for the Special Court for Sierra Leone is also enclosed, which sets out suggestions regarding crucial aspects of the functioning of the court, including modalities of its establishment, its jurisdiction, location and composition. It also provides a blueprint for the future court and several reference points for the subsequent discussions on the matter.

1. Legal basis

Reiterating the position expressed in the letter, part 1 of the framework, entitled "Court created by the United Nations Security Council", advocates that this special court be established by the UN Security Council, taking into account "the special needs and requirements of the Sierra Leone situation." The framework also suggests a direct involvement of the Security Council in the actual setting up of the court, requesting that "[i]mmediately after the adoption of the resolution now requested establishing the court, the Security Council should send a rapid response team of inquiry to Freetown to explore the extent of the violations and the facilities necessary in Sierra Leone to bring credible and secure justice."

2. Jurisdiction

According to the framework, the court would concentrate on bringing to justice those responsible for the crimes committed in Sierra Leone. The number of indictees would be limited to those in positions of military and political leadership.

The court would have an open-ended temporal jurisdiction to address also "future violations until peace and security return to Sierra Leone."[7]

Its subject matter jurisdiction would encompass both crimes under international law and Sierra Leonean criminal law. Crimes under international law would include crimes against humanity, crimes under international humanitarian law and "the war crimes of attacking personnel or objects involved in humanitarian assistance or peacekeeping missions." Crimes under Sierra Leonean law would include grave criminal offences. This element, together with the use of Sierra Leonean procedural law, would ensure the court's unique Sierra Leonean nature.

3. Composition

The framework provides suggestions with regard to the actual composition of the court. It envisages the creation of a single trial chamber with judges from West Africa and other

[7] It should be recalled that, at the time President Kabbah addressed the United Nations, the conflict in Sierra Leone had not yet ended. It was only in January 2002 that, following the conclusion of tripartite peace negotiations among the Government of Sierra Leone, the RUF and United Nations Mission in Sierra Leone (UNAMSIL), the war was officially declared over.

parts of the world. The possibility of appointing judges to hear pre-trial motions and additional trial judges should the caseload so require was also mentioned.

The court would have no separate appeals chamber; instead, the Appeals Chamber of the ICTY and ICTR could hear appeals from decisions of the special court. Furthermore, the framework proposes having two co-prosecutors to lead investigations and prosecution. The Attorney General of Sierra Leone would act as the co-prosecutor appointed by Sierra Leone. The other co-prosecutor would be an international appointee and would ensure that the international community would be "represented for the international crimes committed against the peacekeepers." Investigations would take place inside and outside Sierra Leone.

Finally, the framework stresses the importance of having a strong defence and ensuring that qualified lawyers and defence investigators are assigned to the accused.

4. Location

The framework envisages that the court would sit in Sierra Leone for the pre-trial and trial phases. The court, however, would also be ready to move outside Sierra Leone if security concerns so required.

B. UN Security Council Resolution 1315

Immediately after the publication of the letter of President Kabbah as an official UN document, members of the UN Security Council started informal consultations on a response. Following successive discussions of drafts tabled by the United States and informal talks with the Government of Sierra Leone, the UN Security Council adopted Resolution 1315 (2000) on the establishment of a Special Court for Sierra Leone (Resolution 1315) on 14 August 2000.[8]

Resolution 1315 endorses President Kabbah's request to create an accountability mechanism in Sierra Leone and outlined the basic elements recommended for the functioning of a special court. In addressing the question of the United Nations' involvement in the process, however, Resolution 1315 openly refuses the option of creating a special court as another international tribunal or a body operatively and financially sustained by the United Nations. Different factors contributed to this view. It should be recalled that there was widespread discontent with the two international tribunals among members of the Security Council. In addition, a few members, while ready to support the resolution, were not prepared to accept the financial and other responsibilities deriving from the creation of a special court as a UN subsidiary body. At the same time, the lack of resources and expertise, the gaps in the domestic criminal system and the existence of an amnesty were significant barriers to the establishment of a special court as part of the Sierra Leonean judiciary.[9] Resolution 1315, therefore, puts

8 S.C. Res. 1315, 4186th meeting, UN Doc. S/RES/1315 (2000).

9 While a party to the Geneva Conventions, Sierra Leone has yet to implement the Conventions into its domestic legal system and, as such, there is a barrier to trying violations of the Conventions' provisions in its national courts. In addition, Article IX of the Lomé Peace Agreement of 7 July 1999 contains provisions which grant "absolute and free pardon and reprieve" to all ex-combatants. Article IX also states that "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

forward the idea of a special court as an innovative model and a hybrid or mixed tribunal.

1. Preamble

The preambular paragraphs of Resolution 1315 recall, among other things, the principle of individual criminal responsibility and the determination of the international community to bring to justice those responsible for serious violations of international humanitarian law. The preamble further states, accepting the view that justice is an essential component of lasting peace, that in the case of Sierra Leone the creation of "a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace".

The preamble also refers to the Lomé Peace Agreement, its amnesty provisions and its relationship with the jurisdiction of a special court. Preambular paragraph 5 recalls that in signing the Lomé Peace Agreement, the Special Representative of the Secretary-General appended a statement clarifying that the United Nations does not recognise the amnesty provisions in the peace agreement as being applicable to crimes under international law, namely genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.

Finally, the last preambular paragraph recognises that the situation in Sierra Leone "continues to constitute a threat to international peace and security in the region" without, however, an explicit reference to Chapter VII of the UN Charter. A reference to Chapter VII, which appeared in the first draft of the resolution, was deleted from the final text contrary to the wishes of the Government of Sierra Leone and the UN Secretary-General.[10] The language of Resolution 1315, by omitting such a statement, falls short of creating a legal obligation for member States to cooperate with the establishment and functioning of a special court.[11]

2. Operative paragraphs

While the Security Council decided to support President Kabbah's request to create a special court for Sierra Leone, it refused the idea of establishing such a court as another UN international criminal tribunal and obliging itself to remain directly involved in its functioning.

According to Resolution 1315, a special court would not be created by resolution of the Security Council as a UN subsidiary body administered by the United Nations and

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done by them in pursuit of their objectives as members of those organizations, since March 1991, up to the time of the signing of the present Agreement".

10 Representatives of Sierra Leone to the United Nations insisted, on instructions from Freetown, that a court be granted Chapter VII powers because Sierra Leone anticipated the difficulty of getting cooperation from other States in West Africa.

11 Under Chapter VII of the UN Charter, the Security Council is mandated to determine the existence of a threat to the peace, breach of the peace or act of aggression. If the Security Council resolves that a situation under Chapter VII exists, it can adopt, pursuant to article 48 of the UN Charter, decisions binding on all member States. The failure by a member State to implement decisions or measures contained in a Chapter VII resolution represents a breach of its obligations under the UN Charter. It should, however, be noted that, according to UN practice, decisions under article 48 are included in Security Council resolutions via an explicit statement that the Security Council is acting under Chapter VII.

financed from the UN's regular budget, as the ICTY and ICTR were, but as a *sui generis*, independent institution having its legal basis in an agreement.[12] Operative paragraph 1 of Resolution 1315 thus "[r]equests the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court".

Resolution 1315 also includes recommendations regarding a court's mandate, accepting the suggestions contained in the framework to have a mixed jurisdiction over crimes under both international and domestic law. According to operative paragraph 2, a special court should have subject matter jurisdiction over "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".

According to operative paragraph 3, a special court should have personal jurisdiction over "persons who bear the greatest responsibility" for the crimes within the jurisdiction of the court, "including those leaders who, in committing such crimes, have threatened the establishment of and the implementation of the peace process in Sierra Leone". In addition, the personal jurisdiction of a special court would not be restricted to any specific group or faction.

Resolution 1315 further instructs the Secretary-General to present within 30 days a report on the implementation of the resolution and the progress of consultations with the Government of Sierra Leone. The Secretary-General is specifically instructed by Resolution 1315 to consider in his report other matters relevant to the establishment of a court, such as the temporal jurisdiction of a special court, the feasibility of referral of appeals to the Appeals Chamber of the ICTY and ICTR and the location for the seat of the court. In addition, excluding the possibility of financing a special court in part or in full from assessed contributions of member States, Resolution 1315 requests the Secretary-General to recommend in his report the amount of voluntary contributions of funds, equipment and services needed to operate a court.

C. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone

On 4 October 2000, pursuant to Resolution 1315, the Secretary-General submitted his report on the establishment of a Special Court for Sierra Leone (the Report of the Secretary-General).[13] The report describes the progress of negotiations between representatives of the Secretary-General and the Government of Sierra Leone in New York and in Freetown, clarifies the implications of the decisions taken in Resolution 1315 and makes suggestions with regard to matters that the Security Council requested to be considered or had left open. Annexed to the report is a draft agreement and statute establishing the Special Court.

The Report of the Secretary-General itself is divided into two major parts. The first part considers the nature and specificity of the Court, its competence (including subject matter, temporal and personal jurisdiction), its organisational structure, the enforcement

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12 The decision of the Security Council on the nature of the Special Court was strongly influenced by the dissatisfaction of members of the Council with the results of the ICTY and ICTR, particularly with the length of their proceedings and the cost of their operations.

13 *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915.

of its sentences and options regarding an alternative host country. The second part deals with practical arrangements for the Court and its financial mechanism.

1. Part One

Nature and specificity of the Court: According to the Report of the Secretary-General, because the Special Court would acquire its legal nature through a treaty, the Court would be a unique, *sui generis* institution and as such "is not anchored in any existing system (i.e. United Nations administrative law or the national law of the State of the seat) which would be automatically applicable to its non-judicial, administrative and financial activities."[14] Consequently, the report foresees the necessity to identify rules for various administrative purposes to be applied as the need may arise.

Based on the then status of negotiations, the Report of the Secretary-General also envisages that the Special Court would have concurrent jurisdiction with the national courts of Sierra Leone and would also have primacy over them. The report stresses that, because of the treaty-based nature of the Court, such primacy would not exist in respect of third States. The report therefore asks the Security Council to consider endowing the Special Court with Chapter VII powers for the purpose of requesting the surrender of an accused from any third State.

Subject matter jurisdiction: The Report of the Secretary-General states that the negotiations regarding crimes under international law were guided by "the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation". For this reason, the report states that the crimes against humanity, war crimes and other serious violations of international humanitarian law enumerated in the draft statute are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime. It also notes that, in accordance with the recommendations of the Security Council, the Secretary-General did not consider it appropriate to include the crime of genocide in the jurisdiction of the Special Court "because of the lack of any evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such".[15]

In response to the Security Council's recommendation to include crimes under Sierra Leone law within the jurisdiction of the Court, the report recognises that, while most of the crimes committed in Sierra Leone were covered under international law, the reference to Sierra Leonean law was relevant "in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law."[16] In this light, reference is made to offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 and offences relating to the wanton destruction of property under the Malicious Damage Act, 1861.

The report further states that the draft statute provides that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be applicable *mutatis mutandis* to proceedings before the Special Court and that the Judges shall have the power to amend or adopt additional rules; in so doing, the Judges may be guided, as

14 *Ibid*, at para. 9.
15 *Ibid*, at para. 13.
16 *Ibid*, at para. 19.

appropriate, by the 1965 Criminal Procedure Act of Sierra Leone. As explained by the report, the reference to the Criminal Procedure Act was made necessary by the mixed subject matter jurisdiction of the Court and because "[t]he applicability of two systems of law implies that the elements of the crimes are governed by the respective international or national law, and that the Rules of Evidence differ according to the nature of the crime as a common or international crime."[17] Additionally, referring to the Criminal Procedure Act reinforced the Sierra Leonean character of the Court and offered means to leave a legacy by stimulating the revision and updating of the Criminal Procedure Act.

Temporal jurisdiction: The Report of the Secretary-General outlines alternatives for the beginning date for the temporal jurisdiction of the Special Court. It states that, because reaching back to the beginning of the conflict in 1991 would create a heavy burden for the prosecution and the Court, three different dates – 30 November 1996, 25 May 1997 and 6 January 1999 – were considered. In negotiations, the parties concluded that the first date – the date of the Abidjan Peace Agreement between the Government of Sierra Leone and the RUF – would best balance the need for the Court's jurisdiction to cover the most serious violations committed in Sierra Leone, to avoid a date weighted with political connotations and to prevent the creation of an excessive burden on the Court's Prosecutor.

The negotiations on the temporal jurisdiction of the Special Court were later re-opened by the Government of Sierra Leone, following their consultations with Sierra Leone civil society. In August 2001, the Government of Sierra Leone proposed to the United Nations that they reconsider the matter and include 1991 as the starting date of the temporal jurisdiction of the Special Court. Although the request was considered informally by the Security Council and the group of States interested in the Court, it was rejected. While not opposed in principle to accepting 1991 as the starting date of the temporal jurisdiction of the Special Court, several States felt that re-opening the issue at that stage would create excessive delays in the process and endanger the actual establishment of the Special Court. As a result, Sierra Leone withdrew the request.

In relation to the issue of the temporal jurisdiction of the Court, the Report of the Secretary-General confirms the UN's position regarding the amnesty provisions in the Lomé Peace Agreement. It recalls the disclaimer appended to the signature of the Special Representative of the Secretary-General to the effect that the amnesty provisions shall not apply to crimes under international law, namely genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. It also reports that the parties agreed that the amnesty should not constitute a bar to prosecution for crimes under the jurisdiction of the Special Court.

Personal jurisdiction: The Report of the Secretary-General elaborates on the indications provided by Resolution 1315 with regard to the personal jurisdiction of the Special Court and includes two controversial suggestions. First, the report recommends replacing the expression "those who bear the greatest responsibility" with the more generic "those most responsible". According to the report, the latter wording should be preferred for several reasons:

> "While those 'most responsible' obviously include the political or military leadership, others in command authority down the chain of command

[17] *Ibid*, at para. 20.

> may also be regarded 'most responsible' judging by the severity of the crime or its massive scale. 'Most responsible', therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime."[18]

Second, incorporating a proposal by the UN Office of Legal Affairs, the report recommends extending the personal jurisdiction of the Special Court to cover persons below 18 years of age at the time of the alleged commission of the crime, despite the most recent developments of international law and the Statute of the International Criminal Court. While acknowledging the controversial and sensitive nature of this point, the Secretary-General nevertheless expresses the following opinion:

> "[I]n view of the most horrific aspects of the child combatancy in Sierra Leone, the employment of this term [i.e., 'those most responsible'] would not necessarily exclude persons of young age from the jurisdiction of the Court. I therefore thought that it would be most prudent to demonstrate to the Security Council for its consideration how provisions on prosecution of persons below the age of 18 — 'children' within the definition of the Convention on the Rights of the Child — before an international jurisdiction could be formulated."[19]

Organisational structure: The Report of the Secretary-General conceives of the Court as a self-contained entity consisting of three organs: "the Chambers (two Trial Chambers and an Appeals Chamber), the Prosecutor's Office and the Registry."[20] It also responds directly to the request of the Security Council to examine the viability of having the Appeals Chamber of the ICTY and ICTR function as the Appeals Chamber of the Special Court. The report states that, "the sharing of a single Appeals Chamber between jurisdictions as diverse as the two International Tribunals and the Special Court for Sierra Leone is legally unsound and practically not feasible, without incurring unacceptably high administrative and financial costs."[21]

Enforcement of sentences: The Report of the Secretary-General states that imprisonment shall normally be served in Sierra Leone, but notes that, in certain circumstances, there may need to be relocation to a third State. In such instances, the enforcement of the sentence would need to be based on an agreement between the Court and the State of enforcement.

Alternative host country: In the choice of an alternative host country for the Special Court, the Report of the Secretary-General recommends a two-phase approach, in which an agreement in principle is first reached among the United Nations, Sierra Leone and a third State, and then a process of technical assessment and negotiation of a framework agreement is undertaken. It also is stated that, in the choice of an alternative host country, the following considerations should be taken into account: "the proximity to the place where the crimes were committed, and easy access to victims, witnesses and

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18 *Ibid*, at para. 30.
19 *Ibid*, at para. 36.
20 *Ibid*, at para. 39.
21 *Ibid*, at para. 40.

accused."[22] In addition, the report notes the Government of Sierra Leone's preference for an English-speaking West African country sharing a common law system.

2. Part Two

Practical arrangements: The Report of the Secretary-General includes preliminary recommendations on the staffing requirements of the Special Court during its initial operational phase. It estimates that the Special Court would need:

> "(a) Eight Trial Chamber judges (3 sitting judges and 1 alternate judge in each Chamber) and 6 Appeals Chamber judges (5 sitting judges and 1 alternate judge), 1 law clerk, 2 support staff for each Chamber and 1 security guard detailed to each judge (14);
> (b) A Prosecutor and a Deputy Prosecutor, 20 investigators, 20 prosecutors and 26 support staff;
> (c) A Registrar, a Deputy Registrar, 27 administrative support staff and 40 security officers;
> (d) Four staff in the Victims and Witnesses Unit;
> (e) One correction officer and 12 security officers in the detention facilities."[23]

The report also estimates that personnel costs during the initial phase would be in the range of 22 million USD and that approximately 3.5 million USD would be needed for construction of the premises and detention facilities of the Special Court. In addition, the report envisages provision of advice and sharing of information on the part of the ICTY and the ICTR and significant administrative support from UNAMSIL in the areas of finance, personnel and procurement. The report states:

> "Utilizing the existing administrative support in UNAMSIL, including, when feasible, shared facilities and communication systems, would greatly facilitate the start-up phase of the Special Court and reduce the overall resource requirements. In that connection, limited space at the headquarters of UNAMSIL could be made available for the temporary accommodation of the Office of the Prosecutor, pending the establishment or refurbishment of a site for the duration of the Special Court."[24]

Financial mechanism: The Report of the Secretary-General clearly expresses the opposition of the Secretary-General to a Special Court financed from voluntary contributions. It states:

> "A financial mechanism based entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment. The risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of continuous availability of funds, are very high, in terms of both moral responsibility and loss of credibility of the

22 *Ibid*, at para. 54.
23 *Ibid*, at para. 57.
24 *Ibid*, at para. 67.

> Organization, and its exposure to legal liability. In entering into contractual commitments, which the Special Court and, vicariously, the Organization might not be able to honour, the United Nations would expose itself to unlimited third-party liability. A special court based on voluntary contributions would be neither viable nor sustainable."[25]

The report then concludes with the opinion of the Secretary-General that the only realistic alternatives are financing the Court through assessed contributions or re-designing the Court on the basis of "the concept of 'national jurisdiction' with international assistance".[26]

D. Agreement on the establishment of the Special Court

Following the submission to the Security Council of the Report of the Secretary-General, negotiations continued on the establishment of a Special Court for Sierra Leone and several amendments were made to the draft agreement and statute. For example, the draft agreement and statute were amended to take into account public debate on the definition of the jurisdiction of the court, in particular with regard to the involvement of children in armed conflict.[27] They also were amended to incorporate decisions made in the interim on the administrative structure of the Court, such as the creation of a Management Committee for the Special Court.

The Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (the Agreement), to which the Statute of the Special Court for Sierra Leone (the Statute) was annexed, was signed in Freetown on 16 January 2002. The Agreement and Statute of the Special Court were later issued as Appendix II to the Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone.[28] In accordance with its article 21, the Agreement entered into force on 12 April 2002.

The Agreement consists of 23 articles on the terms of the establishment of the Special Court. The annexed Statute consists of 25 articles that govern the Court's functioning. The matters addressed in the Agreement and Statute encompass not only the functioning of the legal process but also the various practical arrangements necessary for the operation of the Court. Matters related to the legal process include: the Court's jurisdiction; principles of individual criminal responsibility; rights of the accused; forms of judgement and penalties; terms of enforcement of sentences; procedures for appeal, review of judgements and pardon or commutation of sentence; and working language. Matters relating to the practical arrangements necessary for the operation of the Court include: the organisation of Court; the responsibilities of the organs and officials of the Court; qualifications and procedures for appointment of the Court's officials; the privileges and immunities of the Court's appointed officials, staff, counsel, witnesses and experts; the terms of the Government of Sierra Leone's cooperation with the Court; the Court's juridical capacity; the seat of the Court; the Court's security arrangements; the

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25 *Ibid*, at para. 70.

26 *Ibid*, at paras. 71-2.

27 For more details on this issue, see part II of the Guide.

28 *Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone*, annexed to the Letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2002/246.

legal protections for the Court's premises, archives and other documents; the immunity of the Court's property, funds and assets; the Court's expenses; the Court's relationship with its Management Committee; the provisions for an annual report; and the procedures for settlement of disputes, entry into force of the Agreement and Statute, their amendment and termination. Several of the most relevant of these matters are discussed in more detail below.

1. Jurisdiction

As recommended by the Security Council,[29] the Agreement adheres to the wording of Resolution 1315 and establishes the Special Court "to prosecute persons who bear the greatest responsibility" for crimes committed in the territory of Sierra Leone; this language is repeated in the Statute. In the course of the negotiations, there developed an understanding that this phrase regarding personal jurisdiction meant that the Special Court would adopt a focused prosecutorial approach, aiming at the leaders ultimately responsible for the crimes committed in the country.[30]

Generally exempted from the jurisdiction of the Court are peacekeepers and related personnel. Article 1 of the Statute provides that "[a]ny transgressions by peacekeepers and related personnel" are within the "primary jurisdiction of the sending State". Only in the event that "the sending State is unwilling or unable genuinely to carry out an investigation or prosecution" may the Court, "if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons". Article 1 reflects a restrictive approach with regard the Court's exercise of jurisdiction over peacekeepers and related personnel. It also fails to permit the Court to communicate directly with the Security Council regarding a sending State's unwillingness or inability to investigate and prosecute, instead putting the burden on a State to make such proposal. This provision is a rejection of the Secretary-General's suggestion that the Security Council act based on a proposal of the President of the Court, rather than a State.[31]

Additionally, pursuant to article 7 of the Statute, "any person who was under the age of 15 at the time of the alleged commission of the crime" is exempted from the Court's jurisdiction. With respect to a "person who was at the time of the alleged commission of a crime between 15 and 18 years of age", the Court is mandated to take account of that person's age and treat him or her in accordance with international human rights standards. In disposing of the case, the Court may order a range of options, such as community service or approved schools, but imprisonment is not permitted. Fortunately, the proposal to create a separate juvenile chamber, contained in draft statute annexed to the Report of the Secretary-General, was deleted.[32]

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29 See Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40.

30 This understanding is reflected in the Court's first draft budget, which assumes that there would be 26 trials. According to the first draft budget presented by the UN Office of Legal Affairs in March 2001 (alternative A), the financial requirements of the Special Court, during the first three years of its activity, were 30,155,677 USD; 42,550,367 USD; and 41,896,315 USD respectively, for a total of over 114 million USD. During the course of the negotiations, the Office of Legal Affairs explained that those figures reflected the assumption that the Special Court would hold 6 trials during the first year, 12 during the second and 8 during the third.

31 See Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40.

32 For a discussion of this issue, see No Peace Without Justice and UNICEF, *International Criminal Justice and Children*, 2002, p. 58.

With regard to the temporal jurisdiction of the Court, the parties affirmed the understanding noted in the Report of the Secretary-General. The Agreement and Statute provide that the Court has an open-ended temporal jurisdiction starting from 30 November 1996. As noted, the Government of Sierra Leone decided to withdraw its request for the temporal jurisdiction of the Court to commence in 1991 because of a lack of support on the issue and in order to avoid further delays in the signing of the Agreement. However, the Government of Sierra Leone did secure the understanding that the issue could be re-opened by the Prosecutor if so required by the findings of the investigations.

The Court's subject matter jurisdiction, which is spelled out in the Statute, encompasses the power to prosecute: persons who committed crimes against humanity; persons who committed serious violations of article 3 common to the Geneva Conventions and of Additional Protocol II; persons who committed other serious violations of international humanitarian law, namely attacks against civilians, attacks against humanitarian assistance or peacekeeping missions and the conscription or use of child soldiers; and persons who committed crimes under Sierra Leonean law, namely violations of the Prevention of Cruelty to Children Act, 1926 and the Malicious Damage Act, 1861.[33]

2. Organisation[34]

The Agreement reflects the intent to create a Special Court with a strong Sierra Leonean element. However, the idea of having the Attorney General as co-prosecutor, as well as the idea itself of a co-prosecutor, disappeared early in the negotiations in order to avoid the possibility that the investigations and indictments of the Court could be perceived as politically motivated. It was instead agreed that the Secretary-General would appoint the Prosecutor, and the office of Deputy Prosecutor would be created. The Deputy Prosecutor would be appointed by the Government of Sierra Leone.

It also was agreed that the Chambers of the Court would consist of a Trial Chamber and an Appeals Chamber. A second Trial Chamber might be established at the request of the Secretary-General or the President of the Court, after six months from the beginning of the operations of the Court. Three judges, two appointed by the Secretary-General and one by the Government of Sierra Leone, would sit in the Trial Chamber. Five judges, three appointed by the Secretary-General and two by the Government of Sierra Leone, would sit in the Appeals Chamber.

Finally, it was agreed that the Secretary-General would appoint the Registrar, who would be a staff member of the United Nations. The requirement that the Registrar be a UN staff member derived, if indirectly, from the UN Financial Rules and Regulations and the UN decision to transfer funds from the UN Trust Fund for the Special Court to the Special Court only if they were received by a UN official.

3. Expenses

The identification of the financing mechanism of the Special Court was one of the most controversial issues in the course of the negotiations and the last to be solved. As noted,

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33 See part II of the Guide for further discussion of the crimes within the jurisdiction of the Court.

34 See the Agreement, arts. 2-4 and part IV of the Guide for further discussion on the organisation of the Court.

Resolution 1315 requested the Secretary-General to make recommendations on the amount of voluntary contributions of funds, equipment and services necessary for the operations of the Special Court. During the negotiations, however, both the Secretary-General and the Government of Sierra Leone on several occasions expressed concern about the viability of a Court financed exclusively from voluntary contributions, considering that no precedent existed of an institution as complex as an international court financed on a purely voluntary basis. The Government of Sierra Leone repeatedly made known its support for a Court financed from the regular budget of the United Nations. This position was nevertheless not followed.

Following several exchanges between the President of the Security Council and the Secretary-General,[35] a compromise was eventually reached and its content incorporated in articles 6 and 7 of the Agreement. According to article 6, the expenses of the Court shall be financed from voluntary contributions from the international community. It also was agreed that the actual establishment of the Court would start when the Secretary-General "has sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations plus pledges equal to the anticipated expenses of the following 24 months of the Court's operation". In addition, in case voluntary contributions would be insufficient to implement the Court's mandate, it was agreed that the Secretary-General would have the authority to revert to the Security Council "to explore alternate means of financing the Special Court".

As part of the compromise and to assist the Court on questions of funding and administration, the Security Council suggested the creation of a Management Committee, which would include representatives of Sierra Leone, the Secretary-General and interested contributors.[36] Article 7 of the Agreement acknowledges the decision to establish a Management Committee as a distinctive and innovative body mandated "to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States".

4. Seat

While article 10 of the Agreement provides that the seat of the Special Court shall be in Sierra Leone, it also envisages that, if so required by the circumstances, the Court might meet away from its seat. It should be recalled that, at the time of the negotiations of the Agreement, the security situation in Sierra Leone was still volatile and concerns existed about the reaction of former combatants, and the people of Sierra Leone, to investigations and indictments by the Special Court.

5. Practical arrangements

The Agreement offers clear guidance as to the actual establishment of the Special Court, stressing the need to ensure the efficiency and cost-effectiveness of its operations.

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35 See Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234; Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40; and Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2001/95.

36 See Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234.

Article 19 states that a phase-in approach shall be adopted "in accordance with the chronological order of the legal process". The Judges, the Prosecutor and the Registrar shall be appointed in the first instance together with the staff responsible for investigations and prosecution. In the initial phase, the Chambers shall convene on an ad hoc basis. "Judges of the Trial Chamber shall take permanent office shortly before the investigation process has been completed. Judges of the Appeals Chamber shall take permanent office when the first trial process has been completed". This is a further difference between the Special Court and the ad hoc international criminal tribunals, where the appointment of judges and their taking up office coincide, and the reflection of the international pressure to create a Court as cost-effective and efficient as possible.

6. Termination

Article 23 of the Agreement states that "[t]his Agreement shall be terminated by agreement of the Parties upon completion of the judicial activities of the Special Court." Thus, it is foreseeable that another document will need to be negotiated between the United Nations and the Government of Sierra Leone articulating the Court's exit strategy and regulating matters such as the responsibility for the Court's detainees, terms of detention, requests for review of sentences and maintenance costs of Special Court facilities.

E. Special Court Agreement 2002, (Ratification) Act, 2002

Article 21 of the Agreement establishing the Court states that the Agreement shall enter into force "on the day after both parties have notified each other in writing that the legal requirements for entry into force have been complied with." Pursuant to section 40(4) of the Constitution of Sierra Leone, 1991, ratification by Act of Parliament or by resolution of Parliament is required for the entry into force of a treaty that relates to any matter within the legislative competence of Parliament, or which in any way alters the law of Sierra Leone or imposes any charge on, or authorises any expenditure out of, the Consolidated Fund or any other fund of Sierra Leone. In addition, as Sierra Leone is a dualist system, provisions contained in a treaty can be enforced in the Sierra Leone legal system only if implemented by national legislation.

The Special Court Agreement 2002, (Ratification) Act, 2002 (Ratification Act), passed by the Sierra Leone Parliament in March 2002, is the document that ratifies the Agreement establishing the Special Court and implements its provisions into Sierra Leone law.

The Ratification Act is composed of nine parts. Both the Special Court's Agreement and Statute also are included in the schedule of the Ratification Act.

The content of the Ratification Act mirrors the provisions in the Special Court Agreement and Statute. It also includes a number of significant additional provisions that aim at avoiding possible ambiguities with regard to the nature and status of the Court and at clarifying the extent of Sierra Leone's obligations by introducing procedures for their actual implementation.

Part I of the Ratification Act sets out the applicable definitions for its interpretation.

Part II recognises the Court as an independent international court. It acknowledges the legal capacity of the Court, its administrative independence, the inviolability and the immunity of its property and immunity from legal process of its funds, assets and property. It further recognises the immunity of the premises of the Court.

Part III addresses the crucial question of the jurisdiction of the Court and the Court's relationship with Sierra Leone's legal system. Section 11 acknowledges that the Special Court may sit in Sierra Leone and expressly states that the Court "shall not form part of the Judiciary of Sierra Leone". In addition, section 13 clarifies that "[o]ffences prosecuted before the Special Court are not prosecuted in the name of the Republic of Sierra Leone". The Ratification Act thus explicitly stresses that no confusion should be made between the physical location of the Special Court and the existence of the Court within the Sierra Leonean domestic legal system and there should not be any ambiguity regarding the Court's impartiality and independence.

Parts III through VI also clarify the obligations of the Government of Sierra Leone to cooperate with the Court and the procedure to be adopted in case of requests for assistance or orders issued by the Special Court. According to parts III and IV, the Attorney-General of Sierra Leone – the authorised channel of communication with the Court – must consider any request for assistance without any undue delay. The Act sets out the procedure by which a request must be dealt with, including maintaining the confidentiality of the request. Should Sierra Leone not be in a position to fulfil a request, for example if the request falls outside the discretionary power of the executive in the absence of a court order, the Attorney-General of Sierra Leone must notify the Court of the grounds for any refusal, postponement or inability to fulfil the request. Part V therefore imposes an absolute obligation to cooperate with orders of the Court, which are recognised as having the same force or effect as if issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone court. Orders of the Special Court are thus self-executing in Sierra Leone and once issued, no further action is required to compel cooperation. It is also specified that the obligation to cooperate with the Special Court shall be construed as existing in respect of every natural person, corporation, or any other body created by or under Sierra Leone law and that such obligation shall prevail over any other law. The Ratification Act adopts a similar approach with regard to warrants of arrest issued by the Court. Part VI, section 23, states that "[f]or the purpose of execution, a warrant of arrest issued by the Special Court shall have the same force or effect as if it had been issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone court." In addition, the official capacity of an individual cannot be a bar to arrest and any existing immunity is waived by the Ratification Act; section 29 explicitly states that "[t]he existence of an immunity or special procedural rule attaching to the official capacity of any person shall not be a bar to the arrest and delivery of that person into the custody of the Special Court."

Part VII concerns the issues of judgements and sentences. It first provides for the use of judgements of the Special Court, as well as evidence admitted in the Special Court, by the courts of Sierra Leone. Part VII also implements Sierra Leone's obligations under the Agreement with respect to enforcement of sentences of imprisonment imposed by the Special Court, modification of such sentences and pardon or commutation of sentences. It further provides, in an instance where a prisoner is subject to sentences by the Special Court and a Sierra Leone court, the sentences should run concurrently, unless otherwise ordered.

Part VIII implements the obligation to cooperate as an obligation not to interfere with the work of the Court. In so doing, it penalizes as a criminal offence any attempt wilfully to obstruct, pervert or defeat the course of justice in relation to the Court or the impartiality and independence of Court officials. Moreover, part VIII makes it a criminal offence to intimidate witnesses and officials of the Court or to attempt misleading the Court by perjury or incitement to perjury.

Part IX assists victims of crimes within the jurisdiction of the Special Court by providing that they may claim compensation against a person found guilty of that crime in accordance with the Criminal Procedure Act, 1965. In addition, part IX provides that the Attorney-General of Sierra Leone may act on behalf of the Government of Sierra Leone with respect to the responsibilities conferred by the Agreement and that he or she may make regulations to give effect to the Ratification Act.

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The Special Court for Sierra Leone is a unique and innovative institution in the field of international criminal justice because of the nature of the Court and the process that led to its creation. As highlighted above, the Special Court is the only international criminal tribunal having its legal basis in an agreement between the United Nations and a member State. It is also the only established tribunal with an international and national component, a characteristic reflected in its mixed jurisdiction, composition and location.

More importantly, the Special Court is the only international court established through such a participatory process. Unlike the ICTY and ICTR, which were largely perceived when they began as detached from the situations they were meant to address, in this case, Sierra Leone – the State in which the violations occurred – has been an active participant from the beginning of the negotiations for the establishment of the Special Court. Sierra Leone did indeed fight to retain a role throughout the process and greatly contributed to the successful conclusion of the Agreement, as well as the actual commencement of the Court's operations. In this respect, the Special Court offers a distinctive model for any future mechanism meant to address crimes against humanity, war crimes and other serious violations of international humanitarian law.

Part II
Jurisdiction of the Special Court[+]

This part discusses the jurisdiction of the Special Court for Sierra Leone and the substantive law that could be applicable before the Court. It commences with a general discussion on the law applicable during armed conflicts before going on to consider the subject matter jurisdiction, i.e. those crimes over which the Special Court has jurisdiction; the temporal jurisdiction, i.e. the time period during which the Special Court has jurisdiction; and the personal jurisdiction, i.e. the people over which the Special Court has jurisdiction, including a discussion of individual criminal responsibility.

A. Applicable law

1. Introduction to international humanitarian law (IHL)

International humanitarian law, also known as "the laws of war", is the area of international law that regulates conduct during an armed conflict. In the modern era, the development of the rules of IHL began in the late nineteenth and early twentieth century in an attempt to mitigate some of the consequences of the conflicts prevalent at the time. In essence, they attempted to regulate wars to prevent unnecessary suffering being inflicted upon combatants and civilians. Their development attempted to set specific rules concerning what were and were not legitimate targets in conflict and refined the distinction between combatants and civilians. The protection of persons not taking an active part in hostilities became a basic principle of IHL.

Traditionally, there have been two branches of international humanitarian law: the "Hague law", concerned with means and methods of warfare, and the "Geneva law", concerned with the more humanitarian issues, including the protection of civilians; this distinction is largely illusory, as there is a wide degree of overlap between the two.[37] The prohibition on intentionally directing attacks against civilians, which is applicable irrespective of the nature of the armed conflict, is one of the cornerstones of international humanitarian law. This prohibition derives from one of the key tenets of international humanitarian law, that a distinction be made between legitimate and illegitimate military targets. Accordingly, some targets will always be illegitimate, such as undefended towns and objects employed solely for the provision of humanitarian assistance, while some targets will always be legitimate, such as military installations. Additionally, some methods of attack, such as carpet bombing, and some weapons, such as indiscriminate weapons, may not be employed. A key feature underpinning international humanitarian law is the principle of proportionality, according to which the military advantage expected to be gained in any attack must be balanced against the likely incidental or collateral damage to non-military persons and objects. Therefore, in all

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[+] Part II was prepared thanks to substantial contributions of research and writing from Alison Smith. NPWJ remains nonetheless responsible for the views expressed herein as well as any errors or omissions.

[37] See McCoubrey, H., *International Humanitarian Law: The Regulation of Armed Conflicts*, 1990, Dartmouth Publishing Company Limited, Great Britain, pp. 1-2. Indeed, the Hague Law of 1907 and its annexed Regulations on the Laws and Customs of War on Land, which have the status of customary international law, were to a large degree complemented and supplemented in the Third and Fourth Geneva Conventions of 1949 and Additional Protocol I. Roberts, A. and Guelff, R., *Documents on the Laws of War* (3rd ed.), 2000, Oxford University Press, Great Britain, p. 68.

cases where either the target, methods, or weapons are not prohibited, the military commander must apply the principle of proportionality to weigh whether or not a particular target can be attacked in a particular way using particular weapons.

Currently, the Geneva Conventions of 12 August 1949, and the two Additional Protocols of 8 June 1977,[38] form the heart of international humanitarian treaty law and are its most frequently cited sources.[39] The 1949 Geneva Conventions, much but not all of which are now considered to be customary international law, were aimed at both codifying customary international humanitarian law as it had emerged following World War II and at developing law to address the experiences of World War II.[40] These four Conventions concern the treatment of:

(I) sick and wounded combatants on land;
(II) sick and wounded combatants at sea;
(III) prisoners of war (POWs); and
(IV) civilians.

The Geneva Conventions marked the first inclusion in a humanitarian law treaty of a set of war crimes explicitly attracting individual criminal responsibility – the "grave breaches" of the conventions.[41] Each of the four Conventions contains its own list of grave breaches, expanded by Additional Protocol I of 1977. Grave breaches are crimes considered so serious that all States Parties are required to prosecute persons accused of such offences, or to hand them over to other States Parties willing to conduct such prosecutions. However, the grave breaches provisions only apply in international armed conflicts as opposed to non-international armed conflicts[42] and then only to acts against persons protected by each of the Geneva Conventions ("protected persons"), namely sick and wounded combatants on land and sea, POWs and civilians who find themselves in the hands of a State of which they are not nationals. The primary responsibility for enforcement of these grave breaches provisions, and indeed of international humanitarian law in general, rests with States themselves.

International humanitarian law has two main sources: treaty law and customary international law; it can also be found in general principles of law and in judicial decisions and the writings of eminent jurists,[43] as subsidiary means that are of particular importance in this field. Treaty law refers to the obligations binding on a State because they are a party to a treaty containing those obligations. Customary international law, on the other hand, refers to those obligations that are binding on States irrespective of whether they are contained in a treaty or not. The existence of customary international law is determined by reference to State practice and *opinio juris*.[44] State practice is the actions undertaken by States and *opinio juris* means that States undertake such actions

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38 Sierra Leone succeeded to the Geneva Conventions on 10 June 1965 and acceded to the Additional Protocols on 21 October 1986.

39 McCoubrey, *supra*, p. 15. Note also the Geneva Protocol on the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare 1925, which has the statue of customary international law (Roberts and Guelff, *supra*, p. 157) and is reflected in the Rome Statute of the International Criminal Court, article 8(2)(b)(xviii).

40 Roberts and Guelff, *supra*, pp. 195-6.

41 See, for example, the Fourth Geneva Convention, articles 146-7.

42 See below for a discussion of this distinction.

43 Statute of the International Court of Justice, art. 38(1)(c)-(d).

44 *North Sea Continental Shelf Case* [1969] ICJ Rep 3, 44.

because they believe they are under a legal obligation to do so.[45] State practice in the absence of *opinio juris*, no matter how uniform or consistent, will therefore not amount to customary international law; one example is the cancellation of diplomats' parking tickets, which is a standard practice but does not give rise to legal consequences if it is not followed. Official statements and declarations can provide evidence of *opinio juris* and can even amount to State practice in some circumstances, depending on their context. Generally, customary international law is binding on all States. However, it is not binding on a persistent objector, namely a State that has consistently made its objections manifest during the emergence of a new rule,[46] except if it amounts to *jus cogens*, which is a peremptory norm of international law from which no derogation is permissible and, as such, is binding on all States.[47] It should be borne in mind that customary international law is a continually evolving process and what was customary international law 20 years ago will not necessarily be customary international law today.

While international humanitarian law regulates the conduct of war, not all of its provisions attract individual criminal responsibility. For example, the violation of the provision stating the prisoners of war shall be permitted to use tobacco[48] is not considered to be a crime. However, there are a wide number of provisions, based both in treaty and customary law, that do attract individual criminal responsibility, so that people who violate the obligations in those provisions can be held accountable in a court of law. These provisions are considered to form part of a discrete area of law called international criminal law.[49] Many of these provisions will be discussed in the following sections on the crimes over which the Special Court has jurisdiction. The classic modern examples of the enforcement of international humanitarian law are found in two military tribunal established after World War II: the Nuremberg Tribunal, established to try the 22 major Nazi war criminals and the International Military Tribunal for the Far East, established to try major war criminals in the Pacific. The Nuremberg Charter, which gave the Tribunal jurisdiction over war crimes, crimes against humanity and crimes against peace,[50] is often cited as the basis for the development of international criminal law in the latter half of the twentieth century. In fact, "[t]he 1949 Geneva Conventions were prepared in the wake of the Nuremberg trials and were heavily influenced by them".[51]

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45 See the Statute of the International Court of Justice, article 38(1)(b), listing one of the sources of international law as "international custom, as evidence of a general practice accepted as law".

46 Stein, T. L., 'The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law (1985) 26 Harv. Int'l L.J. 457, p. 458.

47 Vienna Convention on the Law of Treaties 1969, article 53; norms amounting to *jus cogens* can only be replaced by norms of a similar character. The prohibition on genocide is generally considered to be *jus cogens*: see, for example, Bassiouni, M. C., 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 Law & Contemp. Probs. 63, p. 68.

48 Third Geneva Convention 1949, art. 26.

49 These provisions form part of International Criminal Law, which is also considered to include a range of other offences such as drug trafficking, piracy and fraud: see, for example, Bassiouni, M. C., *International Criminal Law* (2nd edn), 1999, Transnational Publishers, Ardsley, NY.

50 Nuremberg Charter, article 6; note that conspiracy to commit any of these acts was also within the jurisdiction of the Nuremberg Tribunal.

51 *The Prosecutor v. Tadic*, Case No. IT-94-I, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

2. The International Criminal Court (ICC), including the Elements of Crimes

The preliminary and traditional problem with international humanitarian law is its lack of enforceability. Despite the advances made after World War II by the International Military Tribunals and several notable cases tried in domestic courts, including Eichmann, Barbie and Trouvier, it is only with the advent of the ad hoc tribunals and subsequent developments through the 1990s and beyond that this historic lack of enforceability is being addressed.[52]

In the early 1990s, the international community took steps to enforce international humanitarian law in the former Yugoslavia and in Rwanda, through the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) in 1993 and 1994 respectively. These Tribunals were established by Security Council Resolutions adopted under Chapter VII of the Charter of the United Nations.[53] Crimes within their jurisdictions include genocide, crimes against humanity and violations of the laws and customs of war. The decisions of these tribunals, which are based on customary international law as identified by the judges, represent the first major post-Nuremberg decisions on crimes under international humanitarian law. While the decisions of these international tribunals are not binding on other courts, whether domestic and international, this growing body of jurisprudence is at the very least highly persuasive and was referred to extensively by the Preparatory Commission of the International Criminal Court (ICC) when the time came to elaborate the Elements of Crimes within the jurisdiction of the ICC.

Indeed, the main step forward in the codification of international criminal law since Nuremberg and Tokyo is the creation of the International Criminal Court. In many ways, the ICC can be seen as a logical next step of the process begun at Nuremberg and traced through the establishment of the ICTY and ICTR, albeit a step that would be blocked for 50 years by the Cold War, among other things. The main difference between the ICC and the tribunals that preceded it is that the Statute of the ICC was negotiated by all member States of the United Nations, thereby representing for the first time a truly universal attempt to codify those laws and customs of war that attract individual criminal responsibility.

The Rome Statute of the International Criminal Court was adopted in Rome on 17 July 1998, after weeks of intensive negotiations and debate, and entered into force on 1 July 2002. Following the Diplomatic Conference, the Preparatory Commission comprised of representatives of States[54] with significant input from international organisations and non-governmental organisations, debated the particulars of the supporting documents

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52 For further reading, see McCormack, T. and Simpson, G., *The Law of War Crimes: National and International Approaches*, 1997, Kluwer Law International, Boston.

53 ICTY: Security Council Resolution 827 (1993), 25 May 1993; ICTR: Security Council Resolution 955 (1994), 8 November 1994. The Security Council is mandated under Chapter VII with determining the existence of any threat to the peace, breach of the peace or act of aggression, pursuant to article 39(1) of the UN Charter. Having made that determination, the Security Council may then make recommendations or decisions regarding measures to be taken to maintain or restore international peace and security. Any such decisions are binding on all member States (article 25) and are superior to all other international obligations (article 103).

54 The Republic of Sierra Leone was one of the most active participants in these discussions and made numerous statements, both in formal and informal negotiations, as to what constituted customary international law in respect of the crimes within the jurisdiction of the Court.

for the Rome Statute, in particular the Elements of Crimes and the Rules of Procedure and Evidence.[55] During the negotiations, the often long debates centred around what was and what was not customary international law, with delegates accepting the former and rejecting the latter. As such, the crimes within the jurisdiction of the ICC, found in articles 6 to 8, are the best possible indication of customary international law at the time of the adoption of the Rome Statute, as are their Elements of Crimes, which were approved at the June 2000 session of the Preparatory Commission for the International Criminal Court and subsequently adopted during the first meeting of the Assembly of States Parties in September 2002.[56]

3. Note on procedural law

Along with substantive provisions on international criminal law, the ICTY, the ICTR and the ICC have also contributed to the development of a set of procedural rules for international courts and tribunals. Thus each of the international criminal tribunals and the ICC has its own "Rules of Procedure and Evidence", which represent a cross-fertilisation between major legal systems.[57] The rules have a large impact on the evidence that is accepted at trial and, as such, forms the basis for judgments. As such, these rules have contributed to the development of the procedural and substantive elements of this area of law.

B. Crimes within the jurisdiction of the Special Court

In his letter of 12 June 2000, the President of Sierra Leone suggested that the Special Court have as its applicable law a blend of international and domestic Sierra Leone law.[58] Security Council Resolution 1315 (2000) therefore recommended that the Special Court was to have jurisdiction over crimes under international law and selected crimes under Sierra Leonean law. Pursuant to the Statute of the Special Court, the crimes under international law fall under the broad categories of crimes against humanity; violations of common Article 3 of the Geneva Conventions and Additional Protocol II; and other serious violations of international humanitarian law, including crimes against peacekeepers and the use of child soldiers.[59] These are crimes under international humanitarian law that were considered to have had the status of customary international law at the time the alleged crimes were committed.[60] Violations of common article 3 and

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55 Both the Elements of Crimes and the Rules of Procedure and Evidence, as adopted, are found in UN Doc. ICC-ASP/1/3.

56 See Politi, M. and Nesi, G. (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, Dartmouth Publishing Company Ltd, UK, 2001, p 25 and Lee, RS (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers Inc, USA, 2001, pp. 5, 8 and, generally, Chapter 6, "Reflections on the Elements of Crimes". While there is some debate as to whether the Rome Statute and the Elements of Crimes entirely reflect customary international law, they are used in this report as the most authoritative statement of customary international law to date, due to their manner of negotiation and adoption.

57 The Rules were made in different ways: for the ad hoc tribunals and the Special Court, they are made by the Judges themselves, whereas for the ICC, they were the product of lengthy negotiations between States, which took place at the same time as the negotiations on the Elements of Crimes.

58 UN Doc. S/2000/786, 'Framework for the Special Court', para. 3.

59 Crimes against humanity (article 2); violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (article 3); and other serious violations of international humanitarian law (article 4).

60 See, for example, *Report of the Secretary-General to the Security Council on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, para. 12.

Additional Protocol II and the "other serious violations of international humanitarian law" both require the existence of an armed conflict as a condition of applicability, therefore this will be discussed separately at the beginning of this section. The crimes under Sierra Leonean law cover offences relating to the abuse of girls and wanton destruction of property, taken from Sierra Leone legislation dating from 1926 and 1861 respectively; these are the only crimes under Sierra Leone law over which the Special Court has jurisdiction.[61]

This selection of subject matter jurisdiction was done to pre-empt any challenge to the Court's legality on the basis of the principle of *nullum crimen sine lege*,[62] since the acts these provisions are purporting to address had been criminalised at the time those acts were allegedly committed.[63] It should be emphasised that the Statute of the Special Court does not create the crimes to which it refers: rather, articles 2 to 5 of the Statute simply provide that the Special Court has jurisdiction over pre-existing crimes. Therefore, an examination of the applicability and content of the norms referred to within the Statute – whether as a result of customary international law or voluntary adoption of norms by Sierra Leone – is necessary to determine the elements of the crimes.

Thus the elements elaborated below are drawn primarily from the Elements of Crimes of the ICC, which are the best current indication of customary international law, and the decisions of the International Criminal Tribunals for the former Yugoslavia and Rwanda. While their decisions are not binding *per se* on the Special Court for Sierra Leone, they are persuasive. According to the Statute, the Appeals Chamber "shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda";[64] furthermore, it is also in the interests of certainty of the law and consistency of the application of its provisions that the Special Court for Sierra Leone follow these decisions.

1. The existence and nature of an armed conflict

International humanitarian law applies during times of armed conflict, whether international or non-international in nature. The exception to this is crimes against humanity, namely certain acts committed as part of a widespread or systematic attack against a civilian population, and genocide, namely certain acts committed against a national, racial, ethnic or religious group with the intent to destroy that group in whole or

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61 This may leave a gap in accountability for violations committed during the conflict, leaving aside the question of the Lomé Amnesty for now. For example, if a person is tried for murder as a crime against humanity before the Special Court and the contextual elements are not proven, that person must be acquitted. The Special Court has no jurisdiction to find that person guilty of murder under Sierra Leone law. However, the *non bis in idem* principle then bars any trial of that person in domestic courts for murder based on the same facts. See the Statute, art. 9(1): "No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court."

62 According to this principle, nobody may be found guilty of a criminal offence for acts that were not criminalised, whether under national or international law, at the time of their commission: see the International Convention on Civil and Political Rights, art. 15(1).

63 One of the indictees has filed a motion challenging the Court's jurisdiction in relation to the recruitment of children, submitting that this was not a crime under customary international law at the time of the alleged commission of the alleged acts. Oral arguments were heard in November 2003 and, at the time of writing, the Judges of the Appeals Chamber have not yet decided the matter.

64 Statute of the Special Court, art. 20(3).

in part, as such.[65] According to customary international law, the prohibitions against these acts apply during times of war and times of peace.[66] In all other cases, however, in order to apply these norms, it must first be determined whether an armed conflict existed, before going on to consider whether the conflict was international or non-international in nature.

The ICTY considered the definition of an armed conflict early in its history and stated the following:

> "[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."[67]

International humanitarian law draws a distinction between international armed conflicts, i.e. those between two or more States, and non-international armed conflicts, i.e. those between a State and a non-State organised armed group or between such groups. The majority of provisions in the Geneva Conventions and the Additional Protocol I apply only to international armed conflicts. Nonetheless, article 3 common to the Geneva Conventions and Additional Protocol II lay down a set of basic minimum rules and basic protections applicable in any armed conflict.[68]

Whether an armed conflict is international or non-international in nature depends on the parties to the conflict. In essence, a conflict will be "international" when it is conducted between two or more States and will be "non-international" when it is conducted between a State and another armed force not qualified as a State or between such forces.[69] The character of a conflict can change during its course from being non-international in nature to being international in nature.[70] In the *Tadic* decision, the ICTY

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65 See Genocide Convention 1949.

66 The ICTY Statute limits the jurisdiction of that Tribunal to crimes against humanity committed in the context of an armed conflict (see article 5) but the Statute of the Special Court contains no such limitation, so this aspect of ICTY jurisprudence will not be discussed in the present report.

67 *Prosecutor v. Tadic*, Case No. IT-94-I, Appeals Chamber, Jurisdiction Decision, 2 October 1995 (Tadic Jurisdiction Decision), para.70.

68 *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34, ICTY Trial Chamber, Judgment, 31 March 2003, para. 228.

69 *Prosecutor v. Kayishema*, Case No. ICTR-95-I, ICTR Trial Chamber, Judgment, para. 170.

70 *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Appeals Chamber Judgment, 15 July 1999, para. 84. In addition, there can be both non-international and international armed conflicts taking place side by side. Note, however, that the ICTY Appeals Chamber discussed the issue of the applicable law in such a situation. Addressing the argument that the existence of two types of conflicts meant the application of two different legal regimes in the same place at the same time, the Appeals Chamber stated that such an interpretation would "authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict" (para. 78). This led the Appeals Chamber to consider that "to the extent

Appeals Chamber specifically addressed the question of when a conflict that is *prima facie* internal in nature may be regarded as involving forces acting on behalf of a foreign power, thereby rendering the conflict international in nature.[71] The Appeals Chamber identified three specific tests concerning the necessary degree of control by a foreign power to determine whether this had occurred, namely overall control of an armed group or individuals; specific instructions to an armed group or individuals; and actual behaviour of an armed group or individuals, irrespective of any specific instructions.

The Statute of the Special Court only gives the Court jurisdiction over crimes committed in non-international armed conflicts. Particularly given the three-part test identified by the Appeals Chamber, it is debatable whether the drafters of the Statute for the Special Court should have limited the jurisdiction of the Special Court only to crimes committed within an non-international armed conflict. A more sensible approach would have been to leave that determination to the Special Court itself, so it could have applied the test of whether the conflict was rendered international in nature on the basis of evidence presented to it.

It seems almost counter-intuitive to be asking the question of whether an armed conflict existed in Sierra Leone. The facts as adduced in this report, including the descriptions of fighting between various forces at different times, as well as the numerous public reports from the media, human rights organisations and others seem to negate the need for even raising the issue. Nevertheless, it is important to examine this question, in particular to determine when the conflict began, which determines when international humanitarian law begins to apply, and also to determine the nature of the conflict, in order to determine what provisions of international humanitarian law are applicable.[72]

a. Existence of an armed conflict

As noted, an armed conflict is deemed to have begun whenever there is "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[73] Revolutionary United Front (RUF) and National Patriotic Front of Liberia (NPFL) forces coming from Liberia first entered Sierra Leone through Kailahun District on 23 March 1991, at which time they engaged the Sierra Leone Army (SLA) in battle. From the very beginning, the RUF was organised according to a military structure, including identifiable chains of command, rules of engagement and disciplinary structures. From that time, RUF/NPFL forces would spread throughout the country, engaging the SLA in battle and establishing their own bases, including for recruiting and training.

As the conflict progressed, different fighting factions became involved, including loosely organised groups of local hunters and "vigilantes"; the more organised and structured Civil Defence Forces; the Armed Forces Revolutionary Council (AFRC), who took over

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possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts" (*Ibid*).

71 See *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Appeals Chamber Judgment, 15 July 1999, point IV.B.3.

72 It should of course be remembered that for crimes against humanity, customary international law does not require the existence of an armed conflict; rather, it requires a widespread or systematic attack against a civilian population and that prohibited acts be committed as part of that attack.

73 *Prosecutor v. Tadic*, Case No. IT-94-I, Appeals Chamber, Jurisdiction Decision, 2 October 1995, para. 70.

power during a coup in May 1997; Nigerian and Guinean forces, both independently at the invitation of the Sierra Leone Government and as part of ECOMOG; Executive Outcomes, the South African private military company who entered Sierra Leone under contract with the Sierra Leone Government; and the United Nations military peacekeeping force (UNAMSIL). Some of these armed forces and groups would, at different points, also begin fighting each other, notably the Civil Defence Forces and the SLA, both before and after the establishment of the AFRC during the coup of May 1997.

Thus to greater and lesser degrees from 1991 there was protracted armed violence between both governmental authorities and organised armed groups[74] on the one hand and between such groups[75] within the territory of Sierra Leone on the other hand. It is therefore clear that an armed conflict began in Sierra Leone in March 1991, thereby triggering the application of international humanitarian law.

The question of when the armed conflict ended turns on when a general conclusion of peace was reached or when a peaceful settlement was achieved.[76] At various times throughout the conflict, attempts were made to reach a peaceful settlement between the RUF and the Government of Sierra Leone. A number of ceasefires were declared and peace agreements were negotiated and signed, notably in Abidjan, Côte d'Ivoire, on 30 November 1996 and in Lomé, Togo, on 7 July 1999.[77] None of the agreements would last for any appreciable length of time, instead taking on the appearance of temporary lulls in the fighting, during which each of the armed forces and groups would regroup, sometimes retrain and on all occasions prepare for further fighting.

By the end of 2001, disarmament was well under way in all Districts across the country, leading the President of Sierra Leone to declare an official end to the war during a symbolic weapons-burning ceremony on 18 January 2002. Such a declaration does not necessarily mean that an armed conflict has concluded, as this falls to be determined by whether there is a general conclusion of peace or a peaceful settlement. Nevertheless, those conditions had clearly been met by that time, therefore this report is taking 18 January 2002 as the date on which the armed conflict ended.

b. Nature of the armed conflict

The fact that there was a non-international armed conflict – that is, between government authorities and organised armed groups – is clear. The more complex question is whether the armed conflict was international in nature at any point and, if so, when and for how long.

Because the Special Court only has jurisdiction over those crimes specifically included in the Statute, the answer to this question does not have a practical effect on the work of the Court. Nevertheless, it is useful from the perspective of contextualising the conflict in Sierra Leone and, furthermore, as an indication of whether international or internationalised courts should have jurisdiction over all crimes under international

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74 For example, RUF/NPFL v. SLA; RUF v. SLA; RUF v. CDF; RUF/AFRC v. CDF; RUF v. SLA/ULIMO; RUF v. ECOMOG; SLA v. CDF.

75 For example, RUF/NPFL v. local hunters/vigilantes.

76 *Prosecutor v. Tadic*, Case No. IT-94-I, Appeals Chamber, Jurisdiction Decision, 2 October 1995, para.70

77 The ECOWAS Six-month Peace Plan for Sierra Leone, signed in Conakry, Guinea, on 23 October 1997, should also be noted in this context.

humanitarian law and then determine on the basis of evidence presented to them whether a conflict was international or non-international in nature.

The test of whether an armed conflict is an international armed conflict is based on the presence of forces that are under the control of a foreign power. This falls to be determined by who was controlling the different fighting factions at any given time, for which the ICTY has identified a test consisting of three parts, namely:

1. Overall control of an armed group or individuals;
2. Specific instructions to an armed group or individuals; and
3. Actual behaviour of an armed group or individuals, irrespective of any specific instructions.[78]

Factual information gathered in Sierra Leone reveals very clearly that the RUF was operating under direct orders from Charles Taylor, the leader of the NPFL[79] to greater and lesser degrees throughout the entire conflict, particularly during the early years of the conflict. Indeed, NPFL forces had entered Sierra Leone together with the RUF in 1991 under the direct orders of their leader. Throughout the conflict, logistics and weapons were supplied from Liberia in exchange for property taken by RUF/NPFL forces and later by RUF forces from civilians and other commodities, in particular diamonds mined throughout the country.

Therefore, given that the test of control is satisfied, the conflict in Sierra Leone was international in nature during those periods when the NPFL leader was an official of the State of Liberia. For those periods when he was not an official of the State of Liberia, even during times when the NPFL controlled up to 90% of the territory, there is at least a question about the nature of the conflict, although the answer to this question is beyond the scope of this report. However, as noted, the fact that the conflict was international in nature for at least some periods of time does not alter the crimes over which the Special Court has jurisdiction.

c. Conclusion

Facts demonstrate that there was an armed conflict in Sierra Leone from 23 March 1991 until the most definitive statement of peace, namely in 18 January 2002. In addition, albeit with less clarity, facts also demonstrate that at times, this armed conflict was international in character, at the very least from 1997 until sometime in 2001. Given this, international humanitarian law began to apply in Sierra Leone on 23 March 1991 and continued to apply across the whole territory until 18 January 2002.

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78 See *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Appeals Chamber Judgment, 15 July 1999, point IV.B.3.

79 This section does not consider the position of the Economic Community of West African States (ECOWAS) Cease-fire Monitoring Group (ECOMOG) or other foreign forces engaged in Sierra Leone.

2. Crimes Against Humanity (Article 2)

Article 2 of the Statute of the Special Court for Sierra Leone reads as follows:

> "The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation;
> (e) Imprisonment;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
> (h) Persecution on political, racial, ethnic or religious grounds;
> (i) Other inhumane acts."

Aside from the Elements of Crimes of the International Criminal Court, there is no other document defining crimes against humanity and their legal elements. There are eleven international texts defining the crimes and they all differ slightly. Although the term originated in the preamble to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land,[80] which codified then existing customary law relating to armed conflict, the crimes were first defined in article 6(c) of the Nuremberg Charter following the end of World War II. The category of crimes has been included in the Statutes of the ICTY and ICTR and, in 1998, in the Rome Statute of the ICC.

The UN Secretary-General's report on the establishment of the Special Court for Sierra Leone states that "The list of crimes against humanity follows the enumeration included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, which were patterned on article 6 of the Nürnberg Charter."[81] Considerations on this by the Appeals Chamber of the ICTY and ICTR clearly state that these crimes had the status of customary international law as at the time of the establishment of those Tribunals, i.e. in 1993 and 1994 respectively.[82]

a. Contextual elements of crimes against humanity

There are two sets of elements for crimes against humanity; one of which may be described as the "contextual" elements; the other of which may be described as the elements of the acts enumerated in article 2 of the Special Court Statute. The contextual elements – spelt out in the chapeau to article 2 – must be met in all cases for an act to constitute a crime against humanity. These elements are:

(1) There is an attack against a civilian population;

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[80] The preamble states that until a more complete code on the laws of war is established, "the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result … from the laws of humanity".

[81] *Report of the Secretary-General to the Security Council on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, para. 14.

[82] See, for example, the *Prosecutor v Tadic*, Case No. IT-94-I, Appeals Chamber, Jurisdiction Decision, 2 October 1995 and *Prosecutor v Akayesu*, Case No. ICTR-96-4, ICTR Appeals Chamber, Judgment, 1 June 2001.

(2) The attack is widespread or systematic;
(3) The act in question was committed as part of that attack; and
(4) The accused knew of the broader context in which his or her act is committed.

(1) An attack against a civilian population

The "attack against a civilian population" means a course of conduct involving the multiple commission of acts enumerated in article 2.[83] Thus the "attack" does not refer to an armed conflict as such, or even to an armed attack or a military attack, but instead refers to one of the acts enumerated in article 2. As such, the attack does not need to be a physical attack but can consist of other forms of inhumane mistreatment of a civilian population.[84]

Customary international law does not require that the attack itself be committed on discriminatory grounds.[85] The case law of the ICTR can be distinguished on this point, as the jurisdiction of the ICTR over crimes against humanity is limited solely to cases where the attack was carried out on discriminatory grounds.[86] The Statute of the Special Court does not contain such a limitation, therefore, in keeping with customary international law, there is no requirement that the attack itself be committed on prohibited discriminatory grounds.

A "civilian population" refers to a population that is predominantly civilian in nature, i.e. that the people comprising the population do not take a direct part in the hostilities or no longer take a direct part in hostilities, including those who are placed *hors de combat*, namely those who are not fighting because they are wounded or otherwise incapacitated.[87] The presence of non-civilians within the population will not deprive that population of its civilian character.[88] In addition, the specific situation of a victim at the time of the commission of a crime is the critical point at which to determine the person's standing as a civilian rather than his or her general status.[89] The definition of "civilian" and "civilian population" is of critical importance in international humanitarian law, which prohibits targeting civilians, a civilian population and civilian objects, such as schools and hospitals. To constitute a crime against humanity, the civilian population must be the primary object of the attack, although it is not required that the entire population of a territory is victimised.[90]

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83 See the preamble to the ICC Elements of Crimes.
84 See, for example, *Prosecutor v. Semanza*, Case No. ICTR-97-20, ICTR Trial Chamber, Judgment, 15 May 2003, para. 327.
85 *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Appeals Chamber Judgment, 15 July 1999, paras. 283, 292 and 305. See also *Prosecutor v. Blaskic*, Case No. IT-95-14, ICTY Trial Chamber, Judgment, 3 March 2000, paras 244, 260.
86 ICTR Statute, art. 3. See also *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Appeals Chamber, Judgment, 1 June 2001, para. 464, footnote excluded.
87 See, for example, common article 3 to the Geneva Conventions and the Additional Protocols.
88 *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Trial Chamber, Judgment, 7 May 1997, para. 638.
89 *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, 3 March 2000, para. 214.
90 *Prosecutor v. Bagilishema*, Case No. ICTR-95-1, ICTR Trial Chamber, 7 June 2001, para. 80.

(2) The attack is widespread or systematic

To fulfil the contextual elements for a crime against humanity, an attack must be *either* widespread *or* systematic, but does not have to be both.[91] "Widespread" means that the attack takes place on a large scale and is perpetrated against a number of victims, whereas "systematic" refers to an organised pattern of conduct.[92]

Early jurisprudence of the international criminal tribunals considered whether "systematic" required the existence of a pre-conceived policy or plan, either of a State or some other organised group.[93] The Appeals Chamber of the ICTY has concluded that while a widespread or systematic attack can be evidence of a pre-existing policy or plan, and in practical terms such a policy or plan would in all likelihood be necessary for an attack to be carried out in a widespread or systematic manner, such a policy or plan is not in itself a necessary element:

> "There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes … proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime."[94]

(3) The act was committed as "part of" the attack

An act must have been committed or intended to be committed as part of the attack against a civilian population to qualify as a crime against humanity. There must therefore be a nexus between the act and the attack,[95] namely that the act was related to the attack.[96] As such, this excludes random or isolated acts – those not forming "part of" the attack – from the definition of crimes against humanity.

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91 See, for example, *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, para. 580. See also the Rome Statute, art. 7.

92 *Ibid.*

93 *Ibid.*

94 *Prosecutor v. Kunarac*, Case No. IT-96-23&23/1, ICTY Appeals Chamber, 12 June 2002, para. 98. In reaching this conclusion, the ICTY Appeals Chamber reviewed a wide range of precedents, including article 6(c) of the Nuremberg Charter; Nuremberg Judgement, Trial of the Major War Criminals before the International Military Tribunal, Nüremberg, 14 November 1945 – 1 October 1945, in particular, pp. 84, 254, 304 (*Streicher*) and 318-19 (*von Schirach*); Article II(1)(c) of Control Council Law No 10; *In re Ahlbrecht*, ILR 16/1949, 396; *Polyukhovich v. The Commonwealth of Australia and Anor* (1991) 172 CLR 501; Case FC 91/026; *Attorney-General v. Adolph Eichmann*, District Court of Jerusalem, Criminal Case No. 40/61; *Mugesera et al. v Minister of Citizenship and Immigration*, IMM-5946-98, 10 May 2001, Federal Court of Canada, Trial Division; *In re Trajkovic*, District Court of Gjilan (Kosovo, Federal Republic of Yugoslavia), P Nr 68/2000, 6 March 2001 plus various reports of the UN Secretary-General and the International Law Commission.

95 *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Appeals Chamber Judgment, 15 July 1999, para. 251; *Prosecutor v Kordic*, Case No. IT-95-14/2, ICTY Trial Chamber, Judgment, 26 February 2001, para. 33.

96 *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Appeals Chamber Judgment, 15 July 1999, para. 271.

While the attack itself will generally involve a large number of acts, as evidenced by the definitions of "widespread" and "systematic", a single act may constitute a crime against humanity if it is perpetrated as part of a larger attack. This has been made clear by the ICTY Trial Chamber, which stated that:

> "Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above."[97]

(4) The accused knew of the broader context in which his or her act was committed

As with most crimes, there is a mental element to crimes against humanity that must be satisfied in order for an accused to be found guilty of that crime. This element is twofold, namely that the accused acted with knowledge of the broader context of the attack and the accused knew that his or her act formed part of the attack on the civilian population.[98]

Simple knowledge on the part of the accused is sufficient to satisfy this requirement; it is not necessary to show that the accused shared the purpose or goal behind the attack against the civilian population.[99] Indeed, the motive with which the accused commits the act is irrelevant. There is no requirement that an act must not have been carried out for purely personal reasons; the only requirement is that the act is related to the attack and the accused knows it is so related.[100]

This is made clear in the Elements of Crimes of the ICC, which states that: "The perpetrator *knew that the conduct was part of* or intended the conduct to be part of a widespread or systematic attack against a civilian population."[101] This is elaborated in the chapeau to the elements of crimes against humanity, which states that:

> "[This element] should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack."[102]

b. Elements of enumerated acts constituting crimes against humanity

Once the contextual elements are met, the elements of the acts that constitute crimes against humanity also have to be established. There are nine types of acts that can

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97 *Prosecutor v. Mrksic, Radi and Sljivancanin*, Review of the Indictment pursuant to Rule 61, 3 April1996, IT-95-13-R61, para. 30.

98 See, for example, *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Trial Chamber, Judgment, 7 May 1997, para. 656 and *Prosecutor v Semanza*, Case No. ICTR-97-20, ICTR Trial Chamber, Judgment, 15 May 2003, para. 331.

99 *Prosecutor v. Semanza*, Case No. ICTR-97-20, ICTR Trial Chamber, Judgment, 15 May 2003, para. 332.

100 *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Appeals Chamber Judgment, 15 July 1999, paras. 271, 272.

101 See, for example, the ICC Elements of Crimes, article 7(1)(a), para. 3, UN Doc. ICC-ASP/1/3, p. 116 (emphasis added).

102 Chapeau of the Elements of Crimes Against Humanity, UN Doc. ICC-ASP/1/3, p. 116.

constitute a crime against humanity, as outlined in paragraphs (a) to (i) of article 2 of the Statute of the Special Court. Although not all of these acts have been considered by the ICTY or ICTR, they have all been elaborated in the Elements of Crimes of the ICC.

(a) Crime against humanity of murder

The elements for the crime against humanity of murder are:[103]

1. The perpetrator unlawfully killed or caused the death of one or more persons.
2. The perpetrator acted:
   (a) With the intent to cause someone's death; or
   (b) With the intent to cause grievous bodily harm and with the knowledge that that bodily harm was likely to cause death and was reckless as to whether death would actually occur.[104]
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Customary international law does not require the element of premeditation for the crime against humanity of murder and, as such, all the different types of murder known to common law would satisfy this requirement.[105] This is mirrored in the Elements of Crimes of the ICC, which refer simply to "killing", with a footnote indicating that this is interchangeable with the phrase "caused the death of".[106]

(b) Crime against humanity of extermination

The elements of the crime against humanity of extermination are:[107]

1. The perpetrator unlawfully killed or caused the death of one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.
2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.
3. The perpetrator acted:
   (a) With the intent to cause someone's death; or

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103 See the Elements of Crimes of the ICC, art. 7(1)(a).

104 See also the Rome Statute of the ICC, article 30(2) for a description of the required *mens rea*.

105 *Prosecutor v. Kayishema*, Case No. ICTR-95-I, ICTR Trial Chamber, Judgment, para. 138. See also *Prosecutor v. Kordic*, Case No. IT-95-14/2, ICTY Trial Chamber, Judgment, 26 February 2001, para. 235 and *Prosecutor v. Jelisic*, Case No. IT-95-10, ICTY Trial Chamber, 14 December 1999, para. 51. The decisions of the ICTR can be distinguished on this point, as they have found that pursuant to the ICTR Statute, this crime requires an element of premeditation, due to the elements of the crime of *assassinat* under French law: see *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, para. 588 and *Prosecutor v. Kayishema*, Case No. ICTR-95-I, ICTR Trial Chamber, Judgment, paras. 138-9 for discussions on this issue.

106 Elements of Crimes of the ICC, art. 7(1)(a), para. 1.

107 See the Elements of Crimes of the ICC, art. 7(1)(b); *Prosecutor v. Vasiljevic*, Case No. IT-98-32, ICTY Trial Chamber, Judgment, 29 November 2002, para. 229 (for the fourth element).

(b) With the intent to cause grievous bodily harm and with the knowledge that that bodily harm was likely to cause death and was reckless as to whether death would actually occur.

4. The accused acted with the knowledge that his or her act was part of a vast murderous enterprise in which a large number of individuals were systematically marked for killing or were killed.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Extermination contains an element of mass destruction, requiring that the act of extermination be "collective in nature rather than directed towards singled out individuals."[108] This mass destruction can include direct killing of individuals but can also include causing the conditions of life calculated to bring about such destruction, for example by detaining individuals and withholding food or by introducing a deadly virus into a population and withholding vital medical supplies.[109] Generally, a numerically significant proportion of the population must be destroyed to constitute the crime against humanity of extermination.[110]

The ICTY recently considered the crime against humanity of extermination in *Valsijevic*, in particular the required level of participation of the accused. The Trial Chamber concluded that in order to be guilty of the crime against humanity of extermination, an accused person has to be responsible for a "large number of deaths",[111] even if the accused's involvement was remote or indirect. Further, the accused must have known of the "vast scheme of collective murder and have been willing to take part therein".[112]

(c) Crime against humanity of enslavement

The elements of the crime against humanity of enslavement are:[113]

1. The accused exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

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108 *Prosecutor v. Vasiljevic*, Case No. IT-98-32, ICTY Trial Chamber, Judgment of 29 November 2002, para. 227.

109 See, for example, *Kayishema* Judgment, para. 146.

110 *Prosecutor v. Krstic*, Case No. IT-98-33, ICTY Trial Chamber, Judgment, 2 August 2001, para. 503, *Prosecutor v Vasiljevic*, Case No. IT-98-32, ICTY Trial Chamber, Judgment, 29 November 2002, para. 227. See, however, *Prosecutor v. Stakic*, Case No. IT-97-24, ICTY Trial Chamber, Judgment, 31 July 2003, para. 640, where the Trial Chamber considered this must be considered on a case-by-case basis and that no specific minimum number of victims is required.

111 *Prosecutor v. Vasiljevic*, Case No. IT-98-32, ICTY Trial Chamber, Judgment, 29 November 2002, para. 227.

112 *Prosecutor v. Vasiljevic*, Case No. IT-98-32, ICTY Trial Chamber, Judgment, 29 November 2002, para. 228; see also *Prosecutor v. Semanza*, Case No. ICTR-97-20, ICTR Trial Chamber, Judgment, 15 May 2003. But see *Prosecutor v. Stakic*, Case No. IT-97-24, ICTY Trial Chamber, Judgment, 31 July 2003, para. 640, which specifically rejected the requirement of a "vast scheme of collective murder".

113 See the Elements of Crimes of the ICC, article 7(1)(c) and below, notes 78 to 83.

2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

The ICTY has held that the crime against humanity of enslavement has the same elements as the war crime of slavery and violates both treaty and custom based international humanitarian law.[114] Indeed, the prohibition against slavery is an "inalienable, non-derogable and fundamental right, one of the core rules of general customary and conventional international law".[115]

The ICTY Appeals Chamber has held that "the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as "chattel slavery", has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership."[116] Thus the indicia of slavery include the following: "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour".[117] This is mirrored in the footnote to the Elements of Crimes of the crime of humanity of slavery, which reads as follows:

> "It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children."[118]

Given that the definition of slavery is exercising "any or all" of the powers attaching to "ownership" over a person,[119] the exaction of forced labour from a person held captive would be sufficient to establish the commission of this crime, provided the other elements are also established. It should further be noted that the lack of consent is not an element of the crime, although "consent may be relevant from an evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership."[120]

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114 *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Chamber, Judgment, 15 March 2002, paras. 352, 353.
115 *Ibid*, para. 353.
116 *Prosecutor v Kunarac et al,* Case No. IT-96-23 and IT-96-23/1 , ICTY Appeals Chamber, Judgment, 12 June 2002, para. 117.
117 *Ibid*, para. 119.
118 Elements of Crimes of the ICC, article 7(1)(c), footnote.
119 *Ibid.*
120 *Ibid*, para. 120.

(d) Crime against humanity of deportation

The elements of deportation as a crime against humanity are:[121]

1. The accused deported, without grounds permitted under international law, one or more persons to another State, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The accused was aware of the factual circumstances that established the lawfulness of such presence.[122]
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Deportation is to be distinguished from forcible transfer, with the former referring to the displacement of people across national borders and the latter simply referring to the forced movement of people, which can occur within the confines of national borders.[123] The ICTY has made it clear that "forced displacement" – charged in the *Krnojelac* case as persecution – is a stand-alone crime and is not a lesser, included offence of deportation.[124] This is mirrored in the Rome Statute of the ICC, which refers to the crime against humanity of "deportation or forced transfer of population".[125]

(e) Crime against humanity of imprisonment

The elements of imprisonment as a crime against humanity are:[126]

1. The accused imprisoned one or more persons or otherwise severely deprived one or more persons of their liberty.
2. The gravity of the conduct was such that it was in violation of fundamental rules of international law.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.[127]

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121 See the Elements of Crimes of the ICC, article 7(1)(d).

122 This element is intended to clarify that the perpetrator does not need to be aware that the presence is lawful, just the facts that go to make up that lawfulness; in other words, the perpetrator does not need to made a legal determination that the victim is lawfully present in the area.

123 *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Chamber, Judgment, 15 March 2002, para. 474.

124 The Appeals Chamber of the ICTY has recently stated that "acts of forcible displacement underlying the crime of persecution … are not limited to displacements across national borders", without making a definitive pronouncement on the crime in general: *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Appeals Chamber, Judgment, 17 September 2003, para. 218. The recent Trial Chamber decision in *Stakic* held that the crime encompasses "forced population displacements both across internationally recognised borders and *de facto* borders, such as constantly changing frontlines, which are not internationally recognised *Prosecutor v. Stakic*, Case No. IT-97-24, ICTY Trial Chamber, Judgment, 31 July 2003, para. 679. While this may be indicative of evolving customary international law, the distinction between the crime of deportation and the crime of forced displacement is retained for the purposes of this report.

125 Rome Statute of the ICC, art. 7(1)(d).

126 See the ICC Elements of Crimes, art. 7(1)(e).

127 This element is intended to clarify that the perpetrator does not need to be aware that the conduct is in violation of fundamental rules of international law, just the facts that go to make up that violation;

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

The crime against humanity of imprisonment, which incorporates deprivation of liberty, has only been considered in two cases at the international criminal tribunals.[128] The ICTY has held that the elements of this crime are not limited by the elements of the similar crime of unlawful confinement, which is a grave breach of the Geneva Conventions, but that any form of arbitrary physical deprivation of liberty might constitute imprisonment.[129] This is mirrored in the Elements of Crimes of the Rome Statute of the International Criminal Court, in which the elements of this crime differ from those for the crime of unlawful confinement.[130]

One of the elements of the crime against humanity of imprisonment is that the deprivation of liberty is imposed arbitrarily, namely that no legal basis can be invoked to justify the deprivation of liberty.[131] Therefore, a determination has to be made regarding the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question,[132] including the fact that the deprivation may be initially justified but may become arbitrary "if the deprivation is being administered under serious disregard of fundamental procedural rights of the person deprived of his or her liberty as provided for under international law."[133] This is mirrored in the Elements of Crimes of the ICC, which refers to the gravity of the conduct being in violation of fundamental rules of international law.[134]

(f) Crime against humanity of torture

The elements of the crime against humanity of torture are:[135]

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

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in other words, the perpetrator does not need to made a legal determination that his or her conduct violates international law.

128 The first of these cases, *Kordic*, considered that this crime was identical in its elements to the crime of unlawful confinement as a grave breach of the Geneva Conventions, whereas the second case, *Krnojelac*, considered that imprisonment as a crime against humanity should not be limited by the elements of unlawful confinement as a grave breach of the Geneva Conventions.

129 *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Chamber, Judgment, 15 March 2002, para. 112.

130 See the Elements of Crimes, art. 7(1)(e) (imprisonment) and art. 8(2)(a)(vii)-2 (unlawful confinement).

131 *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Chamber, Judgment, 15 March 2002, para. 115 (footnote deleted).

132 *Prosecutor v. Kordic*, Case No. IT-95-14/2, ICTY Trial Chamber, Judgment, 26 February 2001, para. 302-3.

133 *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Chamber, Judgment, 15 March 2002, footnote 347.

134 Elements of Crimes, art. 7(1)(e), para. 2.

135 See the Elements of Crimes of the ICC, art. 7(1)(f).

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

The essential element of the crime against humanity of torture is "the infliction, by act or omission, of severe pain and suffering, whether physical or mental".[136] Torture can therefore be distinguished from ill treatment or other inhumane acts by the level of intensity of the pain or suffering inflicted; the standard adopted by the European Court of Human Rights, for example, is "very serious and cruel suffering".[137] The ICTY Appeals Chamber has also addressed this question, stating:

> "In assessing the seriousness of any mistreatment, the Trial Chamber must first consider the objective severity of the harm inflicted. Subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim's age, sex, or state of health will also be relevant in assessing the gravity of the harm."[138]

The ICTY Appeals Chamber has further stated that rape, as an act necessarily implying pain and suffering, can amount to torture provided the other elements are established.[139]

The Convention Against Torture, which requires States to criminalise torture as a self-standing offence, contains the element that the torture be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".[140] However, both the ICTY Appeals Chamber[141] and the Elements of Crimes for the ICC[142] recognise that this element is applicable only to torture pursuant to the Convention and that customary international law does not impose such a limitation in the context of crimes against humanity.

Where the ICTY and ICTR jurisprudence and the Elements of Crimes of the ICC diverge is on the question of whether a purpose is required as an element of this crime. Both the ICTY[143] and the ICTR[144] have held that one of four purposes is required for conduct to rise to the level of torture, namely that the conduct was committed for the purposes of (1) obtaining information or a confession from the victim or a third party; (2) punishing the victim or a third party; (3) intimidating or coercing the victim or a third

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136 *Prosecutor v. Kunarac et al*, Case No. IT-96-23 and IT-96-23/1, ICTY Appeals Chamber, Judgment, 12 June 2002, para. 142.

137 *Republic of Ireland v. UK* (Series A, No 25), European Court of Human Rights, (1979-80) 2 EHRR 25, 18 January 1978.

138 *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1, ICTY Trial Chamber, Judgment, 2 November 2001, paras. 142-3.

139 *Prosecutor v. Kunarac et al*, Case No. IT-96-23 and IT-96-23/1, ICTY Appeals Chamber, Judgment, 12 June 2002, paras. 149-51.

140 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, article 1(1). The Convention against Torture entered into force on 26 June 1987.

141 *Prosecutor v. Kunarac et al*, Case No. IT-96-23 and IT-96-23/1, ICTY Appeals Chamber, Judgment, 12 June 2002, paras. 142, 144-8.

142 Elements of Crimes, art. 7(1)(f), p 119.

143 *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Chamber, Judgment, 15 March 2002, para. 185.

144 *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, para. 594.

party; or (4) for any reason based on discrimination of any kind, although the conduct need not have been committed solely for one of the prohibited purposes.[145]

The Elements of Crimes of the ICC, however, specifically states that "[i]t is understood no specific purpose need be proved for this crime".[146] This was considered by the vast majority of delegations at the Preparatory Commission to reflect customary international law, in part because the Rome Statute – which includes only those crimes already established under customary international law – does not contain any reference to a purpose element.[147] This can be distinguished from the elements of the war crime of torture, which does contain the purpose requirement[148] so as to distinguish it from inhuman treatment,[149] which is included within the offence of torture.[150] Nevertheless, for the purposes of crimes against humanity, the international community has affirmed that torture does not require that the conduct in question be carried out for any particular purpose.[151]

(g)(i) Crime against humanity of rape

The elements of the crime against humanity of rape are:[152]

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight:
   (a) of any part of the body of the victim or of the perpetrator with a sexual organ; or
   (b) of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Much of the jurisprudence of the ICTR about this crime has focused on the discussion of whether rape should be defined as a contextual framework, or whether the elements of the crime should be explicitly defined. The general trend at the ICTR has been to

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145 *Prosecutor v. Kunarac et al,* Case No. IT-96-23 and IT-96-23/1, ICTY Appeals Chamber, Judgment, 12 June 2002, para. 155. These purposes are also included in the Convention Against Torture, article 1(1).

146 *Ibid*, footnote.

147 Lee, pp. 5 and 90-2. The Preparatory Committee also referred to the European Court of Human Rights, in particular the separate opinion of Fitzmaurice J in *Ireland v UK*, who stated that a certain purpose is not a necessary requirement and that the distinguishing feature of torture is its severity: Series A, o.25 (1976), pp. 129 *ff*.

148 Elements of Crimes, art. 8(2)(a)(ii)-1, para. 2.

149 Lee, p. 91.

150 The Rome Statute of the ICC, article 8(2)(a)(ii), prohibits "torture or inhuman treatment".

151 *Ibid*, p 92.

152 See the Elements of Crimes of the ICC, art. 7(1)(g)-1.

adopt a contextual framework, according to which rape is defined as "the physical invasion of a sexual nature committed under circumstances that are coercive".[153]

However, the ICTY Appeals Chamber, considering this matter in the context of common elements in national legislation and the trend for States to broaden the definition of rape, which has as its core element forced physical penetration, has followed the approach of defining the elements of the crime. Thus, the Appeals Chamber held that rape means the non-consensual penetration, however slight, of the vagina or anus of the victim by the perpetrator's penis or another object used by the perpetrator, or of the victim's mouth by the perpetrator's penis.[154] Consent must be given freely and voluntarily, which must be assessed in the context of the surrounding circumstances.[155]

The question of consent is further addressed in the Rules of Procedure and Evidence of the Special Court, which set out the following guiding principles:

"(i) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
(ii) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
(iii) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
(iv) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of [the] sexual nature of the prior or subsequent conduct of a victim or witness."[156]

It is submitted that explicitly stating the elements of the crime, rather than adopting a loose conceptual framework, is the more appropriate approach, as it gives more certainty to the law in respect of this crime. Indeed, this is the approach adopted in the Elements of Crimes of the ICC, which also incorporates aspects of the contextual approach and, as such, better reflects customary international law.

(g)(ii) Crime against humanity of sexual slavery

The elements of the crime against humanity of sexual slavery are:[157]

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

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153 *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, para. 598.

154 *Prosecutor v. Kunarac et al*, Case No. IT-96-23 and IT-96-23/1, ICTY Appeals Chamber, Judgment, 12 June 2002, paras. 127-8.

155 *Ibid*, para. 120.

156 Rules of Procedure and Evidence of the Special Court, rule 96. Unlike the ICTR, however, evidence of consent does not first have to be raised before a Judge in Chambers: cf. ICTR Rules of Procedure and Evidence, rule 96.

157 See the Elements of Crimes of the ICC, art. 7(1)(g)-2.

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

While the crime of sexual slavery is not addressed in the jurisprudence of the *ad hoc* tribunals, it is nevertheless comprehensively addressed in the Elements of Crimes of the ICC. While not explicitly stated in the elements, the framers understood that "deprivation of liberty" in this context may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.[158]

(g)(iii) Crime against humanity of enforced prostitution

The elements of the crime against humanity of enforced prostitution are:[159]

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

(g)(iv) Crime against humanity of forced pregnancy

The elements of the crime against humanity of forced pregnancy are:[160]

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

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158 *Ibid*, footnote 18.
159 See the Elements of Crimes of the ICC, art. 7(1)(g)-3.
160 See the Elements of Crimes of the ICC, art. 7(1)(g)-4.

(g)(v) Crime against humanity of other forms of sexual violence

The elements of the crime against humanity of other forms of sexual violence are:[161]

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature.
2. The act was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
3. Such conduct was of a gravity comparable to the other offences in article 2(g) of the Statute of the Special Court.
4. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.[162]
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

The crime of other forms of sexual violence has been addressed in the ICTR, which has held that sexual violence is any act of a sexual nature that is committed on a person under circumstances that are coercive.[163] In addition, the crime of other forms of sexual violence is comprehensively addressed in the Elements of Crimes of the ICC.

(h) Crime against humanity of persecution

The elements of the crime against humanity of persecution are:[164]

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, or religious grounds.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

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161 See the Elements of Crimes of the ICC, art. 7(1)(g)-6.

162 This element is intended to clarify that the perpetrator does not need to be aware that the conduct is in violation of fundamental rules of international law, just the facts that go to make up that violation; in other words, the perpetrator does not need to made a legal determination that his or her conduct violates international law.

163 *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, para. 688; sexual violence can also fall within the scope of "other inhumane acts" (para. 688).

164 See the Elements of Crimes of the ICC, art. 7(1)(h).

The crime of persecution is premised on the discriminatory intent of the perpetrator. Thus both acts enumerated in article 2 of the Special Court Statute as well as other acts can constitute persecution when they are carried out against a particular group on prohibited discriminatory grounds, namely on political, racial, ethnic or religious grounds. Indeed, the ICTY has characterised persecution as follows:

> "Persecution is grounded in discrimination. It is based on the notion that people who share ethnic, racial or religious bonds different to those of the dominant group are to be treated as inferior to the latter. In the crime of persecution, this discriminatory intent is aggressively achieved by grossly and systematically trampling upon the fundamental human rights of the victim group."[165]

The material element of persecution as a crime against humanity, in addition to the requirement that the acts be carried out on discriminatory grounds, is that there is a gross or blatant denial of a fundamental right laid down in customary international law or conventional law, reaching the same level of gravity as other enumerated acts.[166] The acts that constitute persecution need not themselves be physical acts and must be evaluated in context by looking at their overall cumulative effects,[167] rather than the effect of one specific act. Indeed, it is a requirement that the *effect* of the acts be discriminatory; discriminatory intent is not itself sufficient to warrant characterising an act as persecution, the act must also have discriminatory consequences.[168]

The question of which grounds are prohibited is not a closed issue and customary international law has developed to the extent where, in addition to those grounds listed in article 2(h) of the Special Court Statute, the following grounds are also prohibited: cultural, gender and other grounds that are universally recognised as impermissible under international law.[169] The restriction of the grounds in the Statute of the Special Court can therefore be seen as a jurisdictional limitation only, similar to the requirement of a nexus with an armed conflict in the ICTY Statute[170] and the requirement that the attack itself be committed on discriminatory grounds in the ICTR Statute.[171]

Early jurisprudence of the ICTY and ICTR considered the question of whether discriminatory intent was required for *all* crimes against humanity,[172] not just for persecution. The Trial Chambers initially adopted the position that not only did the

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165 *Prosecutor v. Kupreskic*, Case No. IT-95-16, ICTY Trial Chamber, Judgment, 14 January 2000, para. 751.

166 *Ibid*, para. 621. See also the Elements of Crimes of the ICC for the crime against humanity of persecution.

167 *Prosecutor v. Kupreskic*, Case No. IT-95-16, ICTY Trial Chamber, Judgment, 14 January 2000, para. 622 and *Prosecutor v. Semanza*, Case No. ICTR-97-20, ICTR Trial Chamber, Judgment, 15 May 2003, para. 349.

168 *Prosecutor v. Krnojelac*, Case No. IT-97-25, ICTY Trial Chamber, Judgment, 15 March 2002, para. 432. See also *Prosecutor v. Stakic*, Case No. IT-97-24, ICTY Trial Chamber, Judgment, 31 July 2003, para. 733.

169 See the ICC Elements of Crimes, art. 7(1)(h).

170 ICTY Statute, art. 5; see also *Prosecutor v. Kupreskic*, Case No. IT-95-16, ICTY Trial Chamber, Judgment, 14 January 2000, para. 545.

171 ICTR Statute, article 3; see also *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, para. 580.

172 See, for example, *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Trial Chamber, Judgment, 7 May 1997 and *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998.

attack have to be carried out on discriminatory grounds[173] but that each of the enumerated acts also had to be committed with discriminatory intent to constitute a crime against humanity. However, the Appeals Chamber of both the ICTY[174] and the ICTR[175] overturned this position, holding that the perpetrator did not have to have discriminatory intent each time an act constituting a crime against humanity was committed, in part because this would render the crime of persecution redundant.

(i) Crime against humanity of other inhumane acts

The elements of the crime against humanity of inhumane acts are:[176]

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character, i.e. in terms of gravity and nature, similar to any other act referred to in article 2.
3. The perpetrator was aware of the factual circumstances that established the character of the act.[177]
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

This is a "catch-all" provision that covers all other acts of similar gravity that are not enumerated in article 2. The International Law Commission has noted the impossibility of listing all the various acts that may fall within this category of crimes against humanity, stating that it includes "acts of similar gravity that are intended to cause and in fact actually cause injury to a human being in terms of physical or mental integrity, health or human dignity".[178] This has been followed in the Statutes of the ICTY and ICTR and in the Elements of Crimes of the ICC, which provides greater guidance as to what may constitute an inhumane act.

There must be some nexus between the act and the suffering of the victim, which does not necessarily require physical injury to the victim as such. Mental injury consequent on witnessing acts committed against other people may constitute an inhumane act where the perpetrator intended to inflict suffering on the victim or knew such suffering was likely to occur and was reckless as to whether that suffering would result.[179]

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173 See, for example, *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, para. 578.

174 *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Appeals Chamber Judgment, 15 July 1999, para. 305.

175 *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, para. 464.

176 See the Elements of Crimes of the ICC, art. 7(1)(i).

177 This element is intended to clarify that the perpetrator does not need make a legal determination that his or her conduct constitutes a crime against humanity.

178 ILC Commentary on article 18 to the Draft Code of Crimes Against the Peace and Security of Mankind. See also *Prosecutor v. Kupreskic*, Case No. IT-95-16, ICTY Trial Chamber, Judgment, 14 January 2000, para. 566, for a discussion of what might constitute an inhumane act falling within this category.

179 *Prosecutor v. Kayishema*, Case No. ICTR-95-I, ICTR Trial Chamber, Judgment, 1 June 2001, para. 153. This is reflected in article 30 of the Rome Statute of the ICC, dealing with the *mens rea* of the perpetrator.

3. Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 3)

Article 3 of the Statute of the Special Court for Sierra Leone reads as follows:

> "The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:
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> (a) Violence to life, health and physical or mental well being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
>
> (b) Collective punishments;
>
> (c) Taking of hostages;
>
> (d) Acts of terrorism;
>
> (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
>
> (f) Pillage;
>
> (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
>
> (h) Threats to commit any of the foregoing acts."

The four Geneva Conventions of 1949 were, as noted, concerned mainly with international armed conflicts, that is, conflicts involving two or more States. The Geneva Conventions were expanded on in 1977 with the adoption of the two Additional Protocols, the first of which was also concerned with international armed conflicts. However, article 3 common to the Geneva Conventions, which has been described as a "treaty in miniature", contains the minimum set of protections applicable in any armed conflict.[180] Additional Protocol II expands on common article 3 to specify in more detail the protections that apply during a non-international armed conflict.

In order for these norms to become applicable, they must have been in force at the time of the alleged commission of the crimes, whether through customary international law or because the State in question had ratified these instruments and, as such, was bound by these provisions. In respect of the first possibility,[181] it is clear that common article 3 has the status of customary international law;[182] indeed, most States have criminalised the acts

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[180] It should be noted that while common article 3 refers to its applicability in non-international armed conflicts, it is now recognised that customary international law dictates that these protections are applicable in *any* armed conflict, not just those that are non-international in nature.

[181] Note that Sierra Leone succeeded to the Geneva Conventions on 10 June 1965 and acceded to the Additional Protocols on 21 October 1986, therefore these instruments were, in any case, in force in the territory of Sierra Leone at all relevant times.

[182] See for example *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Appeals Chamber Judgment, 15 July 1999 and *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, para. 608.

listed in common article 3 within their domestic penal codes. Additional Protocol II as a whole is generally not regarded as having the status of customary international law, but article 4(2) relating to fundamental guarantees both reaffirms and supplements common article 3 and, as such, has the status of customary international law.[183]

Nevertheless, in order not to offend the principle of *nullum crimen sine lege*,[184] it is not sufficient simply to show that these instruments had the status of customary international law at the time the alleged crimes were committed. It must also be established that the violation of those norms attracted individual criminal responsibility: the ICTY Appeals Chamber has found that customary international law imposes criminal liability for serious violations of common article 3, as supplemented by other general rules and principles, in particular Additional Protocol II.[185]

a. Contextual elements of violations of common article 3 and Additional Protocol II

Once it is established that these instruments were in force, there are two sets of elements that need to be met, one of which can be described as "contextual" elements, the other of which are the elements of the acts enumerated in article 3 of the Statute of the Special Court. The contextual elements are as follows:

(1) The applicability of common article 3 and Additional Protocol II must be established.
(2) The personal jurisdiction (relating to victims and perpetrators) and the geographical jurisdiction must be met.
(3) There must be a nexus between the act constituting the crime and the armed conflict.
(4) The act constituting the crime must be a serious violation.

(1) Applicability of common article 3 and Additional Protocol II

Both common article 3 and Additional Protocol II contain conditions of applicability that must be considered in order to determine whether or not they apply at a particular location or during a particular time. As noted, the inclusion of these crimes within the Statute of the Special Court is not in itself sufficient to conclude that these instruments apply to the situation in Sierra Leone, nor is it sufficient to establish that the instruments were in force at the time in question.

Common article 3 applies during any armed conflict,[186] thereby ruling out its application during internal disturbances and tensions. Whether an armed conflict exists or not[187]

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183 See, for example, *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, paras. 608-10.

184 According to this principle, nobody may be found guilty of a criminal offence for acts that were not criminalised, whether under national or international law, at the time of their commission: see the International Convention on Civil and Political Rights, article 15(1).

185 *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Appeals Chamber, Judgment, 15 July 1999, para. 134. The Appeals Chamber reached this conclusion following consideration of the decisions of the Nuremberg Tribunal, elements of international practice showing that States intend to criminalise serious breaches of customary rules and principles applicable during a non-international armed conflict as well as national legislation aimed at implementing the Geneva Conventions.

186 *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 137.

187 See above for a discussion on what constitutes an armed conflict.

must be determined on an evaluation of the intensity and organisation of the parties to the conflict; indeed, the *Tadic* decision refers to "protracted armed violence".[188]

The situations to which Additional Protocol II will apply are more limited than those to which common article 3 will apply.[189] It is worth noting that while Additional Protocol II develops and supplements common article 3, the more restrictive conditions of its applicability are not automatically extended to common article 3, which continues to apply during any armed conflict. In order for Additional Protocol II to apply, the following elements must be satisfied:

(a) An armed conflict is occurring between the armed forces of a State and dissident armed forces or other organised groups.
(b) The dissident armed forces or other organised groups were under responsible command.
(c) The dissident armed forces or other organised groups exercised control over territory such that they were able to carry out sustained and concerted military operations.
(d) The dissident armed forces or other organised groups are able to implement Additional Protocol II.

(a) An armed conflict is occurring between the armed forces of a State and dissident armed forces or other organised groups.

The jurisprudence of the international criminal tribunals refers to the fact that "armed forces", namely those fighting on behalf of the State, covers all armed forces described in national legislation.[190] It is unclear whether this would cover armed forces fighting on behalf of the State that are not so described in national legislation but are established as a result of some other procedure. In the absence of a decision on this matter, it is submitted that a test similar to that in *Tadic* related to forces under the control of a foreign power could be adopted to determine whether armed forces are fighting on behalf of the State on whose territory the conflict is being fought.[191] The test could therefore be: overall control of an armed group or individuals by the State; specific instructions to an armed group or individuals by the State; and actual behaviour of an armed group or individuals, irrespective of any specific instructions.[192]

(b) The dissident armed forces or other organised groups were under responsible command.

This requirement refers to the degree of organisation of the groups, namely that they were able to carry out military operations and that they were able to impose discipline in

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188 *Prosecutor v. Tadic*, Case No. IT-94-I, Appeals Chamber, Jurisdiction Decision, 2 October 1995 (Tadic Jurisdiction Decision), para.70.

189 In this respect it should be noted that if the requirements for Additional Protocol II are met, then the lower threshold conditions for common article 3 are also automatically met.

190 *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, para. 625; *Prosecutor v. Musema*, Case No. ICTR-96-13, ICTR Trial Chamber, Judgment, 27 January 2000, para. 256.

191 This question could be relevant, for example, if there are protracted periods of fighting between dissident armed forces and armed forces not described in national legislation that are in fact fighting on behalf of the State, without the involvement of the armed forces of a State.

192 *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Appeals Chamber Judgment, 15 July 1999, point IV.B.3.

the name of the *de facto* authority,[193] although it does not imply that there needs to be a hierarchical system identical to that employed by the armed forces of a State.

(c) The dissident armed forces or other organised groups exercised control over territory such that they were able to carry out sustained and concerted military operations

While the previous requirement refers to the command *ability* of the groups, this requirement considers whether the military operations actually carried out were continuous and planned. This requires that the groups in fact dominate part of the territory that is no longer under government control.[194]

(d) The dissident armed forces or other organised groups are able to implement Additional Protocol II

This refers to the degree of organisation of the dissident armed forces or other organised group, such that they can carry out obligations under Additional Protocol II, which includes matters such as searching for sick, shipwrecked or wounded personnel and providing them with medical care and attention.[195]

(2) Personal and geographical jurisdiction

(i) Personal jurisdiction: Perpetrators

Anybody who commits a violation of common article 3 or Additional Protocol II can be held accountable; there is no category of persons to whom these provisions cannot apply. The early jurisprudence of the ICTR focused on whether there were certain criteria that needed to be satisfied in order for an accused to fall within the *ratione personae* for perpetrators. Thus the Trial Chamber in *Akayesu*, while recognising that this should not be interpreted restrictively and that civilians could be held liable for violations of common article 3 and Additional Protocol II, applied a "public official" test to determine whether a person could be held liable. According to this test, if a person was not a combatant, they could be held liable only if they were public officials or agents or exercised some public authority such that they were mandated and expected to support or fulfil the war effort.[196] However, this was overturned by the Appeals Chamber, who held that this test was not supported either by the language of the Statute nor customary international law. Considering that the core of common article 3 is the protection of victims, which implies effective punishment of perpetrators,[197] the Appeals Chamber held that common article 3 and Additional Protocol II are applicable to everyone.[198] As such, the existence of a special link or relationship between the accused and the armed forces of a State is not a pre-condition for the applicability of these instruments.[199]

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193 *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, para. 626.

194 *Ibid.*

195 Additional Protocol II, part III.

196 *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, paras. 630-4.

197 In this consideration, the Appeals Chamber cited the Appeals Chamber of the ICTY in the *Celebici* case, para. 143, which stated that the quintessence of international humanitarian law is the respect for a few essential rules of humanity that are valid everywhere, under all circumstances, and which exist above and outside war.

198 *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Appeals Chamber, Judgment, 1 June 2001, para. 443.

199 *Ibid*, para. 444.

(ii) Personal jurisdiction: victims

Common article 3 and Additional Protocol II are concerned primarily with the protection of civilians, namely people who do not bear arms. Thus common article 3 refers to persons who are taking no active part in hostilities, including members of the armed forces who have laid down their arms and those who are placed *hors de combat*, namely those who are no longer fighting due to injury or some other similar incapacity, whereas Additional Protocol II refers to those persons who do not take a direct part in hostilities or who have ceased to take a direct part in hostilities.

To take a "direct part" in hostilities means to undertake acts of war that, by their nature or purpose, are likely to cause actual harm to personnel or equipment of the enemy armed forces.[200] Should a civilian undertake such acts, they would lose their right to protection as civilians and could thereby fall within the class of combatants, thus becoming legitimate military targets.

The central question in this respect is, therefore, whether the alleged victim was taking a direct part in hostilities at the time of the alleged offence. If they were not, then they fall within that class of persons protected by common article 3 and Additional Protocol II. As such, it must be determined on a case-by-case basis whether a victim has the status of a civilian and, as such, whether the provisions of common article 3 and Additional Protocol II apply.

(iii) Geographical jurisdiction

The geographical jurisdiction refers to the geographical territory within which common article 3 and Additional Protocol II apply. As noted, international humanitarian law applies across the territory affected by the conflict from the moment hostilities commence until there is general conclusion of peace or, in the case of internal armed conflicts, a peaceful settlement is reached.[201] Customary international law, as reflected in the jurisprudence of the Tribunals, makes it clear that the application of the law is not confined to the narrow geographical scope of the actual theatre of combat operations. Rather, international humanitarian law applies throughout the territory affected by the conflict whether or not actual combat is taking place in parts of the territory under the control of a party to the conflict.[202]

In addition, international humanitarian law also has a temporal scope, namely from the commencement of hostilities until the conclusion of peace or the reaching of a peaceful settlement. Customary international law, as reflected in the jurisprudence of the Tribunals, also requires that the temporal factor not be given a restrictive interpretation. As such, there only needs to be some kind of nexus between the act and the conflict, but not that the act itself occurs during the midst of battle.[203]

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200 *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, ICTR Trial Chamber, Judgment, 6 December 1999, para. 100.

201 *Prosecutor v. Tadic*, Case No. IT-94-I, Appeals Chamber, Jurisdiction Decision, 2 October 1995, para.70.

202 *Prosecutor v. Kunarac et al,* Case No. IT-96-23 and IT-96-23/1, ICTY Appeals Chamber, Judgment, 12 June 2002, para. 57.

203 *Prosecutor v. Tadic*, Case No. IT-94-I, Appeals Chamber, Jurisdiction Decision, 2 October 1995, para.70 and *Prosecutor v Kayishema*, Case No. ICTR-95-I, ICTR Trial Chamber, Judgment, 21 May 1999, para. 183.

(3) Nexus between the crime and the conflict

There must be some kind of link between the crime and the armed conflict, whether it be "closely related",[204] "in conjunction with",[205] or – more reflective of customary law – "in the context of or associated with".[206] This requirement stems from the fact that international humanitarian law, concerned as it is with law during an armed conflict, does not protect persons against crimes unrelated to the conflict,[207] which should be dealt with by other means.

The ICTY Appeals Chamber has addressed this issue in *Kunarac*, holding that an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the crime, his or her decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, establishing that the perpetrator acted in furtherance of or under the guise of the armed conflict would be sufficient to conclude that the acts were closely related to the armed conflict. In determining whether or not an act is sufficiently related to the armed conflict, the Appeals Chamber suggested a number of factors that may assist in making that factual determination: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime was committed as part of or in the context of the perpetrator's official duties.[208]

(4) The violation must be serious

The chapeau of article 3 of the Statute of the Special Court gives the Special Court jurisdiction over "serious violations" of common article 3 and Additional Protocol II. Broadly speaking, the requirement that it be "serious" refers to "the breach of a rule protecting important values involving grave consequences for the victim".[209] The jurisprudence of the Tribunals makes it clear that violations of the fundamental guarantees related to the protection of victims during an armed conflict are, by their very nature, considered to be serious.[210]

b. Elements of enumerated acts constituting violations of common article 3 and Additional Protocol II

For the most part, the elements of the crimes constituting violations of common article 3 and Additional Protocol II mirror the elements required for crimes against humanity. This has been explicitly stated, for example, for murder,[211] torture[212] and rape[213] and it is

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204 *Prosecutor v. Tadic*, Case No. IT-94-I, ICTY Trial Chamber, Judgment, 7 May 1997, para. 573.

205 *Prosecutor v. Semanza*, Case No. ICTR-97-20, ICTR Trial Chamber, Judgment, 15 May 2003, para. 369.

206 See generally the ICC Elements of Crimes, contextual elements for article 8(2)(e).

207 *Prosecutor v. Semanza*, Case No. ICTR-97-20, ICTR Trial Chamber, Judgment, 15 May 2003, paras. 368-9.

208 *Prosecutor v. Kunarac*, Case No. IT-96-23&23/1, ICTY Appeals Chamber, 12 June 2002, para. 58.

209 *Prosecutor v. Akayesu*, Case No. ICTR-96-4, ICTR Trial Chamber, Judgment, 2 September 1998, para. 616.

210 *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, ICTR Trial Chamber, Judgment, 6 December 1999, para. 106.

211 *Ibid*, para. 107.

212 *Prosecutor v. Kunarac*, Case No. IT-96-23&23/1, ICTY Trial Chamber, Judgment, 22 February 2001, para. 465. It should be noted that the purpose element will apply in relation to torture as a war crime: see above for a discussion of the elements of the crime against humanity of torture.

213 *Prosecutor v. Musema*, Case No. ICTR-96-13, ICTR Trial Chamber, Judgment, 27 January 2000, para. 285.

reasonable to predict that the same approach would be adopted for other crimes. There are, however, some crimes within common article 3 and Additional Protocol II that have no direct counterpart within crimes against humanity, which are discussed briefly below.

(a) Mutilation

The elements of the war crime of mutilation are:[214]

1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.
2. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interests.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

(b) Cruel Treatment

The elements of the war crime of cruel treatment are:[215]

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The conduct took place in the context of and was associated with an armed conflict not of an international character.
3. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

(c) Taking of hostages

The elements of the war crime of taking hostages are:[216]

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. The perpetrator intended to compel a State, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

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214 See *Prosecutor v. Musema*, Case No. ICTR-96-13, ICTR Trial Chamber, Judgment, 27 January 2000, para. 285 and the ICC Elements of Crimes, art. 8(2)(e)(xi)-1.

215 See the ICC Elements of Crimes, art. 8(2)(c)(iii).

216 See the ICC Elements of Crimes, art. 8(2)(c)(i)-3. See also *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34, ICTY Trial Chamber, Judgment, 31 March 2003, para. 246.

(d) Outrages on personal dignity, including degrading and humiliating treatment
The elements of the war crime of outrages on personal dignity are:[217]

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognised as an outrage upon personal dignity.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

The Elements of Crimes of the ICC explicitly states that "persons" can include dead people, going on to say: "It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim."[218]

The ICTR has interpreted "humiliating and degrading" treatment as treatment designed to subvert the self regard of the victims.[219] The ICTY held that rape could amount to an outrage on personal dignity and therefore could be covered by this provision.[220] In *Aleksovski*, the ICTY held that the use of detainees as human shields or trench diggers, beatings and the constant fear of being robbed or beaten could constitute outrages upon personal dignity.[221]

(e) Indecent assault
The elements of the war crime of indecent assault are:[222]

1. The accused inflicted pain or injury on the victim or victims.
2. The act inflicting pain or injury was sexual in nature and was committed by coercion, force, threat or intimidation.
3. The act was non-consensual.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

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217 See the ICC Elements of Crimes, art. 8(2)(c)(ii). See also *Prosecutor v. Musema*, Case No. ICTR-96-13, ICTR Trial Chamber, Judgment, 27 January 2000, para. 285.
218 ICC Elements of Crimes, art. 8(2)(c)(ii), footnote.
219 *Prosecutor v. Musema*, Case No. ICTR-96-13, ICTR Trial Chamber, Judgment, 27 January 2000, para. 285.
220 *Prosecutor v. Furundzija*, Case No. IT-95-17/1, ICTY Trial Chamber, Judgment, 10 December 1998, paras. 172-3.
221 *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, ICTY Appeals Chamber, Judgment, 24 March 2000, para. 36.
222 *Prosecutor v. Musema*, Case No. ICTR-96-13, ICTR Trial Chamber, Judgment, 27 January 2000, para. 285

(f) Pillage

The elements of the war crime of pillage are:[223]

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

The crime of pillage encompasses isolated acts of looting committed by individual soldiers for private gain as well as organised forms of the seizure of property, for example as part of a systematic economic exploitation of occupied territory. However, as indicated by the use of the term "private or personal use", appropriations justified by military necessity cannot constitute the crime of pillaging.[224]

4. Other serious violations of international humanitarian law (Article 4)

Article 4 of the Statute of the Special Court reads as follows:

> "The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:
>
> (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
>
> (b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
>
> (c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities."

These provisions give the Special Court jurisdiction over additional crimes under international humanitarian law that have achieved the status of customary international law, including the imposition of individual criminal responsibility for their violation. They are also all included in the Rome Statute of the ICC both for conflicts of an international nature[225] and for conflicts that are not international in nature.[226] As these crimes were not included in the Statutes of the ICTY or ICTR, there is no jurisprudence directly on these provisions and the only authoritative pronouncement on the elements

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223 See ICC Elements of Crimes, art. 8(2)(e)(v). See also *Prosecutor v. Jelisic*, Case No. IT-95-10, ICTY Trial Chamber, 14 December 1999, paras. 48-9.

224 ICC Elements of Crimes, art. 8(2)(e)(v), footnote.

225 See Rome Statute of the ICC, art. 8(2)(b).

226 See Rome Statute of the ICC, art. 8(2)(e).

of the crimes comes from the Elements of Crimes of the ICC and in the writings of eminent jurists.

(a) Intentionally directing attacks against the civilian population

The elements of the crime of intentionally directing attacks against the civilian population are:[227]

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The crime of intentionally directing attacks against the civilian population confirms the fundamental and long-standing distinction between combatants and civilians and the prohibition on intentionally directing attacks against the latter.

(b) Intentionally directing attacks against personnel and objects of humanitarian and peacekeeping missions

The elements of the crime of intentionally directing attacks against personnel and objects of humanitarian and peacekeeping missions are:[228]

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
5. The perpetrator was aware of the factual circumstances that established that protection.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The crime of intentionally directing attacks against personnel and objects of humanitarian and peacekeeping missions also recognises the fundamental distinction

[227] See the Elements of Crimes of the ICC, art. 8(2)(e)(i).
[228] See the Elements of Crimes of the ICC, art. 8(2)(e)(iii).

between civilians and combatants.[229] This provision is explicitly directed towards such missions in recognition of the need to extend special protection to them in light of their nature and purpose.[230]

These missions will only be entitled to such protection so long as they retain their civilian character, that is, provided that they do not take a direct part in hostilities, which has been defined as undertaking acts of war that, by their nature or purpose, are likely to cause actual harm to personnel or equipment of the enemy armed forces.[231] These provisions expressly do not apply to "United Nations operations authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations, in which any of the personnel are engaged as combatants against armed forces and to which the law of international armed conflict applies".[232]

(c) The recruitment and use of child soldiers

The elements of the war crime of the recruitment and use of child soldiers are:[233]

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group[234] or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Conscripting or enlisting children under the age of 15, or using them to participate actively in hostilities, is a war crime under all conditions, whether the child is recruited into national armed forces or armed groups, whether the conflict is international or non-international and whether the child is coerced or has volunteered. This crime was first included in Additional Protocol II, article 4(3)(c) and subsequently in other instruments, including the Convention on the Rights of the Child 1989, article 38(3) and the Rome Statute for the ICC, article 8(2)(e)(vii).[235] An examination of State practice and *opinio juris* in this area, which is beyond the scope of the current report, demonstrates that the act of

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229 This is an evolving area of international law and is currently under extensive discussion in the Sixth (Legal) Committee of the United Nations General Assembly: see http://www.un.org/law/UNsafetyconvention/index.html, last visited on 28 February 2004.

230 See *Report of the Secretary-General on the establishment of the Special Court*, UN Doc. S/2000/955, para. 16.

231 *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, ICTR Trial Chamber, Judgment, 6 December 1999, para. 100.

232 *Report of the Secretary General on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel*, UN Doc. A/55/637, endnote 1.

233 See the Elements of Crimes of the ICC, art. 8(2)(e)(vii).

234 With respect to armed conflicts that are international in nature, this element prohibits the conscription or enlistment of children into the national armed forces. See Rome Statute, art. 8(2)(b)(xxvi).

235 The entry into force in 2002 of the Optional Protocol to the Convention on the Rights of the Child 1989 on the Involvement of Children in Armed Conflict raises the minimum age for compulsory recruitment and participation in hostilities to 18. This signifies the gradual emergence of a new standard, albeit one that has not yet reached the status of customary international law.

conscription, enlistment and use of child soldiers is a crime under customary international law.[236]

5. Crimes under Sierra Leonean law (Article 5)

Article 5 of the Statute of the Special Court reads as follows:

> "The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:
>
> (a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):
>
> (i) Abusing a girl under 13 years of age, contrary to section 6;
>
> (ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;
>
> (iii) Abduction of a girl for immoral purposes, contrary to section 12.
>
> (b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:
>
> (i) Setting fire to dwelling-houses, any person being therein, contrary to section 2;
>
> (ii) Setting fire to public buildings, contrary to sections 5 and 6;
>
> (iii) Setting fire to other buildings, contrary to section 6."

Security Council Resolution 1315 (2000) explicitly refers to Sierra Leonean law as being among the provisions over which the Special Court should have jurisdiction. The provisions were selected to cover specific situations that were "considered to be either unregulated or inadequately regulated under international law."[237] The elements of these crimes are governed by Sierra Leone Statute and case law[238] and, as such, do not require any connection with an armed conflict.

a. Abuse of girls

The provisions of the *Prevention of Cruelty to Children Act, 1926* listed in the Statute of the Special Court are designed to protect girls under the age of 16 from sexual abuse and exploitation. They vary in terms of the ages of the children they protect, from under 13 in the case of section 6, through between 13 and 14 in the case of section 7, to under 16 in the case of section 12. The different crimes are considered to have different levels of seriousness and entail different penalties under Sierra Leone law, from 15 years in the case of section 6, which is a felony, to 2 years in the case of sections 7 and 12, which are misdemeanours.

The elements for the crimes under sections 6 and 7 are that the accused "unlawfully and carnally" knew and abused a girl within the stated ages. The elements for section 12 are

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236 See NPWJ and UNICEF, *International Criminal Justice and Children*, 2002, available from www.npwj.org, and the Amicus Brief submitted by UNICEF and others, including NPWJ, to the Special Court for Sierra Leone in *Prosecutor v. Norman*, Case No. SCSL-03-08-PT, filed on 21 January 2004, both of which go into this issue in great detail.

237 *Report of the Secretary-General on the Establishment of the Special Court*, UN Doc. S/2000/955, para. 19.

238 In this regard, it should be noted that regular case reporting in Sierra Leone ceased in 1973 for a number of reasons, mainly to do with lack of resources, and it was only in 2002-3 that the first steps started being taken towards its reintroduction.

that the accused took or caused to be taken an unmarried girl under the age of 16 out of the possession of and against the will of her father or mother or any other person having lawful charge of her.

There are two possible defences to the crimes under these provisions. First, "belief of age" is a defence to the charge: thus if the accused can prove that he had reasonable cause to believe the victim was of or over the required age, this will be a complete defence.[239] In addition, in keeping with the common law applicable in Sierra Leone related to these types of crimes,[240] if the accused can show that the victim was his wife, particularly under the customary law of Sierra Leone, this will also be a defence.[241] However, consent of the girl is no defence to the crime, as lack of consent is not an element of the crime.

b. Wanton destruction of property

These provisions only cover setting fire to specific buildings, namely dwelling houses, public buildings and "other" buildings, which include any type of building not explicitly mentioned elsewhere in the *Malicious Damage Act, 1867*.[242] It should, however, be emphasised that setting fire to a house will only fall within the jurisdiction of the Special Court should a person actually be inside, due to the elements of section 2 of the *Malicious Damage Act, 1867*.[243] Furthermore, the Statute of the Special Court does not incorporate the other provisions of the *Malicious Damage Act, 1867*, thereby excluding setting fire to buildings other than those listed above and excluding other types of damage to all buildings.

An essential element of this crime is that there was actual burning, no matter how slight, of some part of the building or property in respect of which the charge is laid.[244] Each of the crimes listed in article 5(b) constitute a felony under Sierra Leone law, with penalties ranging from 14 years (section 6), through 16 years (section 5) to life imprisonment (section 2).

The mental element is that the act must be committed "unlawfully and maliciously" in order to constitute an offence. In this instance, "malice" does not mean malevolence or ill will, but refers instead to the intention of the accused. The mental element is therefore that the accused either intended to do the act, without just cause or excuse, [245] or was reckless and foresaw or ought to have foreseen the result, even if that result was not necessarily intended.[246]

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239 *Prevention of Cruelty to Children Act, 1926*, proviso s. 15(3).

240 Many common law countries have abolished immunity for spousal rape, considering it to be a breach of human rights, in particular those relating to the dignity of the person and discrimination on the basis of sex; arguably, Sierra Leone law also constitutes a breach of the rights of the child.

241 Thompson, B., *The Criminal Law of Sierra Leone*, 1999, University Press of America, USA, p. 70.

242 These are: a church, chapel or other place of divine worship (section 1); a house (with no person inside), outhouse, manufactory, farm building or similar building (section 3) and railway stations (section 4).

243 Apparently, the person inside the house may be the accused person: *R v. Pardoe* (1894) 15 Digest 1027, 11-547.

244 *R v. Stallion* (1833) 15 Digest 1026, 11-541 (no flame visible); *R v. Parker* (1839) 15 Digest 1027, 11-542 (charring); and *R v. Russell* (1842) 15 Digest 1027, 11-543 (scorching).

245 *Bromage v Prosser* (1825) 4B & C 247, 255 per Bayley J.

246 *R v. Pembliton* (1874) LR 2CCR 119, 122 per Blackburn J.

C. Temporal jurisdiction of the Special Court (Article 1(1))

The Statute of the Special Court for Sierra Leone states that its temporal jurisdiction runs from 30 November 1996 to a future date as yet undetermined.[247] This date was selected on the basis of three considerations during the negotiations:

(a) the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded;
(b) the beginning date should correspond to an event or a new phase in the conflict without necessarily having any political connotations; and
(c) it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country.

Three different dates were discussed in this context:

(a) 30 November 1996 (i.e., the date of the failed Abidjan Peace Accords);
(b) 25 May 1997 (i.e., when the AFRC launched its coup d'état against the government of Sierra Leone); and
(c) 6 January 1999 (i.e., when the AFRC and RUF launched their attack on Freetown).

The date of 25 May 1997 was rejected as having too many political overtones, while 6 January 1999 was rejected as giving the impression of favouring Freetown over the provinces. The date of 30 November 1996 was therefore considered the most appropriate, as it represented the first time the fighting factions had attempted to reach a peaceful settlement of the conflict. Additionally, it was considered to encompass the most serious crimes committed in the provinces, thereby ensuring the Court would not be too "Freetown-centred". Sierra Leone and the United Nations therefore agreed that this would be a suitable starting date for the Court. It has to be queried whether these reasons provide sufficient justification for setting a start date for the Court that is halfway through the conflict, a compromise criticized by Sierra Leoneans from all along the social, political and professional spectrum.[248] The perception in Sierra Leone is that the Statute unjustly favours Freetown over the provinces, as the November 1996 date corresponds to the time when the capital first became a target of attack. For the provinces, the conflict has generally been one long, continuous experience from the beginning of the 1990's, whereas Freetown witnessed intermittent, although extreme, episodes of violence only from the mid-1990's onwards.

Following consultations with civil society groups and others, the Government of Sierra Leone sought to alter the date so as to give the Court temporal jurisdiction over the whole of the conflict in Sierra Leone, i.e. commencing in 1991. This was sought both to provide greater recognition to the situation in the provinces throughout the war, as well as to be more faithful to the tenets of IHL, which applies from the commencement of a

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247 Statute of the Special Court, art. 1(1).

248 Freetown newspapers, for example, have consistently attacked this issue on numerous occasions. In addition, it was criticised in every one of the 26 Special Court Training Seminars conducted by NPWJ, which were held in Freetown, Bo, Kenema and Mile 91 in 2001, when negotiations on the creation of the Special Court were still ongoing. These seminars attracted a total of over 600 participants, including civil society and human rights organisations, lawyers, Paramount Chiefs, police, teachers, combatants and ex-combatants: not a single voice was raised in support of retaining the start-date at 1996.

conflict rather than at an arbitrarily-set date midway through the conflict.[249] However, the general feeling within the United Nations was that this issue should not be reopened, lest "delicate" balances achieved during the negotiations be upset, thereby requiring the re-opening of other aspects of the Statute or Agreement. In addition, the United Nations considered that an extension of the Court's temporal jurisdiction would increase the burden on the Prosecutor and the Court to an unacceptable level. The United Nations also maintained that the Prosecutor would in any event also be relying on evidence relating to events before 1996 (provided it is relevant to cases before the Court), therefore crimes committed prior to 1996 would not necessarily be excluded from consideration by the Court.[250] In order to avoid further delay, the Government therefore withdrew its request, while still maintaining the legitimacy of the reasons behind making it.[251]

Another factor to be considered when examining the Special Court's temporal jurisdiction is the amnesty granted under the Lomé Peace Agreement of 7 July 1999. The UN Secretary-General denied that this would act as any bar to the determination of the start-date of the Special Court's jurisdiction, reasoning that the "United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law."[252] In addition, he reiterated the disclaimer issued by his Special Representative for Sierra Leone at the time of the signing of the Lomé Peace Agreement to the effect that "the amnesty provisions contained in article XI of the Agreement ('absolute and free pardon') shall not apply to international crimes and other serious violations of international humanitarian law."[253] However, the Statute acknowledges that amnesties will be valid in respect of the included provisions of Sierra Leone law.[254] This makes for a situation in which the Special Court will be able to hear violations of international humanitarian law committed since 30 November 1996 but only hear violations of the Sierra Leone provisions committed from the date of the signing of the Lomé Peace Agreement, namely 7 July 1999, in effect creating a dual start-date for the Special Court's temporal jurisdiction.

D. Personal jurisdiction of the Special Court (Article 1(1))

Security Council Resolution 1315 (2000) states that the Special Court should have jurisdiction over those who bear the "greatest responsibility" for crimes committed within Sierra Leone. This was understood to be a limitation on the number of accused who would be tried, according to their command authority and the gravity and scale of crimes committed. The UN Secretary-General's report recommended this be altered to "those most responsible" in order to widen the potential pool of defendants before the

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249 11th Report of the Secretary-General on the United Nations Mission in Sierra Leone, 7 September 2001, UN Doc. S/2001/857.

250 Letter from the Office of Legal Affairs to the Government of Sierra Leone (19 October 2001).

251 Letter from the Government of Sierra Leone to the Office of Legal Affairs (29 November 2001).

252 *Report of the Secretary-General on the Establishment of the Special Court*, UN Doc. S/2000/955, para. 22.

253 *Ibid,* para. 23.

254 Article 10 of the Statute provides: "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution." The omission of Article 5, which inscribes the provisions of Sierra Leone law, indicates that amnesties granted in respect of these crimes will be a bar to prosecution.

Special Court.[255] However, the Security Council refused to accept this change, preferring instead to remain consistent with the wording of Resolution 1315 (2000).[256] Therefore, the Statute retains the wording of "those who bear the greatest responsibility". It should be emphasised that article 1 contains no other limitations on personal jurisdiction, in particular it does not limit jurisdiction based on nationality, political affiliation or official position.

Article 1 also specifically refers to the ability of the Special Court to try peacekeepers who otherwise satisfy the requirements of the personal jurisdiction. Article 1 basically replicates what is found in most Status of Forces Agreements, namely those agreements between troop-contributing and troop-receiving States. According to these types of agreements, the primary responsibility for prosecuting peacekeepers for crimes committed on the territory of the recipient State remains with the sending State. Article 1 contains an exception to this principle, whereby it may be possible to try peacekeepers before the Special Court if the sending State is unwilling or unable genuinely to investigate or prosecute peacekeepers for crimes committed in Sierra Leone. The Special Court may hear such cases upon receiving authorisation from the Security Council,[257] which may act on the proposal of any State.[258]

The aspect of the Special Court that has, perhaps, provoked the most public debate is its position vis-à-vis accused below the ages of 18 at the time of the alleged commission of the crimes. Pursuant to article 7 of the Statute, the Special Court shall have no jurisdiction over persons under the age of 15 at the time of the alleged commission of the crime but persons between the ages of 15 and 18 at the time of alleged commission of the crime may be brought before the Special Court,[259] although the Prosecutor is directed to have resort to alternative truth and reconciliation mechanisms, where appropriate. If convicted, juvenile offenders may not be sentenced to imprisonment, instead the Special Court may order a variety of correctional care. Nevertheless, the personal jurisdiction limitation of bearing the "greatest responsibility" always made it unlikely that children aged below 15 at the time of the alleged commission of the crime would be prosecuted before the Special Court; more recently, the Prosecutor of the Special Court has stated publicly that no child will be prosecuted before the Special Court.[260]

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255 *Report of the Secretary-General on the Establishment of the Special Court*, UN Doc. S/2000/955, paras. 29-31.

256 Letter from the Security Council to the Secretary-General, 22 December 2000.

257 Although many Status of Forces Agreements require the consent of the sending State before trials are launched against their forces, there does not appear to be such a limitation in the Statute of the Special Court, presumably due to the involvement of the Security Council.

258 As at the time of writing, no peacekeepers have been publicly indicted by the Prosecutor of the Special Court.

259 The position represents a break with the Statute for the ICC, which provides that the "Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime": article 26.

260 Press release of the Special Court, "Special Court Prosecutor Says He Will Not Prosecute Children", 2 November 2002.

E. Individual criminal responsibility (Article 6)

1. Direct criminal responsibility

Following well-established principles of customary international law, article 6 of the Statute states that any person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 shall be individually responsible for the crime. The accused does not necessarily have to be a member of the armed forces in order to attract liability; civilians, for example, can also be held criminally responsible for violations of the laws of war.[261] Criminal responsibility for the crimes contained in article 5, namely those under Sierra Leonean law, falls to be determined by the relevant laws of Sierra Leone.

The fact that the accused was acting under the orders of a Government or superior does not relieve the individual of his or her criminal responsibility, although – according to general principles of law as well as the Statute – it may be taken into account in mitigation of sentence. According to these principles of liability, if a commander orders that certain acts be committed, he or she would bear direct responsibility for those acts, as the Statute specifically refers to 'ordering' that the act be committed as a basis for liability.

2. Command responsibility

The laws of war also impose what is known as "command responsibility", referring to the principle by which a superior will be responsible for the acts of subordinates under his or her control.[262] This concept, which is longstanding in military hierarchies,[263] has also become a well-established principle in customary international law, particularly following its development at the Nuremberg, Tokyo and post-Nuremberg Trials.

Command responsibility is concerned with being in a position of command, namely that the commander is in a certain relationship towards his or her subordinates, rather than actually giving commands. Thus the commander will be responsible for any acts of his or her subordinate, irrespective of whether the commander actually issued an order to commit such acts. If a command is actually given, as noted, the commander will bear direct responsibility for acts carried out pursuant to that command. The theory of command responsibility as been described by the ICTY as follows:

> "The distinct legal character of the two types of superior responsibility must be noted. While the criminal liability of a superior for positive acts follows from general principles of accomplice liability ... the criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act. As is most clearly evidenced in the case of military commanders … international law imposes an affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the

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261 See above, discussion on violations of common article 3 and Additional Protocol II.

262 See, in general, Bantekas, I., 'The Contemporary Law of Superior Responsibility' (1999) 93(3) *American Journal of International Law* 573.

263 See, for example, Charles VII's Ordinance "Ordonnances des Rois de France de la Troisieme Race", cited in Meron, T., *Henry's Laws and Shakespeare's Wars*, 1993, Cambridge University Press, p.149, fn.40.

> contours of, the imputed criminal responsibility under Article 7(3) of the Statute."[264]

This type of responsibility is applicable in two situations. First, where the superior knew or ought to have known the acts were about to be committed or were being committed and did nothing to stop their commission. Second, where the superior knew that such acts had been committed and failed to punish those responsible for their commission. The ICTY Trial Chamber has described the relevant elements for the imposition of command responsibility in the following way: (i) the existence of a superior-subordinate relationship; (ii) that the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator.[265] As with direct responsibility, command responsibility is not limited to military personnel but extends also to civilian commanders. It is also worth emphasising that the principle of command responsibility does not limit or extinguish the individual criminal responsibility of the subordinates for the acts they have committed.

Command responsibility applies during any armed conflict, both international and non-international in nature. The ICTY Appeals Chamber addressed this issue recently, stating:

> "the fact that it was in the course of an internal armed conflict that a war crime was about to be committed or was committed is not relevant to the responsibility of the commander; that only goes to the characteristics of the particular crime and not to the responsibility of the commander. The basis of the commander's responsibility lies in his obligations as commander of troops making up an organised military force under his command, and not in the particular theatre in which the act was committed by a member of that military force."[266]

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International humanitarian law contains a wide variety of provisions that attract individual criminal responsibility, both direct and command, for their violation. This law has evolved through treaty and customary international law, which is based on the actions and beliefs of States, as well as through jurisprudential developments by international courts and tribunals, in particular the International Military Tribunals after the Second World War and the ad hoc International Criminal Tribunals for Rwanda and for the former Yugoslavia. As such, there is a wide body of precedence that needs to be considered in relation to the charges being brought before the Special Court for Sierra Leone, which will in turn make its own contributions to the development of the law and, most importantly, the protection of civilians and those who are *hors de combat* during times of armed conflict.

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264 *Prosecutor v. Delelic et al*, Case No. IT-96-21-T, ICTY Appeals Chamber, Judgement, 16 November 1998, para. 334.

265 *Ibid*, para. 346; the first two of these grounds was appealed and the Appeals Chamber upheld the decision of the Trial Chamber in this respect.

266 *Prosecutor v. Hadzihasanovic, Alagic and Kubura*, Case No. IT-01-47, ICTY Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 20.

Part III
Role of the Rules of Procedure and Evidence[+]

The Rules of Procedure and Evidence of the Special Court for Sierra Leone (hereinafter, the Rules) regulate the conduct of the legal proceedings before the Court. In serving this role, they are subordinate to and limited by the Agreement that established the Special Court and the Statute of the Special Court that sets out the provisions in accordance with which the Court must function.[267] Moreover, the Rules must take into account other aspects of the legal framework of the Court, including the Special Court Agreement Ratification Act, the Headquarters Agreement between the Republic of Sierra Leone and the Special Court for Sierra Leone (hereinafter, the Headquarters Agreement), and relevant case law. This part discusses the origin and structure of the Rules. It also discusses the general procedure and practice regarding the amendment and interpretation of the Rules.

A. Origin

Article 14(1) of the Statute provides:

> "The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court".

Thus, when the Special Court was established on 12 April 2002,[268] the then-current Rules of Procedure and Evidence of the ICTR[269] became applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.[270]

By making applicable these rules, this provision attempts to promote a degree of consistency among the rules of the Special Court, ICTR and ICTY. This provision follows the example of the Statute of the ICTR, which commanded the Judges of the ICTR to adopt the "the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters" of the ICTY.[271]

[+] Part III was prepared thanks to substantial contributions of research and writing from John Stompor. NPWJ remains nonetheless responsible for the views expressed herein as well as any errors or omissions.

267 See Statute, preamble.

268 See article 1(1) of the Agreement, which states: "There is hereby established a Special Court for Sierra Leone", and article 21 of the Agreement, which states: "The present agreement shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with". According to the United Nations, the notification required under article 21 took place on 11 April 2002.

269 The then-current Rules of Procedure and Evidence of the ICTR were those last amended on 31 May 2001.

270 The Special Court's current Rule 1 also acknowledges the applicability of the Rules of Procedure and Evidence of the ICTR on 12 April 2002.

271 Statute of the International Tribunal for Rwanda, art. 14, annexed to S.C. Res. 955, 3453rd meeting, U.N. Doc. S/RES/955 (1994).

However, because the Rules that became applicable in 2002 to the legal proceedings of the Special Court were designed for a different court with a different legal basis, jurisdiction and powers, they contained provisions that fit awkwardly into the legal framework established for the Court by the Agreement and the Statute. Many of these provisions were changed through amendments of the Rules, but more changes could still be made. More care could be taken to emphasize that the Rules are subordinate to and limited by the Agreement and Statute, and to avoid rephrasing or repeating Sierra Leone's obligations under these documents.[272] Additionally, the Rules could acknowledge relevant provisions of Sierra Leone law, as they acknowledge provisions of the Statute, and thus clarify the source for certain obligations and avoid rephrasing or repeating those obligations.[273] These measures would serve the useful purpose of eliminating the possibility of any obligations in the Rules exceeding the terms of the Agreement and Statute or conflicting with the Special Court Agreement Ratification Act. Furthermore, the Rules contain certain anachronisms that were not addressed at the ICTR. For example, even though the Rules contain a provision stating that "the masculine shall include the feminine",[274] they forego any effort to employ gender-neutral pronouns.

B. Structure

The Rules are currently divided into nine parts:

- Part I – General Provisions;
- Part II – Cooperation with States and Judicial Assistance;
- Part III – Organization of the Special Court;
- Part IV – Investigations, Rights of Suspects and Accused;
- Part V – Pre-Trial Proceedings;
- Part VI – Proceedings Before Trial Chambers;
- Part VII – Appellate Proceedings;
- Part VIII – Review Proceedings; and
- Part IX – Pardon and Commutation of Sentence.

The Rules also provide for their own enforcement. Rule 5 states that a party may raise the issue of non-compliance with the Rules, and the Trial Chamber of the Court or a designated judge of the Trial Chamber may grant relief.

C. Amendment

Article 14(2) of the Statute provides that the "judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules". The Rules were

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[272] For example, Rule 8 could avoid repeating Sierra Leone's obligation to cooperate with the Special Court and specify that the source of this obligation is article 17 of the Agreement.

[273] For example, Rule 8 could acknowledge that, in Sierra Leone, the source of the force and effect of the Special Court's orders is section 20 of Sierra Leone's Special Court Agreement Ratification Act.

[274] Rule 2.

last amended on 30 October 2003. Previously, they were amended on 1 August 2003 and 7 March 2003.[275]

Rule 6 provides a two-step procedure for amendment. First, there must be a proposal for amendment. Such proposal may come from a judge, the Prosecutor, the Registrar, the Defence Office, the Sierra Leone Bar Association or any other entity invited by the President to make a proposal.[276] Second, the proposal must be adopted by the judges of the Court at a plenary meeting,[277] or approved unanimously by the judges via any appropriate means, which if not in writing, must be confirmed in writing.[278] Upon adoption or unanimous approval, the amendment enters into force immediately, unless otherwise indicated, and the Registrar is directed to publish the amendment by appropriate means.[279]

In reviewing and deciding on proposals, it would appear that Article 14(2) of the Statute requires the judges to have found that "the applicable Rules do not, or do not adequately, provide for a specific situation". Thus far, the Court has not made publicly available any such findings with regard to amendments adopted or approved.

Article 14(2) of the Statute also directs the judges to find guidance in the Criminal Procedure Act, 1965, of Sierra Leone. Indeed, one of the early decisions of the Court acknowledged that the Criminal Procedure Act, 1965, of Sierra Leone is a source of guidance.[280] This provision of the Statute appears to be intended in part to deal with proceedings regarding crimes under Sierra Leone law.[281] Presumably, the judges might look as well to the rules of international courts such as the ICTY and ICC, as well as to amendments of the rules of the ICTR since the establishment of the Special Court.

The power of the judges to amend the Rules has been described in an early decision of the Court as a "broadly permissive power".[282] However, this power is not without boundaries. As even the judges themselves have admitted the Rules cannot "contravene any express provision of the Agreement and Statute".[283]

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275 Prior to the first amendment of the Rules, the Judges consulted with members of the Sierra Leone Bar Association at a seminar held by NPWJ, the Bar Association and the Special Court in December 2002. A report from the seminar also was made available to the Judges prior to their plenary meeting in March 2003. See Report on the Special Court Rules of Procedure and Evidence Seminar, 3 December 2003, available from http://www.specialcourt.org/.

276 Rule 6(A).

277 For a discussion of plenary meetings, see part IV of the Guide.

278 See Rule 6(B) and (C).

279 See Rule 6(D).

280 *Prosecutor v. Norman*, Case No. SCSL-2003-08-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, para. 3.

281 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, U.N. Doc. S/2000/915, para. 20.

282 *Prosecutor v. Norman*, Case No. SCSL-2003-08-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, para. 3.

283 ibid., para. 27.

D. Interpretation

Any interpretation of the Rules must be in light of the Agreement and Statute, which sets forth the provisions in accordance with which the Court is mandated to function.[284] The Rules also should be read in light of relevant national law to which it makes explicit or implicit reference, particularly Sierra Leone's Special Court Agreement Ratification Act. Additionally, the Rules themselves provide guidance. Rule 2 provides a list of definitions, and states that in interpreting the Rules "the masculine shall include the feminine and the singular the plural, and vice-versa".

Furthermore, interpretation of the Rules must be guided by the jurisprudence of the ICTY, ICTR and the Sierra Leone courts. This would appear to follow not only from the origin of the Rules and their provisions for amendment but also from Article 20(3) of the Statute, which provides:

> "The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone".

Guidance also may be sought from the relevant jurisprudence of other courts such as the International Criminal Court, and international customary law, particularly applicable international human rights law.

* * * *

As the Guide now proceeds to discussion of several issues in which the Rules play a significant role, the points set forth above are likely to be of reoccurring relevance. In particular, it will be important to remember the limitations of the Rules, which in accordance with the Statute are applicable to the conduct of the legal proceedings before the Court. It also will be important to read the Rules within the legal framework established by the Agreement and Statute, as well as Sierra Leone's Special Court Agreement Ratification Act.

[284] See Statute, preamble.

Part IV
Organisation of the Special Court[+]

Article 11 of the Statute of the Special Court provides for the organisation of the Court as follows:

> "The Special Court shall consist of the following organs:
>
> (a) The Chambers, comprising one or more Trial Chambers and an Appeals Chamber;
>
> (b) The Prosecutor; and
>
> (c) The Registry."

The Agreement, Statute and Rules of Procedure and Evidence of the Special Court contain a number of provisions detailing the structure and functions of each of these organs, together with associated matters such as disciplinary measures. While the Defence Office is not specifically foreseen within the Court hierarchy in the founding instruments, it was recognised early on that the Special Court represented a good opportunity to overcome the problems faced by the ICTY and ICTR by dealing with defence issues in a more systematic and structured way.[285]

This part will consider the organisation of each organ of the Court in the order in which they are dealt with in the Statute for the Special Court, concluding the analysis with a discussion of the Defence Office.

A. The Chambers

The Statute of the Special Court provides that the Chambers shall consist of one or more Trial Chambers and an Appeals Chamber.[286] In this, the structure follows that of the International Criminal Tribunals for the former Yugoslavia and Rwanda, which each have a number of Trial Chambers and one Appeals Chamber.[287] During the negotiations on the Special Court, the parties were directed to consider whether the Special Court should also share the Appeals Chambers of the two international criminal tribunals, so as to facilitate the harmonisation of international criminal law.[288] While in theory this was desirable, it was eventually decided to create a separate Appeals Chamber within the Special Court structure due to the projected additional burden adding appeals from the Special Court would place on the Appeals Chamber of the ICTY and ICTR.[289]

[+] Part IV was prepared thanks to substantial contributions of research and writing from Alison Smith, Claire Carlton-Hanciles and Pascal Turlan. NPWJ remains nonetheless responsible for the views expressed herein as well as any errors or omissions.

[285] For a discussion on these issues, including proposals for dealing with defence matters before the Special Court, see the report written by Sylvia de Bertodano on behalf of NPWJ, *Report on Defence Provision for the Special Court for Sierra Leone*, available from http://www.specialcourt.org/.

[286] Statute, art. 11; see also Agreement, art. 2.

[287] ICTY Statute, arts. 11 and 12; ICTR Statute, arts. 10 and 11.

[288] Security Council Resolution 1315 (2000), UN Doc. S/RES/1315 (2000), OP 7.

[289] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2003, paras 40-1: UN Doc. S/2000/915.

1. Composition of Chambers

The Trial Chamber is the "court of first instance", where the charges against the accused are tried before a panel of judges. The Trial Chamber is composed of three Judges, one appointed by the Government of Sierra Leone and two appointed by the United Nations Secretary-General.[290] The Agreement provides that a second Trial Chamber may be formed after six months following the establishment of the Court on the request of the UN Secretary-General or the President of the Special Court,[291] with judges to be appointed similarly to the first Trial Chamber.[292] In July 2002, the Judges were named in a joint press conference held in Freetown and New York. They are: Pierre Boutet (Canada, appointed by the Secretary-General); Benjamin Itoe (Cameroon, appointed by the Secretary-General); and Bankole Thompson (Sierra Leone, appointed by the Government of Sierra Leone).

The Appeals Chamber is the "court of appeal", where the parties may appeal a decision of the Trial Chamber on grounds specified in the Statute. The Appeals Chamber is composed of five judges, two appointed by the Government of Sierra Leone and one appointed by the United Nations Secretary-General.[293] In July 2002, the Judges were named in a joint press conference held in Freetown and New York. They are: Emanuel Ayoola (Nigeria, appointed by the Secretary-General), George Gelaga-King (Sierra Leone, appointed by the Government of Sierra Leone), Geoffrey Robertson (United Kingdom, appointed by the Government of Sierra Leone) and Renate Winter (Austria, appointed by the Secretary-General). The fifth Judge, Hassan Jallow (The Gambia, appointed by the Secretary-General) was subsequently appointed to be the Prosecutor of the International Criminal Tribunal for Rwanda after the decision had been taken to split the functions of the Prosecutor for the former Yugoslavia and Rwanda.

In addition and on the request of the President of the Special Court there may be up to two alternate judges appointed, one by the Government of Sierra Leone and one by the Secretary-General, to sit in the event that a judge is unable to continue sitting.[294] During the joint press conference, the United Nations and the Government of Sierra Leone announced that they had identified alternate judges in the event that they would be required, namely Issac Aboagye (Ghana) and Elizabeth Muyovwe (Zambia).

In appointing the judges, the United Nations and the Government of Sierra Leone took account of the balance of experience within Chambers, including their experience in international humanitarian and human rights law, criminal law and juvenile justice.[295] In addition, each of the judges was considered to be "of high moral character, impartiality and integrity [and possessing] the qualifications required in their respective countries for appointment to the highest judicial offices".[296] In fulfilling their judicial obligations, the judges are required to be "independent in the performance of their functions, and shall

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290 Statute, article 12(1)(a); Agreement, art. 2(2)(a). Article 2(3) of the Agreement also requires the Government of Sierra Leone and the Secretary-General to consult on the appointment of any judge.
291 Agreement, art. 2(1).
292 *Ibid*, art. 2(2)(b).
293 Statute, art. 12(1)(b); Agreement, art. 2(2)(c).
294 Statute, art. 12(4); Agreement, art. 2(5).
295 Statute, art. 13(2).
296 *Ibid*, art. 13(1).

not accept or seek instructions from any Government or any other source".[297] Each of the judges was appointed for a three-year, renewable term.[298]

2. Absence, resignation and replacement of Judges

If a Judge is likely to be absent from a part-heard case for a period exceeding five days, the President may designate one of the alternate Judges to complete the case.[299] Nevertheless, if the case is at an advanced stage and an alternate Judge is not available, the case may proceed provided the remaining Judges are satisfied the verdict will not be affected.[300] If this option is chosen and the Chamber ends up being split evenly on its decision, a new trial or appeal shall be ordered.[301]

When a Judge resigns, he or she is to send notice of their resignation in writing to the President, who will transmit it to the Government of Sierra Leone and the United Nations.[302] Although none of the constituent instruments provide a procedure for appointing a replacement Judge, the logical conclusion is that the original appointment process should be followed, including the consultation process envisaged in article 2(3) of the Agreement. As noted, Judge Jallow resigned to take up the post of Prosecutor at the International Criminal Tribunal for Rwanda. As at the time of writing, no judge has been appointed to fill Judge Jallow's position and the Appeals Chamber has held hearings with only four judges. In this respect, it is worth noting that the Rules of Procedure and Evidence were amended in October 2003 to allow preliminary motions raised in the Trial Chamber prior to the Prosecutor's opening that address issues relating to jurisdiction or "that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial" to be referred to a bench of "at least three" Appeals Chamber Judges.[303]

3. Organisation of Chambers

Within the Chambers, there is a hierarchy of seniority, foreseen by the Agreement and Statute and detailed in the Rules. The Chambers are headed by the President of the Special Court, who is elected by the judges of the Appeals Chamber as the Presiding Judge of the Appeals Chamber.[304] The President is required to undertake a number of functions, including issuing Practice Directions on the conduct of proceedings before the Special Court,[305] convening and chairing the Plenary meetings of the Judges, coordinating

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297 *Ibid*, article 13(1).
298 Statute, article 13(3); see also Agreement, article 2(4).
299 Rule 16(B).
300 Rule 16(B)(i).
301 Rule 16(B)(ii). This rule does not specify by whom the order should be made, which presumably would be done by the Chamber itself.
302 Rule 16(C). Note also Rule 14(C), which provides as follows: "The members of the Special Court shall continue to discharge their duties until their places have been filled."
303 Rule 72(E) and (F), as amended on 30 October 2003. It is worth emphasising that this Rule was changed *after* Judge Jallow had resigned from the Special Court and a replacement had not yet been found; the unavoidable conclusion is that the rule was changed to fit the circumstances in which the Special Court found itself.
304 Statute, art. 12(3); Rule 18. The President of the Special Court for Sierra Leone is currently Judge Geoffrey Robertson, QC, who was appointed by the Government of Sierra Leone and elected by his fellow judges after their swearing-in in December 2002 in Freetown.
305 Rule 19(B).

the work of the Chambers and overseeing the work of the Registry.[306] The President is also charged with authorising sittings of the Court away from the seat of the Court, including the use of audio or video-link technology, email and similar means of communications.[307]

The Judges must meet in Plenary session for the following purposes:

> "(i) Adopt and amend the Rules;
> (ii) Adopt the Annual Report provided for in Article 25 of the Statute;
> (iii) Decide upon matters relating to the internal functioning of the Chambers and the Special Court;
> (iv) Exercise any other functions provided for in the Agreement, the Statute or in the Rules."[308]

Plenary meetings must be called by the President on the request of five or more Judges, i.e. the majority of Judges, and may be called at any other time when the functions of the President so require.[309] The quorum for the Plenary is five Judges, at least one of whom must be from the Trial Chamber, and voting is done by simple majority, with the President having the casting vote in the event of a tie.[310]

If the President is unable to undertake the functions assigned by the Rules of Procedure and Evidence, because he or she is not present in Sierra Leone or for other reasons, they are to be carried out by the Vice President.[311] The Vice President is, according to the Rules of Procedure and Evidence, a rotating position based on the seniority of the Judges as designated in the Rules.[312] If neither the President nor the Vice President is able to perform the functions of the Presidency, this is to be undertaken by a senior Judge determined in accordance with the Rules relating to precedence of the judges.[313]

In addition, the Presiding Judge of the Trial Chamber, who is elected for a one-year renewable term,[314] is required to organise the work of the Trial Chamber including issuing any necessary practice directions[315] and to liaise with the Registrar as appropriate on matters concerning the Trial Chamber.[316] This work includes consulting with other members of the Trial Chamber and assigning a "Designated Judge", whose function is to review indictments, warrants and all other pre-trial matters not pertaining to a case already assigned to a Chamber.[317] Information about who is acting as the Designated Judge at any particular time is to be published by the Registrar "by appropriate means and as soon as possible."[318]

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306 Rule 19(A).
307 Rule 4.
308 Rule 24.
309 Rule 25.
310 Rule 26.
311 Rule 21.
312 Rule 20.
313 Rule 22.
314 Rule 27(A).
315 Rule 27(C).
316 Rule 27(B).
317 Rule 28.
318 *Ibid.*

Curiously, the election of the first Vice President of the Special Court does not appear to be in accordance with the Rules as adopted by the Judges. The Rules of Procedure and Evidence of the Special Court were first amended and adopted by the Judges in Plenary session on 7 March 2003 and entered into force on 12 April 2002.[319] As such, the procedure for determining who should be Vice President of the Special Court was that contained in Rule 20, namely the rotational system based on seniority of the Judges as determined in accordance with Rule 17. However, Judge Gelaga King was, in the first instance, elected; and second, he was not the most senior Judge in order of precedence, as his appointment by the Government of Sierra Leone took place after the appointment by United Nations. While this is a procedural point, the question should be raised of whether this irregularity would have any effect on decisions made by Judge Gelaga King in his capacity as Vice President of the Court and, if so, what that effect might be.

4. The Council of Judges

The Council of Judges is composed of the President, the Vice-President and the Presiding Judge of the Trial Chamber or Chambers.[320] The Council of Judges essentially fulfils the same functions as the Bureau of the ICTR,[321] namely to consult with the President on "all major questions or matters" relating to the functioning of the Court.[322] It is, however, worth noting that under the Special Court Rules, the Council of Judges has a less formal role than the ICTR Bureau, for example on matters relating to the conduct of the Prosecutor,[323] the destination of a person under provisional detention[324] and dealing with counsel whom the Registrar believes has violated the Code of Professional Conduct.[325]

It is worth noting that the Special Court decided not to adopt the Rules of the ICTR setting up the Coordination Council, composed of the President, the Prosecutor and the Registrar.[326] The functions of this Council are to ensure the coordination of the three organs of the ICTR.[327] Although members of the Sierra Leone Bar Association recommended the formal establishment of such a body, noting that it would promote the efficient administration of the Special Court,[328] it has to be assumed that the Judges considered this was not appropriate for inclusion in the Rules of Procedure and Evidence.[329]

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319 Rule 1.
320 Rule 23.
321 ICTR Rule 23.
322 Rule 23(2).
323 Compare the Special Court Rule 37 with ICTR Rule 37(A), which states: "Any alleged inconsistency in the Regulations shall be brought to the attention of the Bureau to whose opinion the Prosecutor shall defer." This has no corresponding provision in the Special Court's Rules.
324 The ICTR allocates this power to the Bureau (see rule 40(B)) whereas the Special Court allocates this power to the President acting on advice of the Registrar (see rule 40(B)).
325 The ICTR allows the Registrar to report the matter either to the President or the Bureau (rule 46(D)) whereas the Special Court requires the Registrar to report the matter only to the President (rule 46(G)).
326 ICTR Rule 23*bis*(A).
327 ICTR Rule 23*bis*(B).
328 *Report on the Special Court Rules of Procedure and Evidence Seminar*, available from available from http://www.specialcourt.org/, commentary on proposed draft rule 23.
329 For example, it may have been considered that given the short mandate of the Court and the relatively smaller staff numbers, it was more appropriate that this be dealt with administratively or informally.

5. Disqualification of Judges

Disqualification of a Judge from a case can occur on the grounds of a personal interest or association in the case, whether past or ongoing, "which might affect his impartiality".[330] The Rules specifically provide that approval of an indictment or involvement with any pre-trial or interlocutory matter against a suspect or accused is not grounds for disqualification either in respect of the trial or any appeal relating to that case.[331] According to Rule 15(B), any party – that is, the Prosecutor or the accused[332] – may apply to the Chamber in which the Judges is a member for disqualification on those grounds. Should a Judge be disqualified, Rule 15(A) sets out the procedure by which that Judges should be replaced,[333] with Rule 15(C) providing that if the absence of a Judge results in the membership of the Trial Chamber being less than two Judges, the President may assign another Judge to act as a replacement. Should the Judge not withdraw, it is up to the other Judges in that Chamber to determine whether the complaint is well founded or not.[334]

The Rules appear to suggest that if a Judge must be replaced in the Appeals Chamber or Trial Chamber, in the event that its membership would fall below two Judges, any Judge may be appointed to act in place of the absent Judge(s). However, this must be read in light of article 12(2) of the Statute, which expressly provides: "Each judge shall serve only in the Chamber to which he or she has been appointed."

The Rules remain vague with respect to disqualification of Judges in general, for example for misconduct or similar behaviour. Rule 15(E) provides: "Where it is alleged that a Judge is not fit to sit as member of the Special Court, the matter shall be referred from the Chamber to the Council of Judges, which will consider the matter and make a recommendation to the body which appointed the Judge, if required." During the Rules Seminar in December 2002, the Sierra Leone Bar Association recommended that rules similar to those adopted for the International Criminal Court[335] be formally incorporated into the Rules of Procedure and Evidence of the Special Court, to provide for formal procedures by which Judges might be disciplined or removed.[336] However, this suggestion was not taken up by the Judges, possibly because it was felt that these matters lay in the hands of the parties who had appointed the Judges, namely the Government of Sierra Leone and the United Nations. Nevertheless, the wisdom of failing to provide a procedure by which a complaint may be made or criteria on which a recommendation to the body that appointed the judge may be made is questionable, as it reduces certainty and allows for the potential impression of arbitrariness in addressing this issue, should it ever arise.

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330 Rule 15(A).
331 Rule 15(D).
332 See Rule 2.
333 Rule 15(A) provides as follows: "Where the Judge withdraws from the Trial Chamber, the President may assign the alternate judge, in accordance with Article 12(4) of the Statute, or another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber may assign another Judge to sit in his place."
334 Rule 15(B).
335 ICC Rules of Procedure and Evidence, section IV(1) (Removal from office and disciplinary measures).
336 *Report on the Special Court Rules of Procedure and Evidence Seminar*, available from available from http://www.specialcourt.org/, commentary on proposed draft rule 15.

B. The Office of the Prosecutor

Pursuant to the Statute of the Special Court, the Prosecutor is charged with the investigation and prosecution of the persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[337] The Prosecutor is entitled to a certain leeway in the implementation of the Statute and Rules, since the Prosecutor has the power to frame and issue his own regulations, if he or she deems it necessary, provided that they are consistent with the Agreement and the Statute.[338]

The organ called Prosecutor under the Statute is a separate and independent organ of the Court and consists of the Prosecutor himself or herself and his or her Office. The Prosecutor is required to act independently, neither seeking nor receiving any instructions from any government or any other source. Similar requirements apply to the Prosecutor of the ICTY,[339] the ICTR[340] and the International Criminal Court.[341]

1. Organisation of the Office of the Prosecutor

The Agreement and Statute[342] provide that the Prosecutor shall be appointed by the United Nations Secretary-General for a three-year term and shall be eligible for re-appointment.[343] The Prosecutor is required to be a person of high moral character who possesses the highest level of professional competence[344] and who has extensive experience in the conduct of investigations and prosecutions of criminal cases. These are standard provisions for such positions in international jurisdictions and are intended to guarantee the independence, objectivity and impartiality of the office.

Within the Office of the Prosecutor (OTP), the Prosecutor is assisted by a Deputy Prosecutor, who shall be appointed by the Government of Sierra Leone, in consultation with the Prosecutor and the Secretary-General.[345] The Deputy Prosecutor is to exercise the functions of the Prosecutor in the event of the Prosecutor's absence or inability to act or upon his express instructions.[346] On 17 April 2002, the UN Secretary-General appointed David Crane (USA) for a three-year term as Chief Prosecutor; on 13

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337 Statute, art. 15(1). Rule 37(A) adds that the Prosecutor shall perform all the functions provided by the Statute.

338 Rule 37.

339 ICTY Statute, art. 16.

340 ICTR Statute, art. 15.

341 The Rome Statute of the ICC speaks about the Office of the Prosecutor instead of the Prosecutor alone. See Rome Statute, art. 34(c). See also Rome Statute, art. 42(1) ("The Office of the Prosecutor shall act independently as a separate organ of the Court.").

342 Agreement, art. 3(1); Statute, art. 15(3).

343 The Special Court itself is expected to operate for three years and has been given a three-year budget during the budgetary negotiations prior to the adoption of the Agreement. Three years is the "minimum time required for the investigation, prosecution and trial of a very limited number of accused", as the Secretary-General mentioned in his Letter dated 12 January 2001 from the Secretary General addressed to the President of the Security Council.

344 Article 3(2) of the Agreement states these requirements for both the Prosecutor and the Deputy Prosecutor. Article 15(1) of the Statute repeats this provision with respect to the Prosecutor only.

345 The Agreement and Statute, as adopted on 16 January 2002, provided that the Deputy-Prosecutor shall be of Sierra Leonean nationality, however this was amended to reflect the agreement of the parties during negotiations that there should be no nationality requirement. Agreement, art. 3(2); Statute, art. 15(4).

346 Rule 38.

November 2002, the Government of Sierra Leone appointed Desmond De Silva QC (United Kingdom) as Deputy Prosecutor.

In addition to the Deputy-Prosecutor, the Prosecutor is to be assisted by such Sierra Leonean and international staff as is necessary for the performance of his or her functions effectively and efficiently.[347] The Prosecutor can delegate his powers under Part IV to VIII of the Rules to staff members identified and authorised by him, as well as by any other person acting under his direction.[348] In the recruitment process of the staff of the OTP, special care is to be given to appoint prosecutors and investigators experienced in gender-related crimes and juvenile justice so as to allow the proper taking into account of the particular sensitivity of crimes committed against girls, women and children.[349]

It is worth noting that the staff of the OTP is intended to include both Sierra Leonean as well as foreign staff. The inclusion of Sierra Leonean staff, as well as the granting of jurisdiction over crimes under Sierra Leone law, was intended to "root… the process in Sierra Leone and makes it uniquely Sierra Leonean"[350] and had been an integral part of the Court's conception since before the initial negotiations began. However, in the first round of staff selection, very few Sierra Leoneans were appointed, particularly in professional positions. This was strongly criticised in Sierra Leone, most notably by the legal profession, who believed this would negative the feeling of ownership by Sierra Leoneans of the Court and also feared the same situation would occur in relation to defence counsel.[351] Soon afterwards, this situation was redressed and Sierra Leoneans now make up a sizeable proportion of the Court's staff.[352]

2. Functions, duties and powers of the Prosecutor[353]

The Prosecutor has a wide range of duties and powers aimed at enabling him to fulfil the mandate of prosecuting those who bear the greatest responsibility for violations of international humanitarian law and Sierra Leonean law. Thus the Statute contains a range of investigatory powers, which are fleshed out by the Rules, relating to the questioning of suspects, victims and witnesses;[354] the collection of evidence; and the conduct of on-site investigations.[355] In so doing, the Prosecutor is empowered to seek the assistance of States and international organisations, in particular INTERPOL.[356]

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347 Statute, art. 15(4).
348 Rule 37(B).
349 Statute, art. 15(4).
350 Letter from President Alhaji Dr Ahmad Tejan Kabbah to the Security Council, Enclosure, para 3: UN Doc. S2000/786.
351 See, for example, the first issue of *Special Court Watch*, issued by the Lawyers' Centre for Legal Assistance, a public interest human rights law centre providing free legal assistance to indigent members of the public in Sierra Leone: http://www.lawcla.org/Publications.htm.
352 See the press release of the Special Court, "More Sierra Leoneans in Prosecutor's Office than Any Other Nationality", 6 November 2002.
353 The specific aspects of the Prosecutor's responsibilities in relation to pre-trial, trial and appeal proceedings are discussed in the relevant parts of this Guide.
354 Article 16(4) of the Statute gives the Prosecutor the right to be consulted on protective measures and security arrangements, counselling and other appropriate assistance for victims and witnesses: see the discussion below on the Victims and Witnesses Unit.
355 See Statute, art. 15(4); see also Rule 39 and Part VI of the Guide.
356 Rule 39(iii) and (iv).

In addition, the Rules authorise the Prosecutor to take provisional measures in some specific cases, in particular: in cases of emergency; in order to request States to arrest suspects and place them in custody; to seize physical evidence; to take necessary measures to prevent the escape of a suspect or accused; and to prevent any action against victims or witnesses or the destruction of available evidence.[357] The inclusion of such provision is indispensable to give the Prosecutor the capacity to send requests to States, although the implementation of these measures depend on the requested State, in particular any bilateral agreement made with that State, as the Court has no power to compel cooperation by any State other than Sierra Leone.[358]

3. Discretion of the Prosecutor

a. Jurisdiction over persons aged below 18

Pursuant to article 7(1) of the Statute, the Court does not have jurisdiction over children under 15 at the time of the alleged commission of the crime, which mirrors the fact that the conscription of children below that age is defined as a war crime over which the Court has jurisdiction.[359] In addition, and pursuant to article 15(5) of the Statute, the Office of the Prosecutor has the obligation to guarantee that children who were between 15 and 18 at the time of the alleged commission of crimes should not be imprisoned, that the child rehabilitation program is not threatened and that alternative means of dealing with juvenile offenders are considered, in particular by referring children to available truth and reconciliation mechanisms. This is in accordance also with article 7 of the Statute, which provides for a special treatment to be given to children between 15 and 18 years old.

Given the mandate to prosecute those who bear the greatest responsibility, it was never likely that children aged between 15 and 18 years old at the time of the alleged commission of the crime would be prosecuted. Indeed, soon after his arrival in Freetown, taking into account the extent of the involvement of child soldiers in the conflict, the Prosecutor publicly announced that he did not intend to prosecute possible offenders under 18 years old.[360] This decision appears to be in accordance with the current general position under international law with regard to the prosecution of children; for example, the Rome Statute of the International Criminal Court provides that the Court does not have jurisdiction over children under 18 years old.[361]

b. Limitations on prosecutorial discretion

While the Prosecutor has wide discretion in a number of areas, his overall discretion is more limited than that enjoyed by the Prosecutors of the ICTY and ICTR. One area relates to the crimes for which persons may be indicted and tried; the subject matter jurisdiction of the Special Court does not cover all crimes under international law. Thus the Statute does not give the Court jurisdiction of the crime of genocide. While this could have been a decision for the Prosecutor to make on the basis of the evidence

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357 Rule 40. See also part VI of the Guide.

358 See part V of this Guide for a detailed discussion of this issue.

359 Statute, art. 4(c).

360 See, for example, the press release from the Office of the Prosecutor on 2 November 2002, *Special Court Prosecutor Says He Will Not Prosecute Children*.

361 Rome Statute, art. 26; see also NPWJ and UNICEF, *International Criminal Justice and Children*, 2002, available from http://www.npwj.org/.

gathered,[362] this decision was taken at the stage of the drafting of the Statute on the basis of the lack of *prima facie* evidence that genocide occurred in Sierra Leone.[363] In the same way, it was decided during the preparatory phases that the Court should not have jurisdiction over crimes committed in international armed conflicts.[364]

In addition, the scope of the personal jurisdiction of the Court – namely "those who bear the greatest responsibility" – also contributes to a restriction on the mandate of the Prosecutor. However, it should be remembered that no other international court or tribunal has had this restriction placed on their jurisdiction and, to a certain extent, the phrase is untested and undefined.[365] Thus the leeway and the prosecutorial discretion of the Prosecutor make it up to him to interpret and implement this provision in his prosecution strategy and his handling of each individual case.

The temporal jurisdiction of the Court adds an additional restriction on the Prosecutor's discretion, as it only runs from 30 November 1996, although the conflict actually began in 1991.[366] Therefore, the Prosecutor would be prevented from prosecuting someone who only committed violations prior to 30 November 1996, even if he has reasons to believe that person bears the greatest responsibility for violations committed during the conflict as a whole. Conversely, the amnesty granted pursuant to the Lomé Peace Agreement, which grants amnesty to all combatants for any acts undertaken in furtherance of their objectives prior to 7 July 1999, only presents a limitation in relation to crimes under Sierra Leone law (article 5) and not in respect of crimes under international law (articles 2 to 4).[367]

Finally, there are special requirements in relation to the jurisdiction of the Special Court over crimes allegedly committed by peacekeepers that tend to limit the extent of the Prosecutor's discretion. In the case of suspected violations committed by peacekeepers, the sending State retains primary jurisdiction.[368] The Court may only exercise jurisdiction in the event that State is either unwilling or unable to exercise jurisdiction itself and if the Court is authorised by the United Nations Security Council, on the proposal of any State.[369] While this is in part a result of the Court's inability to require compliance by any State other than Sierra Leone with its orders, including arrest warrants, this provision entails complicated procedures that discourage the Prosecutor from even trying.

C. The Registry

1. Functions and appointment of Registrar

The Registry is responsible for dealing with servicing of the Chambers and the Office of the Prosecutor, for the recruitment and administration of all support staff and for the

362 See Amnesty International, *Sierra Leone Recommendations on the draft Statute of the Special Court*, 14 November 2000, AFR 51/83/00, p. 4.
363 *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, 4 October 2000, S/2000/915, para. 13.
364 See part II of the Guide for a discussion of this issue.
365 See part II of the Guide for a discussion of this issue.
366 See part II of the Guide for a discussion of this issue.
367 Statute, art. 10 ("An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.").
368 Statute, art. 1(2).
369 Statute, art. 1(3).

administration of financial and staff resources of the Special Court.[370] The Registry is headed by the Registrar, Mr Robin Vincent, who was appointed by the Secretary-General in consultation with the President of the Special Court.[371] The Registrar is a staff member of the United Nations and is appointed for a three-year term.[372] While there is no explicit mention of a Deputy Registrar in either the Agreement or the Statute, the Rules of Procedure and Evidence provide that the Registrar may, if necessary, appoint a Deputy Registrar along with other staff required for the efficient functioning of the Registry.[373]

In addition to the functions of the Registrar as set out in the Agreement and Statute, the Rules of Procedure and Evidence contain additional details about the Registrar's responsibilities and functions. Thus the Registrar is required to act as the channel of communication for the Court and to assist the Chambers, the Plenary Meetings of the Special Court, the Judges and the Prosecutor, the Principal Defender and the Defence in the performance of their functions.[374] Under the direction of the President, the Registrar is responsible in general for the servicing and administration of the Court.[375] In discharging these functions, the Registrar is empowered to make oral or written representations to Chambers on any issue arising in the context of a specific case which may affect the discharge of such functions, including that of implementing judicial decisions[376] and may make practice directions addressing specific aspects of the practice and procedure within the Registry and other matters within his competence.[377] In discharging these functions, the Registrar is directed to keep minutes of all Plenary meetings of the Court and of the sittings of the Chambers or a Judge, except where a full record is made pursuant to Rule 81 or where the deliberations are private.[378] In addition, the Registrar is required to keep a Cause Book, in which the particulars of each case including an index to the case file is to be kept, except documents or information that is subject to a non-disclosure order.[379]

An important function of the Registrar is to oversee the conditions of detention for all persons who are detained in the custody of the Special Court. To that end, he is empowered to make rules and regulations, in consultation with the President, governing such detention; in doing so, the Rules direct that he is to be "mindful of the need to ensure respect for human rights and fundamental freedoms and particularly the presumption of innocence".[380] The Rules of Detention were adopted by the Registrar on 7 March 2003 and amended on 25 September 2003.

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370 Statute, art. 16(1); Agreement, art. 4(1).

371 Agreement, art. 4(1). See also Statute, art. 16(3) and Rule 30.

372 Agreement, art. 4(2). See also the Statute, art. 16(3). Neither the Agreement nor the Statute contain details of required qualifications for the Registrar, as are specified for the Judges, the Prosecutor and the Deputy Prosecutor.

373 Rule 31. A Deputy Registrar was in fact appointed in 2002.

374 Rule 33(A).

375 *Ibid.*

376 Rule 33(B).

377 Rule 32(D). A number of Practice Directions have already been issued and are addressed in the relevant sections in this Guide.

378 Rule 35.

379 Rule 36; see Rule 53 on non-disclosure. See also part VIII of the Guide for a discussion on non-disclosure.

380 Rule 32(C).

2. Victims and Witnesses Unit

The Victims and Witnesses Unit is foreseen in the Statute, which provides that such a Unit shall be established within the Registry. The Unit is to provide, in consultation with the Office of the Prosecutor, "protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses."[381] The only other direction provided for the Victims and Witnesses Unit in the Statute is the requirement that the Unit's staff include experts in trauma, including trauma related to crimes of sexual violence and violence against children.[382] This was included so as to address the needs of likely victims and witnesses, due to the types of things that happened in Sierra Leone throughout the conflict.

The Rules reiterate what is contained in the Statute and expand on the requirements of the Victims and Witnesses Unit, to take into account changes in the structure of the Court and operational requirements.[383] Thus, the Unit is mandated to consult only with the Prosecutor in the case of prosecution witnesses and for defence witnesses to consult only with the Defence Office,[384] which was established pursuant to the Rules and had not been foreseen in the Statute or Agreement. Further, in addition to the staffing requirements, the Rules foresee that the Unit may, where appropriate, cooperate with international non-governmental and intergovernmental organisations.[385]

When issues relating to the protection of victims and witnesses arise during disclosure, the Rules provide that the Trial Chamber or Judge may consult the Victims and Witnesses Unit in this regard.[386] In addition, the Rules provide that the Victims and Witnesses Unit has standing to request protective measures to safeguard the privacy and security of victims and witnesses be ordered by the Court during the course of a trial. Such measures may include closed sessions, the use of a pseudonym, giving testimony by closed-circuit television and other similar measures.[387] Should this take place, the Unit is required to ensure that the witness understands that his or her testimony or identity may be disclosed in subsequent proceedings should that disclosure be ordered.[388]

The type of assistance to be provided to victims and witnesses, as well as others who may be at risk on account of testimony given by such witnesses, have been elaborated in the Rules as follows:

> "(i) Recommend to the Special Court the adoption of protection and security measures for them;
> (ii) Provide them with adequate protective measures and security arrangements and develop long- and short-term plans for their protection and support;

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381 Statute, art. 16(4).
382 *Ibid.*
383 It should be noted that while victims and potential witnesses are already the subject of protective measures, including relocation to a third country, no details are available at this time on the work of the Unit.
384 Rule 34(A).
385 Rule 34(B). This rule, as amended on 1 August 2003, refers to the Unit as a "Section" in this regard, presumably a typographical error, as the Rules as adopted on 7 March refer to it as a "Unit".
386 Rule 69(B).
387 Rule 75(A) and (B).
388 Rule 75(C); see also Rule 75(F).

(iii) Ensure that they receive relevant support, counselling and other appropriate assistance, including medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault and crimes against children".[389]

D. The Defence Office

The Defence Office of the Special Court was established by the Registrar in February 2003 pursuant to Rule 45 to give effect to the right of every accused person to have "adequate time and facilities for the preparation of his or her defence and to communicate with Counsel of his or her own choosing".[390] The Defence Office's mandate is to provide advice, assistance and representation to accused persons and suspects being questioned by the Special Court or its agents.[391] This office represents a unique development in the practice of international courts and tribunals, as it is the first time that the Defence has been institutionalised within the Court structure on a level approaching the three organs of the Court.[392]

1. Organisation of the Defence Office

The Rules of Procedure and Evidence contain little guidance as to the organisation of the Defence Office, providing only that it is to be headed by the Principal Defender. Nevertheless, the Rules provide that in fulfilment of its functions, the Defence Office shall provide, *inter alia*, initial legal advice by duty counsel, who must be "situated within a reasonable proximity to the Detention Facility and the seat of the Special Court and shall be available as far as practicable to attend the Detention Facility in the event of being summoned".[393] By thus referring to a role for "duty counsel", it is apparent that the Rules at least foresee that the Defence Office should be staffed by one or more duty counsel in addition to the Principal Defender. The fact that one of the functions of the Defence Office is to provide "adequate facilities" also suggests the need for administrative support staff. Therefore, in addition to the Principal Defender, who is also the Head of Section, the Defence Office is staffed by three defence associates, who also act as duty counsel, as well as a defence advisor and a number of administrative support staff.[394]

2. Functions of the Defence Office

The purpose of the Defence Office is to give effect to the right of every person accused of a criminal offence to have a proper defence, which is one of the hallmarks of a fair trial. This right is expressly guaranteed in the Statute, which provides that every accused is entitled to minimum guarantees, including "to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in

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389 Rule 34(A).

390 Statute, art. 17(4)(b).

391 Rule 45(A).

392 In other international courts and tribunals, functions similar to those carried out by the Special Court Defence Office are placed directly on the Registrar. See, for example, ICC Rules of Procedure and Evidence, rule 20(1)(c), which provides that the Registrar shall "[a]ssist arrested persons, [suspects] and the accused in obtaining legal advice and the assistance of legal counsel".

393 Rule 45(B).

394 See www.sc-sl.org on the Defence Office, last viewed as of 17 February 2004.

any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it".[395]

As each case is different, the role of the Defence Office will vary depending on the wishes of the suspect or accused. Nevertheless, the Rules delimit the scope of the Office's functions as providing, among other things:

> "(i) initial legal advice and assistance by duty counsel who shall be situated within a reasonable proximity to the Detention Facility and the seat of the Special Court and shall be available as far as practicable to attend the Detention Facility in the event of being summoned;
> (ii) legal assistance as ordered by the Special Court in accordance with Rule 61, if the accused does not have sufficient means to pay for it, as the interests of justice may so require;
> (iii) adequate facilities for counsel in the preparation of the defence."[396]

The purpose of duty counsel is to ensure that no accused is left unadvised at any stage of their trial, thus the Rules of Procedure and Evidence state that duty counsel are to provide initial legal advice and assistance to persons in detention, imposing a proximity requirement to ensure that such advice is given in a timely manner. In the common law system, duty counsel provide short-term basic legal advice to unrepresented persons, primarily in family or criminal courts, including information on court processes. The role of duty counsel is general fulfilled by local lawyers who work in their own offices or chambers, acting on a rotating basis and paid through legal aid programs, rather than by the person requiring legal assistance.[397]

In the Special Court context, duty lawyers provide initial legal advice and assistance, including by being available to meet with suspects or accused at the detention centre and deal with any practical issues that may arise. Nevertheless, the situation of duty counsel acting in the Special Court needs to be approached with far greater care than those acting within a national system.

> "It cannot be compared with a system in a state or country prosecution service, which is trying a wide range of different and unrelated cases. All defendants before this court will be tried for a similar range of offences relating to the same factual situation… All clients are defendants in what is broadly the same case – i.e. all are charged with being among those 'who bear the greatest responsibility' for crimes committed during the conflict."[398]

In such a situation, the risk for conflict of interest – or at least the appearance of a conflict of interest – is high; the only guarantee against this is if duty counsel are prohibited from entering into the substance of the case against any accused they are representing.

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395 Statute, art. 17(1)(d). See also the International Covenant on Civil and Political Rights, art. 14; Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, Oxford, 2003, pp. 59-66.

396 Rule 45(B).

397 See, for example, http://www.legalaid.ab.ca/Legalaid/lah/dutycounsel.html.

398 Sylvia de Bertodano, *Report on Defence Provision for the Special Court for Sierra Leone*, available from http://www.specialcourt.org/.

It should be noted that the Rules provide no guidance on what is meant by "initial legal advice and assistance" in the context of duty counsel. The use of the word "initial" seems to suggest that advice and assistance should be provided from the moment of arrest or detention until such time as the accused is provided with counsel. Indeed, during the majority of the initial appearances before the Special Court, duty counsel provided representation for the accused in court. In two cases, they also filed applications for release from provisional detention[399] and have also filed motions in relation to Protective Measures for Victims and Witnesses and for Non-Public Disclosure on behalf of accused who were yet to be assigned counsel,[400] which focused on the procedural rights of the accused and did not appear to enter the substance of the case. However, it seems that providing advice on pleading to counts in an indictment would present greater challenges in this respect, particularly if the accused clearly wants to talk, although duty counsel appear to have managed avoiding entering the substance in the cases in which they provided initial advice.[401] Nevertheless, the Rules are silent on this issue and should be amended to provide greater certainty in this respect.[402]

Rule 61 concerns the initial appearance of the accused person once he or she has been transferred to the Court, the purpose of which is to charge the accused person formally and receive their plea to each count of the indictment brought against them.[403] Before the Judge may hear the accused person's plea, the Judge must be satisfied that the accused person's right to counsel is being respected.[404] In order to do so, the Judge is required to ask the accused person if they are represented by counsel, question the accused person with respect to their means[405] and instruct the Registrar to provide legal

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399 *Prosecutor v. Fofana*, Case No. SCSL-2003-11-PD, Urgent Application for Release From Provisional Detention, 11 June 2003; *Prosecutor v. Kondewa*, Case No. SCSL-2003-12-PD, Urgent Application for Release From Provisional Detention, 11 June 2003. In both of these cases, the Defence Office filed the application "acting on behalf of the [suspect] pursuant to its mandate set out in Rule 45 of the Rules of Procedure and Evidence … and the Power of Attorney granted to the Defence Office by the Suspect on 30 May 2003". *Ibid*, preamble.

400 See, for example, *Prosecutor v. Kallon*, Case No. SCSL-2003-07-PT, Response of Defence Office to Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and Non-Public Disclosure, 23 April 2003; *Prosecutor v. Sesay*, Case No. SCSL-2003-05-PT, Response of Defence Office to Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and Non-Public Disclosure, 23 April 2003; *Prosecutor v. Sankoh*, Case No. SCSL-2003-02-PT, Response of Defence Office to Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and Non-Public Disclosure, 23 April 2003. In all cases, the motion was filed "without prejudice to the position that might be taken by [the accused's] assigned counsel once such counsel is assigned". *Ibid*, para 3.

401 See, for example, the report on the initial appearance of Issa Sessay, Case No. SCSL-2003-05-PT, available from http://www.specialcourt.org/documents/WhatHappening/ObservationsInitialAppearance.html.

402 While avoidance of a conflict of interest is mentioned in the Directive on the Assignment of Counsel, this is only in respect of providing assistance to assigned counsel, rather than in the context of duty counsel. See Directive on the Assignment of Counsel, art. 26(C).

403 See Part VII of this Guide for a discussion of the initial appearance.

404 Rule 61(i).

405 Curiously, it appears that the Judge is required to question every accused person about their means at this stage. "The Designated Judge … shall question the accused with regard to his [sic] means", even if the accused has retained independent counsel or indicated they will represent themselves. Rule 61.

assistance to the accused as necessary,[406] unless the accused has elected to represent themselves or has refused representation. At this stage, the Defence Office will provide the accused person with the list of assigned counsel from which defence counsel may be chosen.

In the ICTY and ICTR, the right of an indigent person to be assigned legal assistance differs between the investigative phase, where the right is unconditional, and the trial phase, where the right is limited by what is necessary in the interests of justice.[407] In the Special Court, however, the "interests of justice" limitation applies both during the investigative phase,[408] and the trial phase;[409] although the right to initial legal advice and assistance during the period between detention and the initial appearance appears to be unconditional.[410] Furthermore, it appears that the indigence of a suspect undergoing questioning is not in itself sufficient to fulfil the "interests of justice" requirement, as the suspect has the right to have legal assistance provided by the Defence Office "where the interests of justice so require *and* where the suspect does not have sufficient means to pay for it".[411] Nevertheless, the Rules provide that a suspect may not be questioned without the presence of counsel unless the suspect has voluntarily waived the right to counsel.[412] As a practical matter, this presumably means that indigent suspects will have to be provided with legal assistance free of charge in order that they may be questioned, without the need to bring additional proof that this is in the "interests of justice".

Finally, the Rules charge the Defence Office with providing facilities necessary for counsel in the preparation of the defence.[413] The facilities to be provided are governed by the part V of the Directive on the Assignment of Counsel, which entered into force on 3 October 2003. They include photocopiers, computer equipment, various types of office equipment and telephone lines for counsel who do not have professional facilities close to the seat of the Court,[414] as well as access to the libraries and documentation centre of the Court.[415] The Defence Office also provides weekly updates to assigned counsel on what is happening at the Court, including the different documents filed in Court each week. Furthermore, assistance is provided to defence teams by way of research on general areas of relevant law, case preparation and strategy, provided it can be done in such a way as to avoid the appearance of any conflict of interest.[416]

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406 See, for example, *Prosecutor v. Sesay*, Case No. SCSL-2003-05-I, Order for Legal Assistance and Detention on Remand, 15 March 2003.

407 Zappalà, pp 59-60.

408 Rule 42(A)(i). See also Part VI of the Guide for more discussion on the investigations phase.

409 Statute, art. 17(1)(d); Rule 45(B)(ii). See also Part VIII of the Guide for more discussion on the trial phase.

410 Rule 45(B)(i).

411 Rule 42(A)(i) (emphasis added).

412 *Ibid.* Augustine Gbao, who was provisionally detained as a suspect, signed a waiver of counsel form on 21 March 2003, although he subsequently filed a request for legal assistance (accompanied by a declaration of means) on 4 April 2003. The Registrar assigned counsel on 23 April 2003, although in the meantime, the indictment against Mr Gbao was approved and subsequently served. *Prosecutor v. Gbao*, Case No. SCSL-2003-09-I, Decision Approving the Indictment, 16 April 2003.

413 See part XII of this Guide for more information on the practical aspects of this function.

414 Directive on the Assignment of Counsel, art. 26(A).

415 *Ibid*, art. 26(B).

416 See http://www.sc-sl.org/, on the Defence Office, last viewed on 17 February 2004.

3. Assigned counsel

While the majority of accused before the Special Court have assigned counsel, as is the case in the *ad hoc* tribunals,[417] it should be noted that a suspect or accused has the right to engage his or her own counsel, provided that counsel has been admitted to the practice of law in any State and has at least five years of criminal defence experience.[418] If the suspect or accused elects to engage their own counsel, that counsel must file a power of attorney with the Registrar at the earliest opportunity.[419] In addition, a suspect or accused may conduct his or her own defence, which must be notified in writing to the Registrar at the first opportunity.[420]

In addition to the functions outlined in Rule 45(B), in the interests of providing an effective defence, the Principal Defender is also required to, "maintain a list of highly qualified criminal defence counsel whom he [sic] believes are appropriate to act as duty counsel or to lead the defence or appeal of an accused".[421] The criteria for inclusion on the List of Assigned Counsel are: fluency in English (the official language of the Court); admission to practice in the law of any State; at least seven years of relevant experience; willingness to be assigned by the Special Court to suspects or accused persons;[422] and have no record of professional or other misconduct.[423] In addition, the possibility of a conflict of interest is taken into account when considering the assignation of counsel to an accused or a suspect.[424]

Any suspect or accused requesting legal assistance must file a declaration of means, in which they must list their income, assets, dependants and whether they are the sole means of support for their family.[425] On the basis of that information, the Principal Defender will then investigate their financial situation and reach a decision as to whether the suspect or accused is indigent, partially indigent or not.[426] If the suspect or accused is found to be indigent, the Principal Defender may provisionally assign counsel, consulting with the suspect or accused to choose a name from the List of Qualified Counsel.[427] If the suspect or accused is found to be partially indigent, the Principal Defender may

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417 Zappalà, p 63.
418 Rule 44(A).
419 *Ibid.*
420 Rule 45*bis*.
421 Rule 45(C).
422 Rule 45(C)(i)-(iv) and Directive on Assignment of Counsel, art. 13(i)-(v).
423 Directive on Assignment of Counsel, art. 13(vi). To be included in the list, counsel who fulfil the criteria are required to submit to the Defence Office the Application Form for Assigned Counsel, together with certified copies of all relevant degrees, a curriculum vitae, a certificate of good standing from their professional body, two recent photographs, copies of their passport and a letter setting out their schedule for the following 18 months and undertaking to be available for trial if called upon. *Ibid*, art. 13(C).
424 See Special Court press release, *Court Rebuttal of Allegations of Mistreatment by Mr Edo Okanya*, 1 May 2003, which says, "If an Accused or Suspect declares that they cannot afford to contract a lawyer and makes a request for the assignment of legal assistance, then the Defence Office assigns the Accused or Suspect a lawyer from a list of persons who meet the relevant requirements and also, importantly for this case, do not have a conflict of interest."
425 Rule 45*bis*. Note, however, that the Principal Defender and the Defence Office are required to keep confidential any information about the suspect or accused's financial situation. Directive on Assignment of Counsel, art. 7(B).
426 Directive on the Assignment of Counsel, arts. 8 and 9.
427 *Ibid*, art. 9(i). It should be noted that assigned counsel may be withdrawn if the suspect or accused is no longer indigent. *Ibid*, art. 23.

provisionally assign counsel once the suspect or accused has paid an amount to be determined by the Principal Defender, in which case the decision must be accompanied by a written explanation on the amount to be paid.[428] It should also be noted that the Principal Defender may decide to assign counsel in the absence of the filing of a declaration of means or an investigation, if it is in the interests of justice so to do.[429] Alternatively, the Principal Defender may decide not to assign counsel, in which case the decision must be accompanied by reasons in writing.[430]

In any case, the Principal Defender shall notify the suspect or accused of his or her decision regarding the assignment of counsel as outlined above; any counsel thus assigned are also to be notified.[431] A suspect or accused who has been denied assignment of counsel or who is required to pay a certain amount for the assignment of counsel has the right to seek review of that decision, with the assistance of duty counsel, by way of preliminary motion before the "appropriate" Chamber objecting to the Principal Defender's decision in accordance with Rule 72(B)(iv).[432]

Counsel assigned by the Defence Office are expected to conduct the case to finality and are only permitted to withdraw in the most exceptional circumstances; any failure to conduct the case to finality that is not approved by a Chamber[433] may result in the partial or total forfeiture of fees.[434] Counsel are also subject to the "relevant provisions of the Agreement, the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Special Court, the Host Country Agreement, the Code of Professional Conduct and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel".[435] Any request for the replacement of assigned counsel must be addressed to the Principal Defender, who may withdraw the assignment in a range of specified circumstances; where the situation does not involve misconduct by counsel or their removal from the list of qualified counsel, exceptional circumstances must exist in order for the Principal Defender to grant the request.[436] Where the request is denied, the person making the request may seek review of the decision by the presiding Judge in the appropriate Chamber.[437] In addition, in exceptional circumstances, the request may be made to a Chamber upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings.[438] If counsel is withdraws or is withdrawn, the Principal Defender must immediately assign new counsel to an indigent suspect or accused.[439]

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428 *Ibid*, art. 9(ii).
429 *Ibid*, art. 10.
430 *Ibid*, art. 9(iii).
431 *Ibid*, art. 11.
432 *Ibid*, art. 12.
433 The Rules do not specify which Chamber; presumably either the Trial Chamber or the Appeal Chamber may act in this regard.
434 Rule 45(E).
435 Rule 44. See also Rule 46 and the discussion on this rule in Part XII of this Guide and the Directive on Assignment of Counsel, article 24.
436 Rule 45(D); Directive on the Assignment of Counsel, art. 24(A) and (B).
437 Directive on the Assignment of Counsel, art. 24(E) and (F).
438 Rule 45(D).
439 Rule 45(D); Directive on the Assignment of Counsel, art. 24(D).

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The structure of the Special Court for Sierra Leone mirrors that of the ICTY, the ICTR and the ICC in terms of the principal organs of the Court, namely Chambers, the Office of the Prosecutor and the Registry. The innovation of the organisation of the Special Court comes in the form of the establishment of the Defence Office, which is charged with the functions relating to the defence that are assigned to the Registrar in the ad hoc Tribunals. By providing a Defence Office almost at the same level as the organs outlined above, the Special Court has taken a unique step towards guaranteeing the equality of arms and the right to a fair trial in a structured way while avoiding the problems that have plagued the two *ad hoc* tribunals, as well as the Special Panel for Serious Crimes in East Timor.[440] Nevertheless, while the Defence Office has to date discharged its duties professionally and efficiently, care must continue to be taken to ensure that no difficulties arise in relation to the appearance of a conflict of interest, whether through the activities of duty counsel or in relation to assigned counsel.

[440] See generally the report written by Sylvia de Bertodano on behalf of NPWJ, *Report on Defence Provision for the Special Court for Sierra Leone*, available from http://www.specialcourt.org/.

Part V
Cooperation with States[+]

State cooperation with the Special Court for Sierra Leone depends on the terms of the relationship between an individual State and the Court. While these terms differ, all relationships with the Court find their basis in the Court's basic documents: the Agreement, the Statute, and the Rules of Procedure and Evidence. These documents establish a structure for the Court's relationships that is characterised by two sets of obligations and two modes of communication.

For Sierra Leone, these documents – as well as Sierra Leone's Special Court Agreement Ratification Act – establish obligations to cooperate with all organs of the Court and comply with all orders of the Court. For other States, however, there are no obligations to cooperate or comply. Instead, States other than Sierra Leone are encouraged to cooperate with the Court and, if possible, enter into agreements of cooperation with the Court.

The two modes of communication that are recognised by the Court's basic documents are requests and orders. A request may be issued by any of the organs of the Court, namely the Chambers, the Office of the Prosecutor, or the Registry. An order only may be issued by the Chambers.

In order to explore further State cooperation with the Special Court, this part begins with an examination the obligations of States to the Special Court, whether Sierra Leone or another State. It next discusses the Court's two modes of communication – requests and orders. The examination of these general principles is then followed by a discussion of their application in the context of deferral and discontinuance.

A. Obligations of States

1. Sierra Leone

The Government of Sierra Leone is obliged to cooperate with the Special Court's requests and comply with its orders. Pursuant to article 17(1) of the Agreement, and as acknowledged in Rule 8, the Government of Sierra Leone is obliged to cooperate with "all organs of the Special Court at all stages of the proceedings". In particular, the Government is obliged to "facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation".[441] Furthermore, under article 17(2) of the Agreement, the Government of Sierra Leone must "comply without undue delay with any request for assistance by the Special Court". The Government also must "comply without undue delay with … an order issued by the Chambers".[442]

[+] Part V was prepared thanks to substantial contributions of research and writing from John Stompor. NPWJ remains nonetheless responsible for the views expressed herein as well as any errors or omissions.

[441] Agreement, art. 17(1).

[442] *Ibid*, art. 17(2).

With the enactment of the Special Court Agreement, 2002 (Ratification) Act, 2002, Sierra Leone incorporated these obligations into its national laws. Sections 14 through 18 of the Ratification Act establish a framework for cooperation with requests from the organs of the Court. Section 20 of the Act provides that an order issued by the Chambers of the Special Court is binding in Sierra Leone and states that it has "the same force or effect as if it had been issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone court."[443] Moreover, section 21 of the Act mandates that "any person" who executes the order must comply with "any direction specified in that order" and that "every natural person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court."

2. Other States

States other than Sierra Leone are not obliged to cooperate with the Court's requests or comply with its orders. The Agreement, the Statute, the Rules and Sierra Leone's Ratification Act only establish obligations to cooperate and comply on the part of Sierra Leone, not other States.

States other than Sierra Leone are instead encouraged to cooperate with the Special Court. For example, UN Security Council Resolution 1470 "urges all States to cooperate fully with the Court".[444] The Management Committee for the Special Court also has, as one of its functions, the responsibility to "[e]ncourage all States to cooperate with the Special Court".[445]

In its Rules, the Special Court has anticipated that such encouragement might result in cooperation and compliance by other States. For example, Rule 8(C) foresees that the Court may invite other States to provide assistance to the Court "on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis."[446]

B. Requests and Orders

1. Requests

A request is not expressly defined in the Agreement, the Statute, the Rules or Sierra Leone's Special Court Agreement Ratification Act. Nonetheless, it is acknowledged by Rule 8 to be a form of communication that may be used by any organ of the Court to obtain assistance. According to the Agreement, Statute, Rules and Ratification Act, requests may be made by organs of the Court to obtain assistance from a State with regard to deferral, discontinuance, identification and location of persons, service of

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443 Rule 8(A) echoes this language, stating: "An order issued by a Chamber or by a Judge shall have the same force or effect as if issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone court." Rule 8(A), however, does not acknowledge that the source of this language – and an important source of the force and effect of the Special Court's orders in Sierra Leone – is the Special Court Agreement Ratification Act, section 20.

444 S.C. Res. 1470, 4729th meeting, 28 March 2003, UN Doc. S/RES/1470 (2003).

445 Terms of reference for the Management Committee for the Special Court for Sierra Leone, para. 3(e), attached as Appendix III to the *Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone*, annexed to the Letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2002/246.

446 The language of Rule 8(C) is similar to article 87(5)(a) of the ICC Statute, which states: "The Court may invite any State not party to this Statute to provide assistance … on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis."

documents, arrest or detention of persons and transfer of an indictee to the Court. Rule 8(E) also specifies that the Prosecutor may request a State "to forward to him [sic] all relevant information" regarding "a crime within the jurisdiction of the Special Court [that] is or has been the subject of investigations or criminal proceedings instituted in the courts of any State." These examples, however, are not exhaustive. Article 17 of the Agreement and section 15 of the Ratification Act make clear that by noting these examples, they are not limiting the subjects of potential requests.[447]

As mandated by article 17(2) of the Agreement, and acknowledged in Rule 8, the Government of Sierra Leone, as the legal representative of the Republic of Sierra Leone, must "comply without undue delay with any request for assistance by the Special Court". In order to meet the requirements of this obligation, Sierra Leone provided for a procedure for responses to requests in its Special Court Agreement Ratification Act.[448]

Pursuant to section 15(1) of the Ratification Act, "upon receiving from the Special Court a request for assistance", the Attorney-General of Sierra Leone must consider such request "without any undue delay". In accordance with section 18(1), the Attorney-General must then, without undue delay, notify the Court "of his response to a request and the outcome of any action that has been taken in relation to it."

In execution of a request, the Ratification Act mandates strict adherence to the terms of such request. Section 16 states that if a request for assistance specifies that it should be executed in a particular manner that is not prohibited by Sierra Leone law, the Attorney-General must ensure that the request is executed in that manner. Moreover, under section 17, adherence to the terms of a request is specified to include maintenance of the confidentiality of the request where required by the Court, except to the extent that disclosure of the request is necessary for its execution.

The procedure in the Ratification Act also recognises that there might be an instance in which the Attorney-General must refuse or postpone compliance with a request. Section 18 provides that in such instances the Attorney-General must notify the Special Court and provide the reasons for such failure to comply. This procedure appears designed to resolve situations in which compliance with a request might violate the existing laws of Sierra Leone or might be impossible without judicial order. For example, in the case of a request that would require disclosure of "material that may be prejudicial to the national security of the Republic of Sierra Leone", section 18(4) provides that the Attorney-General shall "without undue delay, notify the Special Court of that fact together with the reasons therefor." Once the Court receives this response, a Judge of the Court may order disclosure of the material, which is recognised by the Ratification Act to be authorisation for disclosure that otherwise would have been prohibited under Sierra Leone's national security laws.

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447 Section 15(3) of the Special Court Agreement Ratification Act also acknowledges the possibility of "co-operation of an informal nature."

448 The Special Court Agreement Ratification Act also sets out a procedure for requests for assistance from Sierra Leone to the Special Court. Under section 19(1) of the Ratification Act, the Attorney-General of Sierra Leone may make a request for assistance to the Special Court "for the purposes of any investigation into or trial in respect of any act or omission that may constitute a crime within the jurisdiction of the Special Court." However, in the absence of an agreement between Sierra Leone and the Special Court regarding such requests, there is no obligation of compliance on the part of the Court.

Ultimately, the Government of Sierra Leone has undertaken to comply with requests for assistance from the Special Court and Rule 8 acknowledges this obligation. Rule 8(B) provides that, in general, "where a Chamber or a Judge is satisfied that the Government of Sierra Leone has failed to comply with a request made in relation to any proceedings before that Chamber or Judge, the Chamber or Judge may refer the matter to the President to take appropriate action."[449] Before taking such step, however, it is likely that the Chamber or Judge would issue an order, which, as noted above in the case of a request for material that may be prejudicial to national security, is necessary in certain instances to facilitate compliance by Sierra Leone.

States other than Sierra Leone are not obliged to cooperate with the Court's requests, but are encouraged to do so by the UN Security Council and the Management Committee for the Special Court. Since there is no formal obligation of cooperation on the part of States other than Sierra Leone, there is no established procedure for responding to a request.

For this reason, Rule 8 foresees that the Court might enter into agreements or ad hoc arrangements for cooperation that would include a procedure for compliance with a request. Rule 8 also foresees enforcement of such ad hoc arrangements or agreements. In such cases, it provides that if a State "fails to cooperate" with the Court's requests, the Court's "President may take appropriate action."[450]

Ultimately, it is possible that, if a State refuses to cooperate with a request that is critical to an organ of the Special Court, the Court might appeal to the Management Committee and invite one of its member States to appeal to the UN Security Council for assistance in obtaining cooperation. Prior to undertaking this step, however, it is likely that the Court would exhaust any available alternative, including all diplomatic means of securing cooperation.

2. Orders

In accordance with the Agreement, the Statute and the Rules, an order may be issued by a Chamber or by a Judge. Sierra Leone's Special Court Agreement Ratification Act takes an additional step and defines an "order of the Special Court" to mean "any order, summons, subpoena, warrant, transfer order or any other order issued by a judge of the Special Court".[451] These documents also acknowledge that, without limitation, an order may be issued regarding any of the examples of potential requests noted in the previous section. With respect to the form of an order, however, they provide no direction, leaving this matter to the discretion of the Judges of the Court.

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[449] Rule 8(B) states that there are four exceptions to this general rule: "cases to which Rule 11, 13, 59 or 60 applies". Rule 13 sets out specific procedures regarding requests and orders for discontinuance, and also provides for the President to "take appropriate action" if a court fails to cooperate with a request or comply with an order. It is unclear, however, why the other rules are listed as exceptions. Rule 11 deals only with orders – not requests – for deferral. Rule 59 deals with the failure to execute a transfer order or a warrant of arrest, which is also a form of order. Rule 60 does not discuss requests or orders; rather, it deals with trial in the absence of the accused.

[450] Rule 8(D).

[451] Special Court Agreement Ratification Act, s. 1. This mirrors Rule 54 of the Special Court Rules, based on the ICTR equivalent, which provides for the power of a Judge or Chamber to issue "orders, summonses, subpoenas, warrants and transfer orders".

In Sierra Leone, the obligation to comply with orders of the Court is absolute. Section 21(2) of the Special Court Agreement Ratification Act establishes that an order of the Special Court is binding on "every natural person, corporation, or other body created by or under Sierra Leone law."[452] Regarding procedures for compliance with an order, section 21(1) of the Act provides that "any person executing an order of the Special Court shall comply with any direction specified in that order." In particular, with respect to the execution of an order for seizure of documents or other tangible objects, section 21(3) requires such items to be delivered "forthwith" into the custody of the Special Court, even if that is not specified in the order. Finally, section 21(4) requires that "[i]f a person to whom an order of the Special Court is directed is unable to execute that order, he [sic] shall report forthwith the inability to the Special Court and give the reasons therefor." This section of the Ratification Act facilitates compliance with provisions such as Rule 59, which sets out a requirement for the reporting forthwith by Sierra Leone authorities of any inability to execute a warrant of arrest or transfer order that has been transmitted to them.[453]

States other than Sierra Leone are not obliged to comply with the Court's orders, but are encouraged to do so. Thus, as is the case with requests, since there is no formal obligation on the part of States other than Sierra Leone, there is no established procedure for compliance with an order. Rather, States are encouraged to negotiate such a procedure with the Court. If a State refuses to comply with an order, the Special Court retains the option of appealing to the Management Committee and inviting one of its member States to appeal to the UN Security Council for assistance in obtaining compliance.

C. Deferral

Rules 9 through 11 establish a procedure regarding deferral of investigations or proceedings instituted in the courts of a State. Through this procedure, the Special Court asserts jurisdiction by requesting or ordering the court of a State to cease investigations and proceedings regarding matters set out in the Statute. The Special Court may then undertake investigations and proceedings regarding these matters in accordance with its competence.

Rule 9 provides that the Prosecutor may apply to the Trial Chamber of the Special Court for a request or an order for deferral:

> "[w]here it appears that crimes which are the subject of investigations or proceedings instituted in the courts of a State:
>
> (i) Are the subject of an investigation by the Prosecutor;

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452 In addition, section 38 of the Special Court Agreement Act provides:

> "Any person who resists or wilfully obstructs–
> (a) an official of the Special Court in the execution of his duty, or any person lawfully acting in aid of such an official; or
> (b) any person executing an order of the Special Court,
> commits an offence and shall be liable on conviction, to a fine not exceeding two million leones or to a term of imprisonment not exceeding two years or to both such fine and imprisonment".

453 For a discussion of arrest and transfer, see part VII of the Guide.

(ii) Should be the subject of an investigation by the Prosecutor considering, amongst others:
  (a) The seriousness of the offences;
  (b) The status of the accused at the time of the alleged offences;
(iii) Are the subject of an indictment in the Special Court,
(iv) Fall within Rule 72(B)."

Because the Prosecutor is responsible pursuant to the Statute for the investigation and prosecution of crimes within the jurisdiction of the Court, it is understandable that the Court permits him to seek deferral a State's investigations or proceedings with respect to crimes that satisfy Rules 9(i), (ii) or (iii), and are thus within the Court's presumptive jurisdiction. It is unclear, however, based on a plain reading of Rule 9, how Rule 9(iv) designates "crimes" or what this sub-rule is meant to achieve.

Rule 9(iv) provides that the Prosecutor may apply for a request or an order of deferral of a State's investigations or proceedings if they have as their subject "crimes" that fall within Rule 72(B). This sub-rule, however, does not refer to crimes but to preliminary motions by the accused. Rule 72(B) reads only as follows:

"(B) Preliminary motions by the accused are:
(i) Objections based on lack of jurisdiction;
(ii) Objections based on defects in the form of the indictment;
(iii) Applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82(B);
(iv) Objections based on the denial of request for assignment of counsel; or
(v) Objections based on abuse of process."

It may be that the Court intends to allow the Prosecutor to seek deferral of a State's proceedings that have as their subject the preliminary motions by an accused. If this is the case, however, there does not appear to be a need for Rule 9(iv), because a preliminary motion by an accused presumes the existence of an indictment, which is the basis for an application for deferral under Rule 9(iii).

Pursuant to Rule 10(A), once the Trial Chamber is seized of such application, "[i]f it appears … that Sub-Rules (i), (ii) or (iii) of Rule 9 is satisfied, the Trial Chamber shall issue an order or request for assistance to the effect that the court defer to the competence of the Special Court." Such order or request for deferral "shall include a request that the results of the investigation and a copy of the court's records and the judgement, if already delivered, be forwarded to the Registrar."[454] Significantly, Rule 10 does not discuss an application based on Rule 9(iv) and declines to state that the Trial Chamber must – or may – issue a request or an order for deferral if Rule 9(iv) is satisfied.

With respect to the determinations of the investigations or proceedings instituted in the courts of a State, Rule 12 makes clear that, subject to article 9(2) of the Statute, they are not binding on the Special Court. Article 9 of the Statute concerns the principle of *non bis in idem*, or double jeopardy, which holds that a person should not be tried twice for

[454] Rule 10(B).

the same crime. Article 9(2) specifically provides, however, that within the framework of the principle of double jeopardy,

> "[a] person who has been tried by a national court for the acts referred to in articles 2 to 4 of the present Statute may be subsequently tried by the Special Court if:
>
> (a) The act for which he or she was tried was characterized as an ordinary crime; or
>
> (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted."

In responding to a request or an order for deferral, Sierra Leone is guided by article 8 of the Statute. With respect to the relationship between the Special Court's Chambers and the national courts of Sierra Leone, it specifies that, while the Special Court and the national courts of Sierra Leone have concurrent jurisdiction, the Special Court has primacy over the national courts of Sierra Leone.[455] It further provides that "[a]t any stage of the procedure, the Special Court may formally request a national court to defer to its competence."[456] Upon receiving any request for deferral pursuant to article 8 of the Statute, section 14 of the Special Court Agreement Ratification Act provides that the Attorney-General "shall grant the request, if in his [sic] opinion there are sufficient grounds for him to do so." This provision allows the Attorney-General to comply with the request if it is within his or her powers. If it is not, such as a case where a deferral requires an order of the courts of Sierra Leone, the Attorney-General must report this inability to the Special Court in accordance with section 18 of the Ratification Act. In such instances, the Trial Chamber may issue an order for deferral, with which Sierra Leone is bound to comply, as it is bound to comply with any other order of the Court.

Rule 11 provides specific guidance about the timing of compliance. It states that, if "within 21 days after an order for deferral has been notified by the Registrar to the Government of Sierra Leone" the Government of Sierra Leone "fails to file a response which satisfies the Trial Chamber that it has taken or is taking adequate steps to comply with the order, the Trial Chamber may refer the matter to the President to take appropriate action."[457]

There currently are no particular procedures for States other than Sierra Leone to respond to a request or comply with an order for deferral. Again, other States are encouraged to cooperate with such requests and comply with such orders.

Following a deferral, if the Special Court discontinues its investigation or prosecution, the proceedings may be reinstituted in the courts of a State, subject to the principle of *non bis in idem*, or double jeopardy. With respect to this principle, article 9(1) of the Statute specifically states: "No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court."

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455 Statute, art. 8.

456 *Ibid*, art. 8(2).

457 Rule 11.

D. Discontinuance

Rule 13 sets out a procedure with respect to discontinuance of criminal proceedings in national courts "instituted against a person … for acts for which that person has already been tried by the Special Court." This procedure enables the Special Court to act in protection of the principle of *non bis in idem*, or double jeopardy, by working to ensure that a person is not tried twice for the same crime. Rule 13 specifically provides that, when the Special Court's President "receives reliable information" with regard to such proceedings in the court of a State, he or she is required to "issue a reasoned order or request to such court seeking permanent discontinuance of its proceedings."

In responding to a request or an order for deferral, Sierra Leone is guided by article 9 of the Statute. It provides: "No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court."[458] If the Attorney-General receives any request for discontinuance, section 14 of the Special Court Agreement Ratification Act provides that "he [sic] shall grant the request, if in his opinion there are sufficient grounds for him to do so". As with the case of a request for deferral, this provision allows the Attorney-General to comply with the request if it is within his or her powers. If it is not, such as where discontinuance requires an order of the courts of Sierra Leone, the Attorney-General must report this inability to the Special Court in accordance with section 18 of the Ratification Act. In such circumstances, the Special Court's President may issue an order for discontinuance, with which Sierra Leone is bound to comply, as it is bound to comply with any other order of the Court.

For States other than Sierra Leone, there currently are no particular procedures to respond to a request or comply with an order for discontinuance.

In the case of a request or order for discontinuance directed to any State, Rule 13 states that the Special Court's President has the discretion to "take appropriate action" if the proceedings in the national court are not permanently discontinued. Presumably, such action might include appealing to the Special Court's Management Committee and inviting one of its member States to appeal to the UN Security Council for assistance in obtaining cooperation or compliance.

* * * *

As can be seen from the discussion above, cooperation with the Special Court for Sierra Leone depends on the terms of the relationship between an individual State and the Court, as well as the Court's mode of communication, whether a request or an order. Currently, only Sierra Leone is obliged to cooperate with the requests and comply with the orders of the Special Court. It is hoped, however, that in time additional States will agree to cooperate with the Special Court. Such cooperation is particularly important in order for the Special Court to secure the arrest and transfer of all those indicted, to protect the rights of all persons appearing before the Court and to ensure the enforcement of penalties.

[458] Statute, art. 9(1).

Part VI
Investigations[+]

Responsibility for the investigation of crimes within the jurisdiction of the Special Court rests with the Prosecutor. To enable the Office of the Prosecutor to fulfil these duties, the Statute provides it with significant powers. In addition, the Rules set out several provisional measures – including arrest and detention – that may be requested by the Prosecutor. This part first discusses the investigatory powers of the Prosecutor. It then examines the provisional measures available to the Prosecutor and the rights of the suspect during an investigation.

A. Investigatory powers of the Prosecutor

Pursuant to article 15(1) of the Statute of the Special Court, the Prosecutor is "responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leone law committed in the territory of Sierra Leone since 30 November 1996." In carrying out these responsibilities, the Prosecutor is mandated by the Statute to "act independently as a separate organ of the Special Court."[459] The Prosecutor also is commanded not to "seek or receive instructions from any Government or from any other source."[460]

To fulfil these responsibilities, article 15(2) of the Statute provides the Office of the Prosecutor with the power "to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations." It also provides that the Prosecutor shall have the assistance of Sierra Leonean authorities; by article 17(1) of the Agreement, Sierra Leone has already undertaken to "facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation."[461]

The Rules of Procedure and Evidence of the Special Court provide additional information with respect to how the Prosecutor may exercise these investigatory powers. Rule 2 defines an "investigation" as "[a]ll activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after approval of an indictment". Then, echoing but not specifically referring to the provisions of article 15 of the Statute, Rule 39 provides that "[i]n the conduct of an investigation" the Prosecutor may "[s]ummon and question suspects, interview victims and witnesses and record their statements, collect evidence and conduct on-site investigations". Rule 39 also provides that the Prosecutor may "[t]ake all measures deemed necessary for the purpose of the investigation, including the taking of any special measures to provide for the safety, the support and the assistance of potential witnesses

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[+] Part VI was prepared thanks to substantial contributions of research and writing from Sam Scratch. NPWJ remains nonetheless responsible for the views expressed herein as well as any errors or omissions.

[459] Statute, art. 15(1).

[460] *Ibid*; see also Agreement, art. 3: "The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source."

[461] For a discussion of cooperation between Sierra Leone and the Special Court, see part V of the Guide.

and sources". In addition, Rule 39 acknowledges that the Prosecutor may need to seek the assistance of State authorities as well as relevant international bodies, including the International Criminal Police Organization (INTERPOL), and invites the Prosecutor to "[r]equest such orders as may be necessary [in the conduct of an investigation] from a Trial Chamber or a Judge."

Finally, the Rules assign to the Prosecutor the responsibility for the "preservation, storage and security of information and physical evidence obtained in the course of his [sic] investigations."[462] Rule 41(B) further requires the Prosecutor to produce an inventory of all materials seized from the accused, serve a copy of the inventory on the accused and return without delay to the accused materials that are of no evidentiary value.

B. Provisional measures

Rule 40(A) provides that, in a "case of urgency", the Prosecutor may request the assistance of a State by undertaking provisional measures. The Prosecutor may request a State to do any of the following: "arrest a suspect and place him [sic] in custody in accordance with the laws of that State"; "seize all physical evidence"; and "take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence."[463]

The right to personal liberty is now considered to be "one of the most fundamental tenets of human rights law, to be preserved in all phases of the administration of criminal justice".[464] The International Covenant on Civil and Political Rights (ICCPR) 1966, as well as many domestic jurisdictions, recognises the right of those arrested to be brought promptly before a Judge for trial within a reasonable time, or to be released.[465] The rationale behind this principle is that the fundamental importance of the right to personal liberty requires that an independent assessment of the reasons that an authority may have for detaining someone be undertaken at the earliest opportunity, given the fundamental importance of personal liberty.

This is reflected in the Rules of the Special Court, in particular in Rule 40(B), which provides that if a suspect is arrested by a cooperating State pursuant to a request by the Prosecutor, in addition to adhering to the laws of that State, the Prosecutor must, within 10 days from such arrest, "apply to the Designated Judge for an order pursuant to Rule 40*bis* to transfer the suspect to the Detention Facility [of] the Special Court or to such other place as the President may decide, with the advice of the Registrar, and to detain him [sic] provisionally." If the Prosecutor fails to make that application within the 10-day period, Rule 40(C) states that the suspect shall be released. Although the Rules appear to suggest that the Court must review a suspect's situation within that 10-day period, the Trial Chamber's recent ruling in *Prosecutor v. Kondewa* suggests that it will be up to an accused or suspect to make an application for review under Rule 40*bis*(K) where there is an issue as to the legality of his or her detention.[466] Rule 40(C) also states that the

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462 Rule 41(A).
463 Rule 40(A).
464 Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, Oxford, 2003, p. 67.
465 International Covenant on Civil and Political Rights 1966, art. 9(3).
466 *The Prosecutor v. Kondewa*, Case No. SCSL-2003-12-PD, Decision on the Urgent Defence Application for Release from Provisional Detention, 21 November 2003. This is similar to the situation in the ICTY

suspect shall be released if "the Chamber so rules". Furthermore, the Prosecutor may request the State to release the suspect at any time.

In this respect, the Rules of the Special Court differ from the Rules of the ICTY and ICTR and provide better safeguards for the suspect's right to personal liberty, as the corresponding provision of the ICTR and ICTY Rules contain no time limit for the period between arrest and the suspect appearing before a Judge.[467] As such, these provisions are open to abuse, as any time spent in detention prior to the transfer of a suspect to the ICTY or ICTR – which is not subject to any "reasonable time" requirements – is not calculated within the 90-day limit after which the suspect must be released if charges are not brought formally.[468]

Rule 40*bis*(A) permits the Prosecutor to transmit to the Registrar a request for an order by the Designated Judge for a suspect's transfer to and detention in the premises of the Detention Facility of the Special Court. The request must indicate "the grounds upon which the request is made and, unless the Prosecutor wishes only to question the suspect, shall include a provisional charge and a brief summary of the material upon which the Prosecutor relies."[469] It is thus interesting to note that Rule 40*bis*(A) permits the Prosecutor to seek detention of suspects whom the Prosecutor only wishes to question.[470]

According to Rule 40*bis*(B), the Designated Judge shall then order the transfer and provisional detention of the suspect, provided the Prosecutor has made a request in accordance with Rule 40 or the suspect is otherwise detained by a State. In addition, the Designated Judge must consider provisional detention "to be a necessary measure to prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation." Where there are provisional charges, there also must be "reason to believe that the suspect may have committed a crime or crimes specified in those provisional charges over which the Special Court has jurisdiction".[471]

Nevertheless, the Trial Chamber has interpreted the arrest and detention provisions in the Rules in such a way that the threshold to be met by the Prosecution in order to justify an individual's detention is considerably lower than in many jurisdictions. The decision in *Kondewa* contains the most – and at this point, the only – comprehensive interpretation by the Special Court Trial Chamber of the arrest and initial detention provisions in the Rules of the Special Court. It is worth nothing that in addressing the defence motion that these rules were *ultra vires* because the Statute makes no provision for the detention of suspects, the Trial Chamber held that such powers of detention are

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and ICTR; although neither Tribunal has ruled directly on this issue, the facts of the *Barayagwiza* case suggest that the Trial Chamber of the ICTR did not consider itself bound to monitor the apprehension or detention of that suspect: *Prosecutor v. Barayagwiza*, ICTR, Case No. ICTR-97-19.

467 ICTR Rule 40(B); ICTY Rule 40.

468 See Zappalà, supra, p. 70.

469 Rule 40*bis*(A).

470 Note the United States Code, Title 18, Section 3144, which provides for the detention of a material witness. However, such detention may only be effected if "the testimony of a person is material in a criminal proceeding" and upon showing proof that "it may become impracticable to secure the presence of the person by subpoena".

471 Rule 40*bis*(B)(ii).

"ancillary to a proper functioning of 'the Special Court' ".[472] More importantly, however, the decision in *Kondewa* also defines the scope of the requirements for "reasonable belief" (that an offence has been committed) in Rule 40*bis*(B)(ii) and "necessity" in Rule 40*bis*(B)(iii).

With respect to the requirement in Rule 40*bis*(B)(ii) that there be "reason to believe that the suspect may have committed a crime or crimes" within the jurisdiction of the Special Court, the Trial Chamber held that in the absence of alternate proof, the statement of the *prosecution's* belief that the suspect had committed offences within the jurisdiction of the Special Court was sufficient grounds to satisfy this requirement. The test that the Trial Chamber appeared to apply seems to be a test in the negative, namely whether the issuing Judge had "valid reasons not to accept, believe or to disregard" the information provided by the Prosecutor.[473] If the Judge does not have such "valid reasons", then the order for provisional detention shall be issued. In the absence of a requirement for detailed supporting statements, it is difficult to see how a Judge could find *valid* reasons for not accepting, disbelieving or disregarding a conclusory statement as to a suspect's guilt. While the Chamber did state that, "it might have been *preferable* for the Prosecution to provide more detailed statements",[474] such detail is not required for the issuance of an order for provisional detention. Given that there is no requirement to submit detailed supporting statements, the *Kondewa* decision appears in effect to put the burden on an accused or suspect to show that the prosecution's information is somehow defective in order to challenge the validity of the arrest and detention order. This arguably falls short of the international human rights standards regarding judicial supervision of any interference with personal liberty, particularly where the order is sought *ex parte*.

In the *Kondewa* decision, the Trial Chamber also equated the necessity requirement in Rule 40*bis*(B)(iii) with the requirements for provisional release of an accused, including the "proportionality test", namely whether the measure sought was "suitable, necessary and if its degree of and scope remain in a reasonable relationship to the envisaged target".[475] Taking its cue from the ICTY in *Prosecutor v. Hadzihasanovic et al.*,[476] the Special Court Trial Chamber deemed that pre-trial detention was likely the norm for a court such as the Special Court, as it lacks the coercive powers available to most judicial institutions and in light of the "very serious nature" of the crimes within its jurisdiction.[477] In this context, it is worth emphasising that the language of Rule 40*bis*(B) appears to be mandatory, in that if a Designated Judge is satisfied of the conditions outlined above, he or she *shall* order provisional detention. The Trial Chamber's decision in *Kondewa* appears to rely heavily on this absence of discretion without fully exploring whether the mandatory language of the provision accords with human rights norms governing judicial review of arrest and detention. The wisdom of such an approach is highly questionable; indeed, it is difficult to argue that a body created to address such very serious crimes and

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[472] *Ibid*, para. 25.
[473] *Ibid*, para. 35.
[474] *Ibid*, emphasis added.
[475] *Ibid*, para. 42, quoting *The Prosecutor v. Hadzihasanovic et al.*, 19 December 2001, Decision Granting Provisional Release, IT-01-47-AR72, para. 8.
[476] *The Prosecutor v. Hadzihasanovic et al.*, Case No. IT-01-47-AR72, Decision Granting Provisional Release, 19 December 2001.
[477] *The Prosecutor v. Kondewa*, Case No. SCSL-2003-12-PD, Decision on the Urgent Defence Application for Release from Provisional Detention, 21 November 2003, para. 35, emphasis added.

contribute to the restoration of the rule of law may do so without strict adherence to due process rights.[478]

Pursuant to Rule 40*bis*(C), the period of provisional detention ordered may be "a period not exceeding 30 days from the day after the transfer of the suspect to the Detention Facility of the Special Court."[479] Rule 40*bis*(D) provides that the order for transfer and provisional detention must be signed by the Designated Judge and bear the seal of the Special Court. It also provides that the order must set out the basis of the request made by the Prosecutor, including any provisional charge, state the Designated Judge's grounds for making the order and specify the initial time period for the provisional detention of the suspect. The execution of the order, according to Rule 40bis(I), is governed by the provisions in Rules 55(B) to 59.[480]

Rule 40*bis*(E) provides that "[a]s soon as possible, copies of the order and of the request by the Prosecutor shall be served upon the suspect and his counsel by the Registrar." In accordance with Rule 40*bis*(D), the copy served on the suspect must also "be accompanied by a statement of his rights, as specified in this Rule and in Rules 42 and 43."[481]

After the suspect is transferred to the Special Court, Rule 40*bis*(J) provides that "the suspect, assisted by his [sic] counsel, shall be brought, without delay, before the Designated Judge who made the initial order, or another Designated Judge, who shall ensure that his rights are respected." Rule 40*bis*(K) explicitly states that during detention "the Prosecutor, the suspect or his counsel may submit to the Trial Chamber all applications relative to the propriety of provisional detention or to the suspect's release." Rule 40*bis*(L) provides: "Without prejudice to Sub-Rules (C) to (H), the Rules relating to the detention on remand of accused persons shall apply to the provisional detention of persons under this Rule."

Following the initial order for transfer and provisional detention, the Prosecutor is permitted under Rule 40*bis*(F) to seek an extension of the period of provisional detention. This request, indicating the grounds upon which it is made, may be granted by the Designated Judge who made the initial order, or another Designated Judge, "if warranted by the needs of the investigation".[482] Such extension, however, may be ordered only after an *inter partes* hearing and before the end of the current period of detention. In addition, the extension may only be for a period not exceeding 30 days.

Following an order extending the period of provisional detention, the Prosecutor is permitted under Rule 40*bis*(G) to seek a further extension of the period of provisional detention. This request, which must indicate the grounds upon which it is made, may be granted by the Designated Judge who made the initial order, or another Designated

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478 See Zappalà, supra, p. 6.

479 See *Prosecutor v. Delalic et al.*, Case No. IT-96-21, Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged Between Zejnil Delalic and Zdravko Mucic, 11 November 1996, at paras. 38-39, for a definition of investigative necessity, albeit in the context of the ICTY's equivalent of Rule 54's general order and warrant provisions.

480 For a discussion of the provisions of Rule 55(B) through Rule 59, see part VII of the Guide.

481 For a discussion of Rules 42 and 43, see section C of this part of the Guide.

482 Rule 40*bis*(F).

Judge, "if warranted by special circumstances".[483] Again, such extension may be ordered only after an *inter partes* hearing and before the end of the current period of detention. In addition, the extension may only be for a period not exceeding 30 days.

Rule 40*bis*(H) provides that "in no case" may the total period of provisional detention "exceed 90 days after the day of transfer of the suspect to the Special Court". It provides further that, at the end of such time, if an "indictment has not been approved and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made".[484] As a result of these provisions, there is a fairly clear time limit on the total time period for the detention under the authority of the Special Court of people against whom an indictment has not been confirmed.

C. Rights of the suspect

The rights of the suspect during an investigation are recognised in Rules 42 and 43.[485] Rule 42 recognises rights related to questioning by the Prosecutor. These are: the right to legal assistance, including the right to have legal assistance provided; the right to free assistance of an interpreter; and the right to remain silent. Rule 42 also requires the Prosecutor to inform the suspect of these rights "prior to questioning, in a language he [sic] speaks and understands". Moreover, Rule 42 provides that questioning of the suspect "shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel." It further provides that, even after a suspect waives his or her right to counsel, the suspect may later elect to have counsel, at which time questioning shall cease until counsel has been obtained or assigned. Rule 43 requires the Prosecutor to audio- or video-record any interrogation, including any waiver of the right to counsel. It also provides that the suspect must be supplied with a copy or duplicate original recording of the interrogation as well as a transcript. In this regard there appears little difference between the rights of suspects and accused.[486]

In addition, a suspect may assert any rights common to the major international human rights instruments, particularly the ICCPR. Human rights standards can be asserted in any legal proceedings, whether national or international.[487] Thus, the fact that the right to be protected against arbitrary detention, recognised under article 9 of the ICCPR, is not explicitly recognised by the Statute or the Rules does not prevent an accused or suspect from challenging his or her arrest as arbitrary or otherwise contrary to international human rights standards. Similarly, it is arguable that protection of privacy rights pursuant to article 17 of the ICCPR could be asserted to challenge investigatory procedures in a particular case.

The remedy for a violation of the rights of a suspect or an accused under the Statute, the Rules or customary international law is not directly addressed by the Statute or Rules. However, Rule 95 states that evidence will not be admissible at trial where its "admission

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[483] Rule 40*bis*(G).

[484] Rule 40*bis*(H).

[485] The rights of witnesses are less clear. In particular, it is not clear from the Statute, the Rules or the Special Court's case law that a suspect's rights, including the right to have counsel present during questioning, extends to witnesses, especially those who could become suspects.

[486] For a discussion of the assignment of counsel, see section D of part IV of the Guide.

[487] For a discussion of the reasons for such an extension, see Zappalà, supra, pp. 3-7.

would bring the administration of justice into serious disrepute." There is therefore a potential exclusionary remedy under Rule 95 in situations where investigatory or prosecutorial action violates an individual's rights. The question of what violations would bring the administration of justice into "serious disrepute" has yet to be considered by the Special Court. The phrase, however, echoes one contained in section 24(2) of the Canadian Charter of Rights and Freedoms; that country's appellate courts have developed jurisprudence concerning the phrase's application in several contexts.[488]

It is interesting to note the marked difference in the language of the Special Court's Rule 95 compared to its equivalent under the ICTY and ICTR Rules. Those rules speak of the exclusion of evidence obtained by methods that cast "substantial doubt on its reliability" or whose admission "is antithetical to, and would seriously damage, the integrity of the proceedings."[489] However, Decisions from the ICTY and ICTR concerning that exclusionary rule have yet to define the precise scope of the phrase "antithetical to, and would seriously damage, the integrity of proceedings", focussing instead on whether a rights violation occurred at all.[490]

* * * *

Presently, the only authoritative pronouncement by the Special Court on the provisions relating to investigation are found in the Trial Chamber's decision in *Prosecutor v. Kondewa*. The thread running through that decision leans heavily in favour of the prosecution, as is largely the case with the ICTY and ICTR. The loose requirements for the proof required to sustain the granting of an order for provisional detention effectively place the burden on a suspect and, by extension, an accused to prove that his or her arrest and detention was not conducted in accordance with the Rules.

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488 See Peter Hogg, *Constitutional Law of Canada*, Carswell, 1997, vol. 2, ch. 38; Kent Roach, *Constitutional Remedies in Canada*, Canada Law Book, 2003, ch. 10. The landmark Canadian case with respect to the meaning of bringing the administration of justice into disrepute – the language used in the Canadian Charter of Rights and Freedoms – is *R. v. Collins* (1987) 33 C.C.C.3d 1 (S.C.C.). The South African Constitution and New Zealand's Bill of Rights also contain similar provisions.

489 For a discussion of Rule 95, see Part IX of the Guide.

490 See, for example, *Prosecutor v. Delalic et al.,* Case No. IT-96-21, Decision on the Motion on the Exclusion and Restitution of Evidence and Other Material Seized from the Accused Zejnil Delalic, 9 October 1996.

Part VII
Pre-Trial Proceedings[+]

Pre-trial proceedings encompass a wide range of activities, from the preparation of an indictment to the hearing of preliminary motions. Following the natural chronology of proceedings, this part discusses the most significant aspects of pre-trial proceedings, including indictments, orders and warrants, production of evidence, depositions, and preliminary motions.

A. Indictments

The rules regarding indictments concern the procedure for issuing an indictment and the requirements as to its form. They also set out procedures regarding the amendment and withdrawal of an indictment, and joinder.

1. Approval and Form

An indictment must contain:

- the names and particulars of the suspect;
- a statement of each offence; and
- a short description of the particulars of the offence.[491]

In addition, the indictment must be accompanied by a case summary briefly setting out the allegations that the Prosecutor proposes to prove.[492]

With respect the specificity required in an indictment, the Court has found that the "fundamental question in determining whether an indictment was pleaded with sufficient particularity is whether the accused had enough detail to prepare his defence".[493] The degree of specificity required depends on a number of variables, such as the nature and scale of the events alleged, and it may be far higher in cases of ordinary crimes than in cases dealing with extraordinary or mass crimes.[494]

Using these as guiding principles, the Court has sanctioned the practice of referring to both victims and perpetrators by reference to their category or group, and has found that in cases of mass criminality the sheer scale of the offences make it impracticable to require a high degree of specificity with regard to such matters as the identity of victims and the time and place of events.[495] It has therefore found that phrases such as "an unknown number of" and "hundreds of" in relation to victims, and "large-scale" and

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[+] Part VII was prepared thanks to substantial contributions of research and writing from Stuart Alford and Sylvia de Bertodano, and from Haddijatu Kah-Jallow and Ibrahim Yillah. NPWJ remains nonetheless responsible for the views expressed herein as well as any errors or omissions.

491 Rule 47(C).

492 *Ibid.*

493 *Prosecutor v. Sesay*, Case No. SCSL-03-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003, at para. 7(ii).

494 *Ibid,* at paras. 8-9.

495 *Ibid,* at para. 7(xi).

"widespread" in relation to events, are permissible.[496] However, the Court has found that use of the phrase "but not limited to those events" is impermissibly broad and also objectionable because it creates a potential for ambiguity.[497]

The Court also has found that criminal responsibility under articles 6(1) (individual) and 6(3) (superior) of the Statute are not mutually exclusive and can properly be charged both cumulatively and alternatively.[498]

An indictment may include more than one accused (if the crimes alleged arise out of the same transaction),[499] and more than one crime (if the crimes were part of the same transaction).[500] Crimes form part of the same transaction if they are connected with each other in the time and place of their commission, or by their common purpose.[501]

All indictments are subject to review by the Designated Judge, who considers the Prosecutor's indictment, together with accompanying material.[502] The Judge may approve or dismiss each count of the indictment. The Judge must approve the indictment if satisfied that it:

- charges at least one crime within the jurisdiction of the court; and
- that the Prosecutor's case summary makes allegations that, if proven, would amount to such crime.

If no count is approved, the Designated Judge must return the indictment to the Prosecutor.

If the indictment is approved, the Judge may make such orders as are required in the proceedings, including orders of arrest or detention of the accused.[503]

Upon approval, the indictment must be made public. The Designated Judge, however, may order there to be no public disclosure of an indictment, until it is served upon an accused, or all accused.[504]

Moreover, the Designated Judge has wide powers to order non-disclosure of any documents. The Judge may, in exceptional circumstances, order non-disclosure to the public of any document or information, in the interest of justice.[505] The Designated Judge or Trial Chamber may also order non-disclosure of an indictment or any

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496 *Prosecutor v. Kanu*, Case No. SCSL-03-13-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 19 November 2003, at paras. 18-19.

497 *Prosecutor v. Sesay*, Case No. SCSL-03-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003, at para. 33. As a remedy, the Court ordered the Prosecutor within 21 days to file either an Amended Indictment in which the phrase is deleted from every count where it appears or a Bill of Particulars with respect to the additional events alleged against the accused in each count. ibid., annex, pp. 2-3.

498 *Ibid*, at para. 7(xii).

499 Rule 48(A).

500 Rule 49.

501 Rule 2.

502 Rule 47(D), Rule 47(E) and Rule 47(F).

503 Rule 47(H).

504 Rule 53(B).

505 Rule 53(A).

documents or information, or part therefore, in order to give effect to the Rules, or to protect confidential information or in the interest of justice.[506]

For example, when the first indictments were approved on 7 March 2003, orders were made for:

> "no public disclosure of the Indictment or any part thereof, or information pertaining to the Indictment, the warrant of Arrest, the transfer and detention until further order by the Special Court".[507]

2. Amendment and Withdrawal

An indictment may be amended by the Prosecutor:

- without leave, prior to its approval by the Designated Judge;
- with leave of the Designated Judge, between its approval and the initial appearance of the accused;
- with leave of the Trial Chamber, at or after the initial appearance.[508]

If an amendment is made after the initial appearance, a further appearance will be held for the accused to enter his plea to the amended indictment.[509] The accused also shall have 14 days in which to file preliminary motions with respect to the new charges.[510]

An indictment may be withdrawn:

- at any time before its approval;[511]
- upon providing a reason in open court, between approval and commencement of a trial;[512]
- only with leave from the Trial Chamber, once a trial has commenced.[513]

There also is a requirement that the accused and counsel must be promptly notified of the withdrawal of an indictment.[514]

The Prosecutor has requested the withdrawal of indictments of two accused. On 7 March 2003, indictments against Foday Sankoh and Sam Bockarie were approved.[515]

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506 Rule 53(C).

507 *Prosecutor v. Taylor*, Case No. SCSL-03-01-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003, p. 2; *Prosecutor v. Sankoh*, Case No. SCSL-03-02-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003, p. 2; *Prosecutor v. Bockarie*, Case No. SCSL-03-04-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003, p.2; *Prosecutor v. Sesay*, Case No. SCSL-03-05-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003, p. 2; *Prosecutor v. Brima*, Case No. SCSL-03-06-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003, p. 2; *Prosecutor v. Kallon*, Case No. SCSL-03-07-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003, p. 2; *Prosecutor v. Norman*, Case No. SCSL-03-08-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003, p. 2.

508 Rule 50(A).

509 Rule 50(B).

510 Rule 50(C).

511 Rule 51(A).

512 Rule 51(B).

513 Rule 51(C).

514 Rule 51(D).

Since that time, both men have died. Mr Sankoh died in hospital following a long illness, and Mr Bockarie died of multiple gunshot wounds whilst in Liberia. In making his applications for the withdrawal of the indictments to the Trial Chamber, pursuant to Rule 51(B), the Prosecutor produced death certificates for both men and had them entered into the Court's record. His submission was deemed satisfactory by the Trial Chamber, which endorsed the withdrawal of the indictments.[516]

3. Joinder

Even if not jointly charged in one indictment, Rule 48(B) provides that two accused may be tried together if their crimes were committed within the same transaction, subject to leave being granted by the Trial Chamber.

On 27 January 2004, the Trial Chamber issued its first decisions on the matter of joinder.[517] The prosecution had argued that there should be two trials – one for the alleged members of the Civil Defence Forces (CDF) (Mr Norman, Mr Fofana and Mr Kondewa), and the other for the alleged members of the Armed Forces Revolutionary Council (AFRC) (Mr Brima, Mr Kamara and Mr Kanu) and Revolutionary United Front (RUF) (Mr Sesay, Mr Kallon and Mr Gbao). To evaluate the prosecution's motions, the Trial Chamber set out the following test:

> "[T]o succeed on a joinder motion pursuant to Rule 48(B) of the Rules of the Special Court for Sierra Leone, the Prosecution must show:
>
> (a) that the Accused persons sought to be joined and tried together were separately charged with the same or difference crimes committed in the course of the same 'transaction' as defined in Rule 2;
>
> (b) that the factual allegations in the Indictments will, if proven show a consistency between the said crimes as alleged in the Indictments and the Prosecution's theory that they were committed in furtherance, or were the product, of a common criminal design, and
>
> (c) that it will be in the interests of justice to try the Accused jointly, due regard being given to their rights as guaranteed by Article 17(2) and 17(4)(c) of the Statute of the Court".[518]

Pursuant to this test, the Trial Chamber found that joint trials would be more efficient, that they would allow for a more consistent and detailed presentation of evidence, that

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515 *Prosecutor v. Sankoh*, Case No. SCSL-03-02-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003, p. 2; *Prosecutor v. Bockarie*, Case No. SCSL-03-04-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003, p.2.

516 *Prosecutor v. Sankoh*, Case No. SCSL-03-02-PT, Decision on Withdrawal Of Indictment, 8 December 2003, p.2; *Prosecutor v. Bockarie*, Case No. SCSL-03-04-I, Decision on Withdrawal Of Indictment, 8 December 2003, p.2.

517 *Prosecutor v. Sesay et al,* Case No. SCSL-2003-05-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004; *Prosecutor v. Norman et al,* Case No. SCSL-2003-08-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004.

518 *Prosecutor v. Sesay et al,* Case No. SCSL-2003-05-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, para. 31; see *Prosecutor v. Norman et al,* Case No. SCSL-2003-08-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, para. 21.

they would offer better protection for victims and witnesses, and that they would be in the interests of justice.[519] However, in order to protect the rights of the accused, the Chamber held that the accused must be tried in three groups of three defendants each, representing the alleged members of the CDF, the AFRC and the RUF.[520] The Trial Chamber then ordered the Prosecutor to file consolidated indictments for each of the separate joint trials.[521] By a majority, Judge Itoe dissenting, the Trial Chamber also decided that the consolidated indictments need not be resubmitted for the accused to enter new pleas.[522]

B. Orders and Warrants

1. Generally

The Judges and the Trial Chamber are given a general power to make such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or the preparation or conduct of a trial.[523]

2. Arrest

Arrest warrants are issued by the Designated Judge.[524] They, together with an order for the surrender of the accused to the Special Court, a copy of the indictment, and a statement of the accused's rights are sent by the Registrar to the relevant authorities of Sierra Leone, requesting the arrest of the accused.[525]

Upon arrest, the Sierra Leone authorities are requested by the Registrar to:

- serve the indictment and the statement of rights upon the accused;
- read the documents to him in his own language, and caution him as to his rights;
- return a copy of the documents to the Registrar together with proof of service.[526]

The Special Court Agreement Ratification Act places an obligation on the arresting officer to ensure that the accused is afforded these rights.[527] Additionally, when a person

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519 *Prosecutor v. Sesay et al,* Case No. SCSL-2003-05-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, paras. 42-48; *Prosecutor v. Norman et al,* Case No. SCSL-2003-08-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, paras. 29-35.

520 *Prosecutor v. Sesay et al,* Case No. SCSL-2003-05-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, para. 46; *Prosecutor v. Norman et al,* Case No. SCSL-2003-08-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, para. 33.

521 *Prosecutor v. Sesay et al,* Case No. SCSL-2003-05-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, p. 19; *Prosecutor v. Norman et al,* Case No. SCSL-2003-08-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, p. 16.

522 See *Prosecutor v. Sesay et al,* Case No. SCSL-2003-05-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, Separate Opinion of Judge Benjamin Mutanga Itoe on the Nature and Legal Consequences of the Ruling in Favour of the Filing of Two Consolidated Indictments; *Prosecutor v. Norman et al,* Case No. SCSL-2003-08-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, Separate Opinion of Judge Benjamin Mutanga Itoe on the Nature and Legal Consequences of the Ruling in Favour of the Filing of Two Consolidated Indictments.

523 Rule 54.

524 Rule 55(A).

525 Rule 56(B).

526 Rule 55(C).

527 Special Court Agreement Ratification Act, s. 24.

against whom an arrest warrant has been issued is unlawfully at large, he may be arrested in Sierra Leone without a warrant.[528]

It is the responsibility of the Registrar to ensure that personal service of the indictment on the accused is effected at the time he is taken into custody by the Special Court, or as soon as possible thereafter. The indictment must be translated or read to the accused in a language he understands.[529]

A Judge may also issue a warrant addressed to another State or to any relevant international body (such as INTERPOL), if the Prosecutor makes such a request and the Judge is satisfied that it would facilitate the arrest of the accused. When such a warrant is issued, the Registrar is responsible for transmitting such a warrant.[530]

For example, following the issue of an indictment against Charles Taylor, and following a request by the Prosecutor, the Designated Judge directed the Registrar to:

> "address [the] Decision and the Warrant of Arrest of the accused to national authorities of such States, or to relevant international body, including the international Criminal Police Organisation (INTERPOL), as may be indicated by the Prosecutor".[531]

Arrest warrants, as orders of the Court, are binding on the authorities in Sierra Leone.[532] However, arrest warrants and other orders of the Special Court are not binding on States other than Sierra Leone. The Special Court may invite third States to enter into agreements and or ad hoc arrangements that may facilitate arrest and transfer to the Special Court.[533]

The Sierra Leone authorities are required to report to the Registrar if they are unable to execute a warrant of arrest or transfer order. A failure to take action or make a report within a reasonable time is deemed a failure to execute a warrant of arrest or transfer order. Upon such a failure the Special Court may refer the matter to the President for "appropriate action".[534]

3. Transfer and Detention

The Rules envision that after arrest the accused is detained by the State effecting the arrest, and that the State promptly notifies the Registrar. At that time, the authorities of the State effecting the arrest are expected to arrange the transfer of the accused into the custody of the Special Court.[535] The Special Court Agreement Ratification Act requires that the accused be delivered "forthwith" into the custody of the Special Court, although

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528 *Ibid*, s. 28.
529 Rule 52.
530 Rule 56.
531 *Prosecutor v. Taylor*, Case No. SCSL-03-01-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003, p. 2.
532 Special Court Agreement Ratification Act, ss. 20, 23. For discussion of the obligations of Sierra Leone authorities to comply with orders of the Special Court, see Part V of the Guide.
533 Rule 58.
534 Rule 59. For a discussion of Sierra Leone's obligations to cooperate with the Special Court, see part V of the Guide.
535 Rule 57.

it provides that a Sierra Leone prison "may" continue to detain such a person on behalf of the Special Court if so requested or ordered by the Court.[536]

Once under the control of the Court, the Registrar may, where necessary, order special measures of detention for an accused. Those special measures must be endorsed by a Judge within 48 hours.[537] Such special measures are discussed below in the context of bail.

4. Initial Appearance

As soon as practicable after transfer to the Court, the accused must be brought before the Designated Judge for his initial appearance. At the initial appearance, there are several matters for which the Designated Judge has responsibility. First, the Judge must address the accused's rights to counsel and assess the accused's means. Where necessary, and where the accused does not elect to act as counsel or refuses representation, the Judge must instruct the Registrar to provide legal assistance to the accused.[538] Second, the indictment must be read to the accused in a language he speaks and understands, and the Judge must be satisfied that the accused understands the indictment.[539] Third, the accused must be asked to plead guilty or not guilty to each count. If the accused fails to plead, the Judge must enter a plea of not guilty.[540]

At the initial appearance of Foday Sankoh, the Designated Judge refused to enter a plea of not guilty, on the basis that he was not satisfied that the accused understood the indictment. The situation where the accused appears not to understand the indictment is not specifically provided for within the Rules; however, it is unclear why the Judge felt on this occasion that he was not bound by the provision requiring him to enter a plea of not guilty following the accused's failure to plead. Under the Rules there is no situation in which no plea can be entered. If the accused is subsequently found to be unfit to stand trial, the Trial Chamber is required to order that the trial be adjourned.[541]

If the accused pleads not guilty at the initial appearance, the Designated Judge must instruct the Registrar to set a date for trial.[542] In practice, the Designated Judge has instructed Registrar to consult with prosecution and defence counsel regarding dates for a pre-trial conference and the commencement of the trial, before setting any dates.[543]

If the accused pleads guilty, the case will be referred to the Trial Chamber who must satisfy themselves that the plea was made freely and voluntarily, was informed and unequivocal.[544] The Trial Chamber may then enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.[545]

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536 Special Court Agreement Ratification Act, ss. 25-26.
537 Rule 64.
538 Rule 61(i).
539 Rule 61(ii).
540 Rule 61(iii).
541 Rule 74*bis*(C).
542 Rule 61(iv).
543 See, for example, *Prosecutor v. Sesay*, Case No. SCSL-2003-05-I, Scheduling Order, 22 March 2003.
544 Rule 61(v) and Rule 62(A).
545 Rule 62(B).

An accused may not be tried in his absence, unless, following the initial appearance, the accused refuses to attend his or her hearing, or is at large.[546] In such circumstances, the accused may be represented by counsel, and the proceedings may continue if a Judge or Trial Chamber is satisfied that the accused has waived the right to attend.[547]

5. Questioning of Accused

An accused may not be questioned by the prosecution other than in the presence of counsel, unless the accused voluntarily and expressly agrees otherwise.[548] Moreover, the accused may request the presence of counsel at any time, at which point any questioning must stop until the accused's counsel is present. Any questioning, including any waiver of the right to counsel, must be recorded, either by audio or, preferably, by video.[549]

6. Bail

Once detained, an accused shall not be granted bail except upon an order of a Judge or Trial Chamber.[550]

Bail may be ordered by a Judge or Trial Chamber only after hearing the State to which the accused seeks too be released. There is no requirement in these Rules for hearing the host country of the Special Court on a bail application.[551]

In considering an application for bail, the Judge or Trial Chamber must be satisfied that the accused will appear for trial and that the accused, if released, will not pose a danger to any victim, witness or other person.[552]

An accused may only make one application for bail to a Judge or Trial Chamber. There can be no further application for bail unless there has been a material change in circumstances.[553]

The Judge or Trial Chamber may impose such conditions upon the granting of bail as it may determine appropriate including:

- the execution of a bail bond;
- such conditions as are necessary to ensure the presence of the accused at trial; and
- such conditions as are necessary to ensure the protection of others.[554]

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546 Rule 60(A).
547 Rule 60(B).
548 Rule 63(A).
549 Rule 63(B). For a discussion of questioning of suspects, see Part VI of the Guide.
550 Rule 65(A).
551 On hearing an application for a writ of habeas corpus in the case of *Prosecutor v. Brima*, the Special Court decided to hear from the Attorney General of Sierra Leone, on the basis that the grant of a writ of habeas corpus would produce the same effect as a successful bail application in that it would result in the release of the accused to the State of Sierra Leone. It was therefore "equitable, fair, in conformity with legal norms, and acceptable" to order that the Attorney General be heard on the application, even though there is no specific provision for this within the Rules. *Prosecutor v. Brima*, Case No. SCSL 03-06-PT, Ruling on the Application for the Issue of a Writ of Habeas Corpus Filed by the Applicant, 22 July 2003, p. 3.
552 Rule 65(B).
553 Rule 65(C).
554 Rule 65(D).

Any decision as to bail may be appealed by either party. However, leave to appeal must be obtained from an Appeals Chamber Judge, upon showing good cause. Applications for leave to appeal must be made within seven days of the bail decision.[555] If the Prosecutor makes an appeal of a bail decision, the accused remains in custody until the appeal has been heard and decided.[556] Appeals from bail decisions shall be heard by a bench of at least three Appeals Chamber Judges.[557]

If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been granted bail or is for any other reason at large.[558] If an accused has escaped or is unlawfully at large, the Special Court Agreement Ratification Act provides that he may be arrested without warrant.[559]

The first application for bail was filed before the Special Court on 28 May 2003, and ruling was made on 22 July 2003.[560] An argument was presented to the Judge based upon the significance of the wording of Rule 65, in particular the fact that "exceptional circumstances" are not required before a judge can grant bail. This wording contrasts with that found in the ICTR Rules, where proof of exceptional circumstances are required before bail will be granted. The submission that this wording showed there to be a presumption in favour of bail was rejected by the Judge.[561]

In another case, the Judge described the lack of a presumption in favour of bail as being "understandable given the very serious nature of the crimes charged."[562] He stated that in order to justify the grant of bail "there would need to be convincing guarantees that the accused would not abscond or tamper with witnesses or victims or pose a threat to others."[563] He further emphasised the right to a speedy trial, which tempered the burden of custody on remand, and stressed that arguments that would result in the extension of pre-trial detention to a period considerably beyond six to nine months from the date of arrest would be carefully scrutinised.[564]

In addition to applications for bail, a motion for a writ of habeas corpus was filed in the case of *Prosecutor v. Brima*. Although habeas corpus is not included within the Rules, the Judge accepted that the application was properly before him, on the grounds that the application touched on the right to liberty and is too sacred to be violated.[565] There followed argument on the legality of the accused's detention, the substantive part of which was based on deficiencies in the indictment relating to the identification of the accused and the description of his activities. Judge Itoe found that the Prosecution had

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555 Rule 65(E).
556 Rule 65(G).
557 Rule 65(H).
558 Rule 65(F).
559 Special Court Agreement Ratification Act, s. 28.
560 *Prosecutor v. Brima*, Case No. SCSL-03-06-PT, Ruling on a Motion Applying for Bail or for Provisional Release Filed by the Applicant, 22 July 2003.
561 *Ibid*, p.9.
562 *Prosecutor v. Norman*, Case No. SCSL-03-08-PT, Decision on a Motion for the Modification of Conditions of Detention, 26 November 2003, at para. 8.
563 *Ibid*, at para. 13.
564 *Ibid*, at para. 15.
565 *Prosecutor v. Brima*, Case No. SCSL-03-06-PT, Ruling on the Application for the Issue of a Writ of Habeas Corpus Filed by the Applicant, 22 July 2003, p. 7.

met its burden under the Agreement, the Statute and Rules with respect to the detention of the accused, and dismissed the application for the writ.[566]

In the case of *Prosecutor v. Norman*, the Defence also filed a motion for the modification of conditions of detention. Although described by counsel for Mr Norman as an application for special measures of detention under Rule 64, in the form of "house arrest" at an identified safe house, this was recognised by Judge Robertson, the President of the Court, as being in effect an application for conditional release, the conditions including a 24-hour residence condition, which should have been brought under Rule 65.[567] Special measures under Rule 64 encompass only special ways of treating a defendant, who is detained in the detention facility, such as medical or surveillance measures. This was certainly what was envisaged by the Judges when they amended Rule 64 at their second plenary to allow special measures to be ordered by the Registrar and put before a Judge for endorsement within 48 hours. The previous rule, which had required an order from the President of the Court before special measures could be imposed, was not appropriate for what was in effect an administrative decision. In the case of *Prosecutor v. Norman*, the application could not therefore be entertained in its present form, and counsel for Mr Norman were directed to re-file it as an application for bail under Rule 65 if Mr Norman wished to pursue it.[568]

7. Status Conferences

Between initial appearance and the date set for trial, a status conference may be held by the Designated Judge or Trial Chamber to organise exchange of information between the parties or to raise issues on the status of the case.[569]

C. Production of Evidence

Disclosure of materials is subject to the rules providing non-disclosure in the interest of justice[570] and protection for witnesses and victims.[571]

1. Prosecutor's Primary Obligation

The primary obligation upon the Prosecutor is to disclose to the Defence all material that will be relied upon at trial, within 30 days of the initial appearance. This includes all material in the form of witness statements, as well as information to be relied upon to prove facts pursuant to Rule 92*bis*.[572] A Judge of the Trial Chamber may make an order for the disclosure of any further witness statements within a prescribed time, if the Prosecutor shows good cause for doing so.[573]

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566 *Ibid*, p. 17.
567 *Prosecutor v. Norman*, Case No. SCSL-03-08-PT, Decision on a Motion for the Modification of Conditions of Detention, 26 November 2003, at paras. 9-10.
568 *Ibid*, at para. 16.
569 Rule 65*bis*.
570 Rule 53.
571 Rule 69 and Rule 75.
572 Rule 66(A)(i).
573 *Ibid.*

The Prosecutor may be relieved of these primary obligations of disclosure where a judge, designated by the President of the Court, is satisfied that such disclosure would:

- prejudice further or ongoing investigations;
- be contrary to public interest; or
- be contrary to the security of any State.[574]

Such an application for relief from the obligations is made *ex parte* to a judge sitting in closed session. There is no explicit obligation to notify the Defence of the intention to make such an application.[575]

There are two further obligations upon the Prosecutor. First, the Prosecutor is obligated to disclose to the Defence, within 30 days of the initial appearance, any evidence that:

- suggests the innocence of the accused;
- tends to mitigate the accused's guilt; or
- affects the credibility of prosecution evidence.[576]

The Rules also stress that there is a continuing obligation to disclose any exculpatory material.[577] This obligation is in accordance with the obligation on either party to notify promptly the other and the Trial Chamber of the existence of additional information that should have been produced earlier.[578]

Second, the Prosecutor is obligated to notify the Defence as early as is reasonably practicable, and in any event before the commencement of the trial, of those witnesses he intends to call:

- to establish the guilt of the accused;
- to rebut any Defence plea which has been notified to the Prosecutor; or
- to rebut any defence pleaded in a Defence Case Statement.[579]

Additionally, the Defence may request an opportunity to inspect any documents, photographs or objects which may be relevant to the preparation of the Defence, or which are intended by the Prosecutor to be relied upon at trial.[580]

2. Defence Obligation

The Defence has an obligation to notify the Prosecutor of:

- any intention to call evidence of an alibi;[581] or
- any special defence, including diminished or lack of mental responsibility.[582]

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574 Rule 66(B).
575 *Ibid.*
576 *Ibid.*
577 *Ibid.*
578 Rule 67(D).
579 Rule 67(A)(i).
580 Rule 66(A)(ii).
581 Rule 67(A)(ii)(a).
582 Rule 67(A)(ii)(b).

Such notification must be given as soon as reasonably practicable, and in any event before the start of the trial. The notification must specify:

- in the case of an alibi, the place at which the accused was at the time of the allegations;[583] and
- in the case of an alibi or a special defence, an indication of the evidence to be rely upon, including the names and addresses of any witnesses.[584]

However, the failure of the Defence to provide such notice under this rule shall not limit the right of the accused to rely on an alibi or a special defence.[585]

At any time prior to trial, the Defence may provide the Prosecutor with a Defence Case Statement. The intention of a Defence Case Statement is to assist the Prosecutor with his obligations for the disclosure of exculpatory evidence. A Defence Case Statement should include:

- in general terms, the nature of the defence;
- the issues taken with the prosecution case; and
- the reason why issue is taken.[586]

3. Prosecutor's Secondary Obligation

The Prosecutor has a secondary obligation to disclose any material that is relevant to issues raised in the Defence Case Statement. Such material must be disclosed within 14 days of receipt of the Defence Case Statement.[587]

4. Protection of Witnesses

In exceptional circumstances, either party may apply for the identity of a victim or witness to be withheld. An order to withhold will only be granted if the victim or witness is considered by the Judge or Trial Chamber to be in danger or at risk.[588] In any event, the identity must be disclosed within sufficient time to allow adequate preparation of the opposing party's case.[589] In determining protective measures appropriate to the protection of victims or witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Unit.[590]

The Prosecutor has applied for protective measures for witnesses in ten cases before the court.[591]

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583 Rule 67(A)(ii)(a).
584 Rule 67(A)(ii)(a) and Rule 67(A)(ii)(b).
585 Rule 67(B).
586 Rule 67(C).
587 Rule 68(A).
588 Rule 69(A).
589 Rule 69(C).
590 Rule 69(B). For a discussion of the Victims and Witnesses Unit, see Part IV of the Guide.
591 See *Prosecutor v. Sankoh*, Case No. SCSL-03-02-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003*; Prosecutor v. Sesay,* Case No. SCSL-03-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003*; Prosecutor v. Brima,* Case No. SCSL-03-06-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003*; Prosecutor v. Kallon,* Case No. SCSL-03-07-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003*; Prosecutor v. Norman,* Case No. SCSL-03-08-PT, Decision on the Prosecutor's Motion for Immediate

In four decisions on 23 May 2003,[592] the Court ruled that the principles to be applied were those set out in the ICTY case of *Prosecutor v. Blaskic*, in which that Court stated:

> "The Victims and Witnesses merit protection, even from the Accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of an Accused to an equitable trial, must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obscure the view of the public and the media".[593]

The Court considered the question of protection of three categories of witnesses:

- witnesses resident in Sierra Leone;
- witnesses resident outside Sierra Leone but in other parts of West Africa, or who had relatives within Sierra Leone; and
- witnesses residing in other parts of the world who had asked for protective measures.[594]

The Court relied upon the evidence of two expert witnesses as to the security situation in Sierra Leone, and it did not consider it necessary to call each witness to establish the situation pertaining in Sierra Leone as it affected them individually.[595] On the basis of the expert evidence, the Court granted the Prosecutor extensive orders of anonymity and confidentiality, which entailed the non-disclosure of material to the Defence during the pre-trial stage.[596] The Court gave no consideration to the different circumstances in each of the three categories of witness, so it must be assumed that it relied on the situation in Sierra Leone as the justification for protection in all categories.

Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003; *Prosecutor v. Gbao,* Case No. SCSL-03-09-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003; *Prosecutor v. Kamara,* Case No. SCSL-03-10-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 October 2003; *Prosecutor v. Fofana,* Case No. SCSL-03-11-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 16 October 2003; *Prosecutor v. Kondewa,* Case No. SCSL-03-12-PT, Ruling on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and an Urgent Request for Interim Measures until Appropriate Protective Measures Are in Place, 10 October 2003; *Prosecutor v. Kanu,* Case No. SCSL-03-13-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 24 November 2003.

592 *Prosecutor v. Sesay,* Case No. SCSL-03-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003; *Prosecutor v. Brima,* Case No. SCSL-03-06-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003; *Prosecutor v. Kallon,* Case No. SCSL-03-07-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003; *Prosecutor v. Norman,* Case No. SCSL-03-08-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003.

593 See, for example, *Prosecutor v. Sesay,* Case No. SCSL-03-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, para. 14, quoting *Prosecutor v. Blaskic*, Case No. IT-95-14, Decision on the Application of the Prosecution dated 17th October 1996 Requesting of Protective Measures for Victims and Witnesses, 5 November 1996.

594 See *ibid*, at para. 1.

595 See *ibid*, at para. 10.

596 See *ibid*, annex.

The Court found that the security situation justified the withholding of the identities of all witnesses until 42 days before they gave evidence.[597] This system of "rolling disclosure" calculated from the time when a witness is due to give evidence, as opposed to full disclosure of witness identities on a date before trial, was approved by the Court in the face of a defence challenge in the case of *Prosecutor v. Gbao*.[598] This approach is in accordance with Rule 69(C).

In the case of *Prosecutor v. Gbao,* the Court refused the prosecution's request for an order compelling the Defence to provide to the Prosecutor and the Court a designation of all persons working on the defence team who have access to protected information; instead the Court held that such notification should be made to the Defence Office.[599]

In response to defence arguments that these decisions should be made on a case-by-case basis, rather than by the grant of a blanket protection for all witnesses, the Court has found that unless exceptional cause to the contrary is shown, "the option of globally protecting witnesses and victims, if chosen, instead of justifying such measures on a case-by-case basis, is legally well-founded and should be the rule".[600] This approach, which provides protection to an uncertain number of unidentified witnesses, appears to render meaningless the words "exceptional circumstances" used in Rule 69(A).

In another decision issued on 23 May 2003, the Court indicated that the appropriate time to bring a motion for protective measures is after the initial appearance, and dismissed the motion for protective measures in *Prosecutor v. Sankoh* as premature, because the initial appearance had not concluded.[601]

5. Non-Disclosable Material

Documents prepared by either party for the purposes of investigation or for the preparation of the case are not required to be disclosed or notified.[602]

Confidential information provided to the Prosecutor and used solely with the intention of generating further evidence shall not be disclosed to the accused without the consent in writing of the person providing the information.[603] If consent is granted, and the

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597 See *ibid*. Note that this was a deliberate departure from practice at the ICTR, which has commonly been to allow such disclosure only 21 days in advance. This has not been followed in all cases. For example, in *Prosecutor v. Kanu*, the relevant period in the order is 21 days. *Prosecutor v. Kanu,* Case No. SCSL-03-13-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 24 November 2003, at para. 44.

598 *Prosecutor v. Gbao*, Case No. SCSL-03-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003, at paras. 55-58.

599 *Ibid*, at para. 59.

600 *Prosecutor v. Kanu*, Case No. SCSL-03-13-PT, Decision On The Prosecution Motion For Immediate Protective Measures For Witnesses And Victims, 24 November 2003, at para. 41.

601 *Prosecutor v. Sankoh*, Case No. Case No. SCSL-03-02-PT, Decision On The Prosecutor's Motion For Immediate Protective Measures For Witnesses And Victims And For Non-Public Disclosure, 23 May 2003, p. 4.

602 Rule 70(A).

603 Rule 70(B).

Prosecutor intends to use the material as evidence, the material shall be disclosed to the accused.[604] The Trial Chamber, however, may not:

- order either party to produce additional evidence from the person providing the information;
- summon the person providing the information to provide additional evidence; or
- compel the person providing the information to answer any question which is declined on the grounds of confidentiality.[605]

D. Depositions

The Rules state that depositions are for use only in exceptional circumstances. Permission to use a deposition at trial may only be ordered by the Trial Chamber, and when the interests of justice require. In such circumstances, the Trial Chamber appoints a Legal Officer for the purpose of taking the deposition.[606]

Either party may present a motion to the Chamber seeking an order for a deposition. The motion, which is required to be in writing, must include:

- the name of the witness;
- the whereabouts of the witness;
- the date and place where the deposition is to be taken;
- the matters upon which the person is to be examined; and
- the interests of justice that justify the use of a deposition at trial.[607]

If the request for the use of a deposition is granted, the requesting party must notify the opposing party, giving reasonable notice of the appointed time and place for the taking of the deposition. The opposing party has the right to attend the taking of the deposition and to cross-examine the witness.[608] Depositions may be taken by video-conference.[609]

It is the responsibility of the appointed Legal Officer to ensure that the deposition is taken in accordance with the Rules. The Legal Officer must ensure that a record is made, including any cross-examination and any objections raised by either party. The Legal Officer must then transmit the record of the deposition to the Trial Chamber.[610]

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604 *Ibid.*
605 Rule 70(C) and Rule 70(D).
606 Rule 71(A).
607 Rule 71(B).
608 Rule 71(C).
609 Rule 71(D).
610 Rule 71(E).

E. Preliminary Motions

Either party may bring a preliminary motion.[611] There is no definition of the preliminary motions that may be made by the Prosecutor. Preliminary motions made by the Defence are defined as objections based upon:

- lack of jurisdiction;
- defects in the form of the indictment (all of which must be raised in one motion only);
- joinder of crimes or accused in one indictment or the need for separate trials;
- denial of a request for assignment of counsel;
- abuse of process.[612]

Any preliminary motion must be brought within 21 days of the disclosure by the Prosecutor to the Defence of all material it intends to rely upon at trial.[613]

The Trial Chamber is generally responsible for disposing of preliminary motions before trial, and a preliminary motion decided by the Trial Chamber is not subject to interlocutory appeal.[614]

However, the Trial Chamber must refer a preliminary motion to a bench of at least three Appeals Chamber Judges for determination as soon as practicable if it raises:

- a serious issue relating to jurisdiction;[615] or
- an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.[616]

Where a motion is referred to a bench of Appeals Chamber Judges:

- the party who filed the motion may file an additional written submission within 14 days;
- the opposing party may file a response to the submission within 14 days thereafter; and
- any reply to the response may be filed within seven days thereafter.[617]

Such references to a bench of Appeals Chamber Judges do not stay the proceedings or the trial.[618]

A bench of Judges of the Appeals Chamber has held the procedures of Rule 72 to be lawful, and rejected a challenge that they are *ultra vires* the Statute and violate the International Covenant on Civil and Political Rights and basic human rights norms regarding the right to appeal.[619]

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611 Rule 72(A).
612 Rule 72(B).
613 Rule 72(A).
614 Rule 72(D).
615 Rule 72(E).
616 Rule 72(F).
617 Rule 72(G).
618 Rule 72(H).
619 *Prosecutor v. Norman*, Case No. SCSL-03-08, Decision On The Applications For A Stay Of Proceedings And Denial Of The Right To Appeal, 4 November 2003, at paras. 30-31.

Thus far, the Trial Chamber has referred several preliminary motions, including motions relating to head of state immunity, the amnesty provisions of the Lome Accord, the legality of the establishment of the Court, judicial independence, and child recruitment.

In one instance, however, the Court held that a preliminary motion regarding command responsibility was "fundamentally an application to reserve the right to raise an issue at a later stage" rather than a serious challenge to the jurisdiction of the Court.[620] As such, the Court decided not to refer the motion, but rather dismissed it.[621]

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Based on the discussion in this part, it is apparent that a primary influence on the rules and the practice of the Court regarding pre-trial matters is the goal of avoiding delay and commencing and conducting trials expeditiously. This influence is most obviously seen in the expedited procedures regarding preliminary motions and the decisions regarding joinder.

An expeditious process is in the interests of justice. However, it also can raise concerns, particularly with respect to protection of the rights of the accused. Thus, as pre-trial proceedings continue, it is important for the Court to ensure that these rights are not ignored in favour of expediency.

620 *Prosecutor v. Norman*, Case No. SCSL-03-08, Decision on the Defence Preliminary Motion Based on Lack of Jurisdiction: Command Responsibility, 15 October 2003, at para. 22.

621 *Ibid*, p. 8.

Part VIII
Trial Proceedings[+]

The trial is the core of the proceedings of the Special Court because it is at this stage that the Prosecutor and the Defence present their cases, including the evidence in support of their cases, and the Judges deliberate and render judgement. To regulate these proceedings, the Statute and the Rules set out several provisions, which this part discusses below. This part first examines the general provisions regarding trial proceedings and the provisions for regulation of those proceedings. It then explores the provisions regarding case management and presentation. Finally, it concludes with a discussion of deliberation and judgement.

A. General provisions

1. Motions

Rule 73(A) provides that, after the initial appearance, a party may bring a motion before the Trial Chamber or the Designated Judge for an appropriate ruling or relief. Motions may have as their subject a variety of issues that may arise in the course of the trial. They may range from motions for protection of witnesses to motions for judicial notice. A motion also may cover issues that are not directly related to trial, such as a motion on the conditions of detention. Rule 73, however, does not provide fully for all motions. It is subject to Rule 72, which makes specific provision for preliminary motions.[622] Generally, only a motion will trigger a ruling of the Trial Chamber or Judge. Motions are, therefore, an indispensable tool for the conduct of a trial. However, the Trial Chamber or Judge may "at its own motion" issue an order or decision, such as Rule 74*bis*(A) and Rule 74*bis*(C) providing for medical examination of the accused, Rule 75(A) providing for protective measures and Rule 94(B) providing for judicial notice.

Motions are decided based on written submissions, unless the Designated Judge or Trial Chamber decides otherwise.[623] This is unlike the approach taken at the ICTY, where motions are dealt with orally in order to save money and time.[624] In the case of the Special Court, the same motivation for expediency may have led to a different conclusion because many defence counsel are not based in Sierra Leone and would need to travel long distances to present their motions. Whereas such practice makes sense at the pre-trial stage, when defence counsel are only infrequently in Freetown, it is most likely that there will be a shift of these practices at the trial stage, where oral motions will be the rule and written submissions the exception.

Pursuant to Rule 7(C), "any response to a motion shall be filed within ten days [and any] reply to the response shall be filed within five days." There are no specific time limits for

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[+] Part VIII was prepared thanks to substantial contributions of research and writing from Simon M. Meisenberg. NPWJ remains nonetheless responsible for the views expressed herein as well as any errors or omissions.

[622] See part VIII of the Guide on pre-trial proceedings.

[623] Rule 73(A).

[624] John R. W. D. Jones and Steven Powles, *International Criminal Practice*, Oxford University Press/Transnational Publishers, 3rd ed., 2003, para. 8.5.475.

urgent or extremely urgent motions and thus the general time limits apply, unless the Trial Chamber or Judge orders shorter time limits upon receipt of the motion.

Decisions on motions are generally without interlocutory appeal.[625] However, Rule 73(B) provides that the Trial Chamber may grant leave to appeal "in exceptional circumstances and to avoid irreparable prejudice to a party". Leave to appeal a Rule 73 decision must be sought within three days of the decision and does not operate as a stay of proceedings unless the Trial Chamber orders such a stay.[626]

2. Amicus Curiae

Rule 74 provides that a Chamber may "if it considers it desirable for the proper determination of the case, invite or grant leave to any state, organization or person to make submissions on any issue specified by the Chamber."

The Trial Chamber had its first opportunity to interpret this provision in ruling on an application by the Defence Office. In interpreting this rule, the Trial Chamber specified that the governing criterion for granting leave is that the submissions contemplated are "desirable for the proper determination of the case".[627]

It also found guidance in the case law of the ICTR,[628] which has granted leave to make a submission as *amicus curiae* if one of the following reasons is given:

- the party filing the request to appear as *amicus curiae* has a strong interest in or views on the subject matter before the tribunal;[629]
- it is desirable to enlighten the tribunal on certain events that are of particular interest to the tribunal;[630] or
- it may be useful to gather additional views with respect to the legal principles involved, not with respect to the particular circumstances of the current or any other case.[631]

Based in part on this guidance, the Trial Chamber rejected the appearance of the Defence Office as *amicus curiae* on the grounds that it was questionable if the Defence Office would be "an organisation or person" under Rule 74.[632]

Subsequently, the decision of the Trial Chamber was heavily criticised in the course of the determination by the Appeals Chamber of a different application under Rule 74 by

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625 Rule 73(B).
626 Rule 73(B).
627 *Prosecutor v. Kallon*, Case No. SCSL-2003-07-PT, Decision on the Application for Leave to Submit Amicus Curiae Briefs, 17 July 2003, at para. 8.
628 *Ibid*, at para. 9.
629 See *Prosecutor v. Bagosora*, ICTR-96-7-T, Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium, 6 June 1998.
630 See *Prosecutor v. Akayesu*, ICTR-96-4-T, Order Granting Leave for Amicus Curiae, 12 February 1998.
631 See *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on the Kingdom of Belgium's Application to File an Amicus Curiae Brief and on the Defence Application to Strike out the Observations of the Kingdom of Belgium Concerning Preliminary Response by the Defence, 9 February 2001.
632 *Prosecutor v. Kallon*, Case No. SCSL-2003-07-PT, Decision on the Application for Leave to Submit Amicus Curiae Briefs, 17 July 2003, at para. 11.

the Redress Trust and the Lawyers Committee for Human Rights.[633] The Appeals Chamber stated that Rule 74 should not be construed narrowly or technically and that the issue on which leave is sought may be specified by the Chamber directly, or simply may be an issue specified in the substantive motion. The decision of the Appeals Chamber observed:

> "[T]he issue is whether it is desirable to receive such assistance, and 'desirable' does not mean 'essential' (which would be over-restrictive) nor does it have an over-permissive meaning such as 'convenient' or 'interesting'. The discretion will be exercised in favour of the application where there is a real reason to believe that written submissions, or such submissions supplemented by oral argument, will help the Court to reach the right decision on the issue before it."[634]

The Appeals Chamber also stated that the criteria set out in the decision by the Trial Chamber denying *amicus curiae* status should not be considered exhaustive, as the Trial Chamber merely summarised three grounds upon which decisions had turned in cases before the ICTR. In addition, it defined any State, organisation or person broadly and considered that the Defence Office does not fall outside of these categories. Indeed, it noted that the Defence Office, which has a duty to provide assistance to indigent defendants, could intervene under this rule where appropriate to protect the interests of those defendants who are as yet not represented but who have a real interest in the outcome of another defendant's application. Furthermore, the Appeals Chamber added that "leave to intervene will be granted much more readily if what is offered is legal argument – all facts should normally be proved or presented by the parties themselves."[635]

Based on this interpretation of Rule 74, the Appeals Chamber found that there was a real reason to believe that written submissions, supplemented by oral argument by the applicants, would assist it in reaching the right decision on the issues before it and granted the application of the Redress Trust and the Lawyers Committee for Human Rights.

Apart from the Defence Office, the Redress Trust and the Lawyers Committee for Human Rights, the following persons and institutions are among those that have filed *amicus curiae* applications: the University of Toronto International Human Rights Clinic,[636] the African Bar Association[637] and the United Nations Children's Fund (UNICEF).[638] In addition, Professor Philippe Sands and Professor Diane Orentlicher were invited by the Court to appear as *amicus curiae*.

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633 *Prosecutor v. Kallon*, Case No. SCSL-2003-07-PT, Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae Brief and to Present Oral Submissions, 1 November 2003.

634 *Ibid*, at para. 5.

635 *Ibid*, at para. 8.

636 See *Prosecutor v. Norman*, Case No. SCSL-2003-08, Decision on Application by the University of Toronto International Human Rights Clinic for Leave to File Amicus Curiae Brief, 1 November 2003.

637 See *Prosecutor v. Taylor*, Case No. SCSL-2003-01-AR72(E), Decision on Application by African Bar Association for Leave to File Amicus Curiae Brief, 21 November 2003.

638 See Amicus Curiae Brief of the United Nations Children's Fund (UNICEF), 21 January 2004, which was prepared with the assistance of No Peace Without Justice, and submitted regarding *Prosecutor v. Norman*, Case No. SCSL-2003-08, Fourth Defence Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment).

3. Medical examination of the accused

Rule 74*bis* provides that a Judge or the Trial Chamber may either at the request of a party or on its own motion order a medical, psychiatric or psychological examination of an accused.[639] For this purpose, the Registrar keeps a list of approved experts.[640]

Rule 74*bis* also provides that "[w]here the Trial Chamber is satisfied that the accused is unfit to stand trial, it shall order that the trial be adjourned."[641] The Trial Chamber must then review the case "every ninety days unless there is reason to do otherwise", "on its own motion or at the request of the Prosecutor or the Defence".[642] When the Trial Chamber is satisfied that the accused has become "fit to stand trial", the case shall proceed.[643]

This rule was substantially changed as a result of the proceedings regarding Foday Sankoh. At the initial appearance of Mr Sankoh, Judge Itoe observed that the accused was unable to respond to his questions and was most likely not fit to plead. Therefore, the initial appearance was adjourned and two orders were issued for the physiological and psychiatric examination of the accused.[644] Judge Itoe refused the request of the Prosecutor to enter a not guilty plea on behalf of the accused pursuant to Rule 61(A)(iii).[645]

At the time of these proceedings, Rule 74*bis* was identical to the comparable rule at the ICTR. Rule 74*bis*(B) and Rule 74*bis*(C) were added at the third plenary in July/August 2003 so that that rule could establish a uniform procedure regarding fitness to stand trial.[646]

4. Measures for the protection of victims and witnesses

Reference to the protection of victims and witnesses can be found in article 16(4) of the Statute, which provides for a Victims and Witnesses Unit and its role in relation to "protective measures and security arrangements, counselling and other appropriate assistance." Article 17(2) of the Statute also refers to such measures in the context of the rights of the accused, providing that "[t]he accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses."

Measures for the protection of witnesses may be necessary because, even although there is now peace in Sierra Leone, the security situation remains precarious. This situation was described by the Chief of the Victims and Witnesses Unit of the Special Court in a

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639 Rule 74*bis*(A).
640 Rule 74*bis*(B).
641 Rule 74*bis*(C).
642 *Ibid.*
643 *Ibid.*
644 *Prosecutor v. Sankoh*, Case No. SCSL-2003-02-I, Order for Physiological and Psychiatric Examination and Detention on Remand, 15 March 2003; *Prosecutor v. Sankoh,* Case No. SCSL-2003-02-I, Order for Further Physiological and Psychiatric Examination, 21 March 2003.
645 For a discussion of initial appearances and pleas, see part VII of the Guide.
646 Mr Sankoh died during the plenary session, and the indictment against him was subsequently withdrawn. For a discussion of the withdrawal of the indictment, see part VII of the Guide.

statement to the Trial Chamber that was quoted in its decision on an application for the non-disclosure of the identity of witnesses:[647]

> "In my opinion in Sierra Leone the issue of protection of witnesses is a far more serious and difficult matter even than in Rwanda. The trials are being carried out in the country where the crimes took place, and the witnesses feel particularly vulnerable. The witnesses do not actually trust anyone except the Court itself, operating through its officers. It should be borne in mind that witnesses either for the Prosecution or the Defence, are always a delicate resource, and always need reassurances, and often times persuasion, before they are willing to testify. Thus, leaving aside issues of personal safety, even a small incident or a perceived threat may discourage the witness from coming to testify.
>
> At present the Unit is already looking after numerous witnesses, and several threat assessments have been carried out. Without going into details, it is a fact that specific threats have been issued against some of the witnesses, to the extent that active efforts are being made by members of interested factions to determine their exact locations, probably with a view to carrying out reprisals."[648]

Nonetheless, it must be kept in mind that protective measures should not be institutionalised, but only ordered in exceptional and necessary circumstances. The Rules provide for a wide range of possible measures for protection. Rule 75 provides for *in camera* proceedings, expunging names and identifying information from public records, non-disclosure to the public of such records and testimony through image- or voice-altering devices, closed circuit television and video link.[649] It is therefore not necessary to use blanket orders. Instead, the Court can and should evaluate each witness on a case-by-case basis, protecting the witness and at the same time guaranteeing the rights of the accused.

Rule 75(A) expressly provides that appropriate measures for the safeguarding of victims and witnesses may be ordered, "provided that the measures are consistent with the rights of the accused." Protective measures may be ordered by the Judge or Chamber on its own motion or at the request of a party, the victim concerned, or the Victims and Witnesses Unit.[650] Once protective measures have been ordered in respect of a witness or victim in any proceedings, such protective measures continue to have effect *mutatis mutandis* in cases where a witness will testify in different proceedings before the Special Court, unless and until they are rescinded, varied or augmented.[651] Such measures, however, do not prevent the Prosecutor from discharging any disclosure obligation under the Rules in other proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings where the witness appeared.[652]

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647 For discussion of the non-disclosure of the identity of a witness, see part VII of the Guide.

648 *Prosecutor v. Gbao*, Case No. SCSL-2003-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003, at para. 24.

649 Rule 75(B)(i).

650 Rule 75(A).

651 Rule 75(F)(i).

652 Rule 75(F)(ii).

An application by a party to second proceedings to rescind, vary or augment protective measures in the first proceedings must be made to the Chamber or a Judge of the Chamber in the first proceedings, if that Chamber is still seized of the matter.[653] If it is not, then the application may be made to the Chamber or a Judge of the Chamber in the second proceedings.[654] In that case, it appears that before rendering any decision, the Chamber or Judge would need to obtain all relevant information from the first proceedings and consult with any Judge who ordered the protective measures if that Judge remains a Judge of the Special Court.[655]

Because protective measures may be rescinded or varied and testimony may be relevant in other proceedings, Rule 75(D) provides that the Victims and Witnesses Unit must inform a witness that his or her testimony and identity may be disclosed at a later date. Rule 75(E) also provides that the Judge or Chamber must, where appropriate, state in an order for protective measures whether the transcript regarding the witness' evidence may be made available for use in other proceedings before the Special Court.

Finally, when it is time to testify, Rule 75(C) provides that the Chamber or Judge must control the manner of questioning to avoid any harassment or intimidation. Such vigilance is particularly important with child witnesses and in cases of sexual assault.[656]

5. Joint and separate trials

Every accused has fundamental procedural rights, some of which are set out in article 17 of the Statute. The joinder of trials may affect those rights. Therefore, Rule 82(A) asserts the principle that in a joint trial, these rights remain as if the accused were being tried individually. Rule 82(B) also provides for persons that are accused jointly to be tried separately if the Trial Chamber considers it necessary "to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice."

At the ICTR and ICTY, defence counsel often argued that joint trials would prejudice an accused, as evidence might be presented at trial that was admissible with respect to one accused and but not the other. The tribunals dismissed such arguments, stating that it was not a concern because the trials were heard by judges, not juries, and it is generally assumed that professional judges can assess such evidence without any prejudice to another accused.[657]

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653 Rule 75(G)(i) and (I).

654 Rule 75(G)(ii) and (I).

655 See Rule 75(H), which states that the requirement to obtain information from the first proceedings relates to applications under Rule 75(F)(ii). This appears, however, to be a typographical error, because it is Rule 75(G)(ii) that discusses applications, not Rule 75(F)(ii).

656 For an overview of matters regarding child witnesses, see No Peace Without Justice and UNICEF, *International Criminal Justice and Children*, 2002, pp. 35-60.

657 See *Prosecutor v. Ntakirutimana et al.*, Case Nos. ICTR-96-10-I and ICTR-96-17-T, Decision on the Prosecutor's Motion to Join the Indictments ICTR-96-10-I and ICTR-96-17-T, 22 February 2001.

B. Regulation of proceedings

1. Open and closed sessions

In general, proceedings before the Trial Chamber, other than its deliberations, are held in public.[658] Indeed, the right to a public trial is guaranteed in article 17 of the Statute. There also are several important policy reasons for public proceedings. For example, the presence of the public, including the media, may ensure that the accused receives a fair trial and that arbitrary decisions are not rendered. Public viewing of the trial also may serve the important function of allowing people to see that justice is being done. In this way, the trial may contribute to the rule of law, both in terms of education and deterrence.

Nonetheless, the right to a public trial is not absolute, and there are exceptional circumstances that may justify the public's exclusion. Rule 79(A) provides that the Trial Chamber may order the exclusion of the press and the public from all or part of the proceedings:

- because of reasons of national security;
- to protect a person's privacy, as in cases involving sexual offences or minors; or
- to protect the interests of justice from prejudicial publicity.

In such instances, Rule 79(C) urges the Trial Chamber to permit at least representatives of the press and monitoring agencies to remain and Rule 79(B) requires that the Trial Chamber make public the reasons for the order.

An example of a closed session of the Special Court was the initial appearance of Sam Hinga Norman, which the Court closed because "publicity would prejudice the interests of justice".[659] In reaching the decision, the Court did not note any additional facts in support of this measure and did not explain in what way publicity would prejudice the interest of justice.

2. Records of proceedings and preservation of evidence

Under Rule 81, the Registrar is responsible for making and preserving a full and accurate record of the proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings. The Registrar also is responsible for the retention and preservation of all physical evidence.

In accordance with article 17 of the Agreement, which requires a public hearing for the accused, there appears to be a presumption in the Rules that the records of the proceedings are available to the public. This presumption can be seen in Rule 81(B), which provides that the Trial Chamber may order the disclosure of the record of closed proceedings when the reason for ordering its non-disclosure no longer exists.

Under Rule 81(D), the making of a photographic, video or audio record of the trial by persons other than those in the Registry may be authorised by the Trial Chamber. During pre-trial proceedings, the Designated Judge of the Chamber has regularly issued

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658 Rule 78.

659 *Prosecutor v. Norman*, Case No. SCSL-2003-08-I, Reasons for Ordering a Closed Session, 15 March 2003.

orders permitting the making of such records.[660] The Trial Chamber also has sought to regulate such recording. At the initial appearance of two accused, Mr Fofana and Mr Kondewa, Judge Boutet ordered orally, at the request of the Defence, that pictures of the accused should be taken cautiously in order to respect the beliefs of the accused.

3. Control of proceedings

Pursuant to Rule 80(A), the Trial Chamber may exclude persons from the proceedings in order to protect the right of the accused to a fair and public trial, or to maintain the dignity and decorum of the proceedings.

Pursuant to Rule 80(B), the Trial Chamber may order the removal of the accused from the courtroom and may continue the proceedings in the accused's absence, if he or she persists with a disruptive conduct following a warning. If removed, the rule urges the accused be provided an opportunity to follow the proceedings by a video link. Such measures have not yet been applied at the Special Court, or the ICTR or ICTY.

Rule 83 provides that instruments of restraint, such as handcuffs, may be used on the accused as a precaution against escape during transfer or for security reasons. Such restraints must be removed from the accused when he or she appears before a Judge or a Chamber, unless otherwise ordered by the Chamber.[661] This provision appears to be an attempt to protect the accused's dignity and presumption of innocence and is in compliance with internationally recognised standards, such as the UN Standard Minimum Rules for the Treatment of Prisoners.[662]

4. Contempt

Rule 77 declares that, in the exercise of its inherent power, the Special Court may punish for contempt any person, who knowingly and wilfully interferes with its administration of justice, including any person who:

> "(i) being a witness before a Chamber, subject to Rule 90(E) refuses or fails to answer a question;
> (ii) discloses information relating to proceedings in knowing violation of an order of a Chamber;
> (iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;
> (iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness;
> (v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber; or
> (vi) knowingly assists an accused person to evade the jurisdiction of the Special Court."[663]

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660 See, for example, *Prosecutor v. Sankoh*, Case No. SCSL-2003-02, Order to Permit Photography, Video-Recording or Audio-Recording, 14 March 2003.

661 Rule 83.

662 Standard Minimum Rules for the Treatment of Prisoners, UN Doc. A/CONF/6/1, Annex I-A.

663 Rule 77(A).

It also states that incitement or attempt to commit any of these acts is punishable as contempt of the Special Court with the same penalties.[664]

Rule 77 further provides that, when a Judge or Trial Chamber has reason to believe that a person may be in contempt of the Court, the Judge or Trial Chamber may:

> "(i) deal with the matter summarily itself;
> (ii) refer the matter to the appropriate authorities of Sierra Leone;[665] or
> (iii) direct the Registrar to appoint an experienced independent counsel to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings. If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may issue an order in lieu of an indictment and direct the independent counsel to prosecute the matter."[666]

When a Judge of the Appeals Chamber or the Appeals Chamber itself has reason to believe that a person may be in contempt, it may refer the matter to the Trial Chamber or deal with the matter summarily itself.[667]

In the case of an investigation and prosecution by an independent counsel, the proceedings may be heard by a Judge or Trial Chamber.[668]

A person indicted for or charged with contempt is entitled to legal assistance if he or she meets the criteria for indigence established by the Registrar.[669]

If the matter is dealt with summarily and a person is found in contempt, the maximum penalty that may be imposed is a term of imprisonment not exceeding six months and a fine not exceeding two million Leones.[670] If a person is found in contempt after prosecution by an independent counsel, the maximum penalty that may be imposed is a term of imprisonment for seven years and a fine not exceeding two million Leones.[671] Payment of any fine must be made to the Registrar and held in a separate account.[672] In addition, if a counsel is found guilty of contempt, the Chamber may determine that the conduct at issue amounts to misconduct of counsel and that the counsel is no longer eligible to appear before the Special Court.[673]

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664 Rule 77(B).

665 The Special Court Agreement Ratification Act includes several provisions with respect to offences against the administration of justice in relation to the Special Court. The offences proscribed under the Ratification Act include: obstructing justice (section 37); obstructing officials (section 38); bribery of judges and officials (section 39); intimidation of officials and witnesses (section 40); and fabricating evidence (section 41). Section 42 of the Ratification Act also asserts the extraterritorial application of these provisions; for general extraterritorial application of Sierra Leone law, see the Criminal Procedure Act, 1965 (Sierra Leone), section 41.

666 Rule 77(C).

667 Rule 77(L).

668 Rule 77(D).

669 Rule 77(F).

670 Rule 77(G).

671 *Ibid.*

672 Rule 77(H).

673 Rule 77(I).

In general, a decision regarding contempt is subject to appeal, which must be heard by three Judges of the Appeals Chamber and may be determined on the basis of written submissions.[674] However, if matters regarding contempt are dealt with summarily by a Judge of the Appeals Chamber or the Appeals Chamber itself, there is no appeal.[675]

The procedures set out in Rule 77 raise several serious concerns. The most significant is whether the Court has jurisdiction to prosecute the acts that Rule 77 states are instances of contempt, including acts not directly related to courtroom proceedings such as Rule 77(A)(vi). Similar concerns have been raised with respect to the ICTY's comparable rule.[676]

Another serious concern is that the provisions of Rule 77 allow for the denial of the fundamental right of appeal from a conviction.[677] Therefore, Rule 77 should be amended so that all prosecutions for contempt are heard before the Trial Chamber. In the interim, any such prosecution should be referred to the Trial Chamber in accordance with the existing provisions.

Furthermore, the Rules currently do not provide that each witness must be informed of measures that may be imposed if he or she refuses or fails to answer a question. As a matter of fairness, each witness should be informed of such possibility before he or she testifies. This requirement was introduced into the procedures of the International Criminal Court at ICC Rule 66(3).

C. Case management

1. Pre-trial conference

According to Rule 73*bis*, a pre-trial conference may be held prior to the commencement of the trial.[678] At the conference, the Trial Chamber or a Designated Judge of the Chamber may order the Prosecutor to file, before the date set for trial and within a specific time limit:

- a pre-trial brief addressing the factual and legal issues;
- admissions by the parties and a statement of other matters not in dispute;
- a statement of contested matters of fact and law;
- a list of witnesses the Prosecutor intends to call (including their names or pseudonyms, a summary of the facts about which each will testify, the points in the indictment on which they will testify and the estimated time required for each witness' testimony); and
- a list of exhibits the Prosecutor intends to offer, stating whether the Defence has any objection as to their authenticity.[679]

The Trial Chamber or Judge also has the authority at the conference to order the Prosecutor to shorten the examination of some witnesses and to reduce their number if

674 Rule 77(J) and (K).
675 Rule 77(L).
676 André Klip, *Revue International de Droit Pénal*, vol. 67, 1996, pp. 276-77.
677 See, e.g., International Covenant on Civil and Political Rights 1966, art. 14(5).
678 Rule 73*bis*(A).
679 Rule 73*bis*(B).

it appears many witnesses will testify to prove the same facts.[680] If the number of witnesses is reduced, Prosecutor may ask for leave to reinstate witnesses or vary his or her decision as to which witnesses to call.[681]

With respect to the Defence, the Trial Chamber or Judge may order at the conference that it file, not later than seven days prior to trial, a statement of admitted facts and law and a pre-trial brief addressing the factual and legal issues.[682]

2. Pre-defence conference

Rule 73*ter* provides that a conference may be held prior to the Defence's commencement of its case.[683] At the conference, the Trial Chamber or a designed Judge may order the Defence to file, before the commencement of its case but after the close of the Prosecutor's case:

- admissions by the parties and a statement of other matters not in dispute;
- a statement of contested matters of fact and law;
- a list of witnesses the Defence intends to call (including their names or pseudonyms, a summary of the facts about which each will testify, the points in the indictment on which they will testify and the estimated time required for each witness' testimony); and
- a list of exhibits the Defence intends to offer, stating whether the Prosecutor has any objection as to their authenticity.[684]

The Trial Chamber or Judge also may shorten the time for examination of some witnesses and reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.[685] If the number of witnesses is reduced, the Defence may ask for leave to reinstate witnesses or vary its decision as to which witnesses to call.[686]

D. Case presentation

1. Opening statements

Rule 84 provides that, at the opening of its case, each party may make an opening statement, confined to the evidence that it intends to present in support of its case. The Trial Chamber may limit the length of those statements in the interests of justice and it is likely to do so, given the Court's expressed preference for expeditious trials.

2. Presentation of evidence

Each party has the right to call witnesses and present evidence. Rule 85(A) provides that, in general, the Prosecutor presents evidence first and the Defence follows. With leave of the Trial Chamber, both parties may then present additional evidence in response to the evidence presented by the other party. The Trial Chamber may also order the

680 Rule 73*bis*(C) and Rule 73*bis*(D).
681 Rule 73*bis*(E).
682 Rule 73*bis*(F).
683 Rule 73*ter*(A).
684 Rule 73*ter*(B).
685 Rule 73*ter*(C) and (D).
686 Rule 73*ter*(E).

presentation of evidence. In the interests of justice, the order of presentation of evidence may be altered by the Chamber.

With regard to witness testimony, the party that calls a witness to testify conducts the examination-in-chief, which is followed by the cross-examination and the re-examination.[687] At any stage of a witness' testimony, a Judge may ask the witness any question.[688] In the proceedings of the ICTR and ICTY, the Judges have used this power frequently.

Pursuant to Rule 85(C), the accused may appear as a witness in his or her own defence. If the accused chooses to appear, he or she is not obliged to appear as the first witness for the Defence, but may choose the moment to testify within the presentation of evidence by the Defence. The accused is, however, subject to the general provisions regarding all witnesses, such as being required to make a solemn declaration before giving evidence. The accused also is subject to cross-examination.[689]

Evidence is generally given directly in court. It may, however, be given via communications media, such as video and closed circuit television, if ordered by the Trial Chamber.[690] In considering whether to allow testimony by video, the ICTR has stated that certain conditions must be fulfilled, including that the testimony is sufficiently important, that testimony by video is in the interests of justice and that the accused will not be prejudiced in the exercise of the right to confront the witness.[691]

3. Motion for judgement of acquittal

Rule 98 provides that, after the close of the Prosecution's case, the Trial Chamber must enter a judgement of acquittal on any count of the indictment where "the evidence is such that no reasonable tribunal of fact could be satisfied beyond a reasonable doubt of the accused's guilt." The rule does not specify whether the Defence must first bring a motion for such judgement, or whether the Trial Chamber may render judgement at its own motion.

4. Closing arguments

Rule 86 provides that the Prosecutor must present a closing argument after the presentation of all of the evidence, and the Defence may present such argument. Before such argument, the party must inform the Trial Chamber of its length and the Chamber may limit such argument in the interests of justice. Before the closing argument, a party may also file a final trial submission.

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687 Rule 85(B).

688 *Ibid.*

689 This approach is unknown in most civil law jurisdictions, where the questioning of the accused follows the reading of the indictment. In such jurisdictions, while the accused may refuse to make any statement, if the accused does choose to make such a statement, it is without any requirement first to make a solemn declaration. This approach is also different from the proceedings of the ICTY. ICTY Rule 84*bis* permits the accused to make a statement under the control of the Trial Chamber, without being compelled to make a solemn declaration and, in addition, without being examined by the Prosecutor on the content of the statement. It is then the responsibility of the Trial Chamber to decide on the probative value of such statement.

690 Rule 85(D).

691 *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-I, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para. 35.

In a change from the ICTR and ICTY Rules, the parties do not have to address matters of sentencing in their closing arguments.[692] This change is welcome, given the unfairness imposed on the Defence by this provision at the ICTR and ICTY.[693] In proceedings before those tribunals, the rule has forced the Defence to contradict and to undermine its own case and made it difficult to argue mitigating factors.

E. Deliberations and judgement

After the parties have completed their closing arguments, the Presiding Judge must declare that the hearing is closed and the Judges of the Trial Chamber must deliberate in private.[694] The Judges must vote separately on each count in the indictment and if accused are tried together, must make separate findings for each accused.[695] An accused may be found guilty only when "a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt."[696]

Following deliberations, the judgement must be delivered in public.[697] It must be rendered by a majority of the Judges of the Trial Chamber and be accompanied by a reasoned written opinion, to which separate or dissenting opinions may be attached.[698]

If an accused is found guilty on one or more counts, the Trial Chamber must determine the penalty with respect to each count.[699] Separate deliberations would then take place following an opportunity for the parties to present information regarding penalties pursuant to Rule 100 and a judgement regarding penalties would be rendered.[700]

If the accused is acquitted, the Special Court must order the release of the accused.[701] At the time of the pronouncement of the acquittal, however, the Prosecutor may inform the Trial Chamber in open court of the intention to file a notice of appeal and may apply for the continued detention of the accused.[702] After hearing the parties, the Trial Chamber may in its discretion order the continued detention of the accused pending the determination of the appeal.[703]

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The rules regarding trial proceedings indicate a strong preference for trials without delay and allow the Court to exert a great influence over case presentation. They also assert significant powers to control the proceedings. Therefore, in putting these rules into practice, the Court has substantial responsibility for ensuring fundamental fairness. It

692 See ICTY Rule 86(C) and ICTR Rule 86(C).
693 See John R. W. D. Jones and Steven Powles, *International Criminal Practice*, Oxford University Press/Transnational Publishers, 3rd ed., 2003, para. 8.5.605.
694 Rule 87(A).
695 Rule 87(B).
696 Rule 87(A).
697 Statute, art. 18. This provision is echoed, without reference to article 18 of the Statute, in Rule 88(A).
698 *Ibid.* This provision also is echoed, without reference to article 18 of the Statute, in Rule 88(C).
699 Rule 87(C).
700 For a discussion of penalties and sentencing, see Part X of the Guide.
701 Rule 99(A).
702 Rule 99(B).
703 ibid.

also has the duty to remain mindful of the dictates and limits of the Statute, particularly with regard to jurisdiction and the rights of the accused.

Part IX
Rules of Evidence[+]

Like the ICTY and the ICTR, the Special Court for Sierra Leone is "not … bound by national rules of evidence".[704] This is, first, because it is an international or a hybrid international-national court and thus its procedures should not be wed to any one national system of law. Second, because the triers of fact at the Special Court are professional judges, not lay jurors, many of the rules of evidence, which evolved for the institution of a jury, are inapplicable to the proceedings of the Special Court. Thus, practitioners at the Special Court will not find the hearsay rule and its myriad exceptions or a general requirement of corroboration such as the *unus testis, nullus testis* rule.[705] Rather, they will find at the Special Court an emphasis on the *reliability* rather than the *admissibility* of evidence and on determinations of fairness. As set out in Rule 89(B):

> "[A] Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

In this regard, observations that ICTY Judge McDonald made in relation to the ICTY's rules of evidence apply with equal validity to the Special Court:

> "The International Tribunal has ten rules of evidence which are designed only to provide the framework for the conduct of the proceedings. Certainly our Rules could not anticipate every trial procedure that litigants from a variety of countries may expect to utilise and the International Tribunal did not establish hyper-technical detailed rules typical of a jury system to cover every such possibility. In civil law systems technical rules are not available, and all evidence that aids in the search for truth is allowed. Our Rules provide the Judges with the power to review all relevant evidence, and when necessary, to make further rulings to aid in the adjudication before the Trial Chamber. Because of the absence of specific rules, the Trial Chamber has made rulings which it considered would best facilitate the process."[706]

It is to be expected that the Judges at the Special Court, like those of the ICTY and ICTR before them, as they begin to sit and to rule on evidentiary motions and objections, will evolve their own jurisprudence to fill the gaps in the Court's skeletal rules of evidence.

[+] Part IX was prepared thanks to substantial contributions of research and writing from John R. W. D. Jones and Simon M. Meisenberg. NPWJ remains nonetheless responsible for the views expressed herein as well as any errors or omissions.

[704] Rule 89(A).

[705] "One witness is no witness".

[706] *Prosecutor v. Tadić*, Separate and Dissenting Opinion on Prosecution Motion for Production of Defence Witness Statements, 27 November 1996, at para. 34.

A. General provisions

Rule 89, which consists of three sub-rules, provides that the Chambers are not bound by any national rules of evidence. In cases not otherwise provided for in the Rules of the Special Court, the Court must apply the rules of evidence that favour a fair determination and are consistent with the spirit of the Statute and general principles of law. The rule also states that the Court may admit any relevant evidence.

This rule differs in several respects from its ICTY and ICTR equivalents. In particular, ICTY Rule 89 has three additional sub-rules:

> "(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
> (E) A Chamber may request verification of the authenticity of evidence obtained out of court.
> (F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form."

It may be that the Judges of the Special Court felt that ICTY Rule 89(D) was unnecessary; in effect, the discretion to admit relevant evidence implies its opposite, namely the power to exclude evidence. This reasoning may explain why ICTR Rule 89 also fails to refer to the power to exclude evidence. Nonetheless, it is submitted that it is better to state explicitly that the Chamber may exclude evidence where its probative value is substantially outweighed by the need to ensure a fair trial. Indeed, the sub-rule should provide that the Chamber *must* exclude evidence in those circumstances; otherwise the Chamber would appear to be sanctioning an unfair trial.

Sub-rules (E) and (F) of ICTY Rule 89 are also not reflected in Rule 89 of the Special Court Rules. Again, it may have been thought that the two rules were axiomatic and did not need stating. There is no harm, however, in emphasising the need to authenticate doubtful evidence and the preference for oral testimony; arguably, it adds clarity to make such provision explicit, as is done in the ICTY Rules.

The other major difference between the rules of evidence of the Special Court and those of the ICTY and ICTR is to be found not in the rules themselves, but in article 14(2) of the Statute of the Special Court, which provides:

> "The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone."

Thus, the Special Court uniquely allows scope for a national procedural law to be applied, albeit indirectly in the form of guidance, to its international criminal proceedings. Indeed, it has been argued that the rules of evidence applicable in the instance of crimes under Sierra Leone law, prosecuted before the Special Court pursuant to article 5 of the Statute, should be the rules of evidence under Sierra Leonean law.[707] As yet, however,

[707] See Micaela Frulli, 'The Special Court for Sierra Leone: Some Preliminary Comments', *European Journal of International Law*, vol. 11, 2000, p. 860. See also the *Report of the Secretary-General on the establishment of the Special Court for Sierra Leone*, UN Doc. S/2000/915, at para. 20.

this issue has not arisen because there has been no indictment charging crimes under Sierra Leone law.

B. Testimony of witnesses

The testimony of witnesses and the admission of documentary evidence are the principal engines of a criminal trial. Rule 90 deals with the former. It provides that, with the exception of depositions[708] and the giving of evidence by "communications media, including video [and] closed-circuit television",[709] witnesses are to give evidence directly in court. That is to say, they will be sworn, in accordance with Rule 90(B), and then give evidence in person before the Judges and parties.[710] They will be first examined-in-chief, then cross-examined, then re-examined, as provided for in all common law systems and in accordance with Rule 85(B). In order to insulate the witness from "contamination" by hearing the evidence of other witnesses and therefore possibly being influenced by what they have said, Rule 90(D) provides that:

> "A witness, other than an expert, who has not yet testified may not be present without leave of the Trial Chamber when the testimony of another witness is given."[711]

Rule 90(C) deals with the testimony of children. A child is permitted to testify,

> "if the Chamber is of the opinion that he [sic] is sufficiently mature to be able to report the facts of which he had knowledge, that he understands the duty to tell the truth, and is not subject to undue influence."[712]

Unfortunately, the Rules do not make any specific provision for how a child may testify. It would be welcome if the Judges were to amend the Rules in this regard and to establish appropriate regulations for the testimony of child witnesses. In this area, the Judges should be guided by existing international standards concerning child witnesses.[713]

Rule 90 further provides, in sub-rule (E), for the privilege against self-incrimination for a witness, which, as applied to an accused, is a feature of most international human rights instruments.[714] As interpreted by Rule 90(E), the privilege permits the Chamber to compel a witness to answer a question, but any testimony compelled in this way cannot be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony under solemn declaration.

Finally, Rule 90(F) stipulates that the Trial Chamber shall exercise control over the trial proceedings so as to "(i) Make the interrogation and presentation effective for the ascertainment of the truth; and (ii) Avoid the wasting of time."

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708 See Rule 77.

709 See Rule 85(D).

710 If the evidence of the witness is to be given through the services of an interpreter or translator, that person must also be sworn in accordance with Rule 76.

711 Hearing the testimony of another witness, however, is not a sufficient reason itself under Rule 90(D) to disqualify a witness from testifying.

712 Under Rule 90(C), however, a child cannot be compelled to testify by solemn declaration.

713 For an overview on the treatment of child witnesses during trial, see No Peace Without Justice and UNICEF, *International Criminal Justice and Children*, 2002, pp. 35-60.

714 See, e.g., International Covenant on Civil and Political Rights 1966, art. 14(3)(g).

Rule 90 is, in substance, similar to ICTY Rule 90 and ICTR Rule 90. There are, however, two important variations from ICTR Rule 90. First, the Special Court's rule does not include the following provision found in the Rules of the ICTR: "A judgement, however, cannot be based on [the] testimony [of a child who has not made a solemn declaration] alone." In foregoing this provision of the rules of the ICTR, the Judges of the Special Court appear to adopt the approach that, should this situation arise, they may exercise their judgement as to whether they are satisfied that the accused's guilt has been established beyond a reasonable doubt by such testimony alone.

The other major difference between ICTR Rule 90 and Special Court Rule 90 is that the former contains a further sub-rule (G), which provides that:

> "Cross-examination shall be limited to points raised in the examination-in-chief or matters affecting the credibility of the witness. The Trial Chamber may, if it deems it advisable, permit enquiry into additional matters, as if on direct examination."

It seems likely that the Judges of the Special Court thought that the scope of cross-examination was a matter best left to the Trial Chamber's discretion. Interestingly, ICTY Rule 90 is even more detailed in its provisions on the nature and conduct of cross-examination.

C. False testimony under solemn declaration

False testimony, or perjury as it is commonly known, is one of two offences against the administration of justice (the other being contempt) which, while not set out in their statutes, have been created under the rules of procedure and evidence of international courts and tribunals.[715] The Judges of the ICTY and ICTR have justified the introduction of an offence not provided for in their statutes by appealing to their "inherent jurisdiction" to control their proceedings.

In Rule 91, the Judges of the Special Court assert jurisdiction over the offence of "knowingly and wilfully [giving] false testimony" and provide that it may be dealt with in accordance with the contempt procedures of Rule 77.[716] Rule 91(D) specifies that false testimony includes a false statement, knowingly and wilfully made, in a written statement that the witness "knows, or has reason to know, may be used in evidence in proceedings before the Special Court."[717]

In terms of penalties, Rule 91 of the Special Court Rules differs from the comparable rule of the ICTR. There is a maximum penalty of a term of imprisonment of two years and a fine of two million Leones (which is equivalent to less than 1,000 USD) in the Special Court's rule, compared to a maximum one-year prison term and a 10,000 USD fine in the ICTR's rule.[718] The greater maximum term of imprisonment at the Special Court may reflect the fact that the financial penalty is less. It also is worth noting that

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715 By contrast, the Rome Statute of the International Criminal Court sets out offences against the administration of justice in its article 70.

716 See part VIII of the Guide for a discussion of procedures under Rule 77.

717 Rule 91 also provides that a Chamber may warn a witness of the duty to tell the truth and the potential consequences of failing to do so, but does not require such warning.

718 Rule 91 further provides that any fine must be paid to the Registrar and held in the separate account referred to in Rule 77(H).

the penalty is comparable with that for fabricating evidence under section 41 of the Special Court Agreement, 2002 (Ratification) Act, 2002 (Sierra Leone).

With respect to appeal from a conviction for false testimony, Rule 91 incorporates the procedures laid down in Rule 77, which provide for appeal, unless the false testimony occurs before the Appeals Chamber and the Chamber decides to deal with the matter summarily. To avoid a situation in which the fundamental right of appeal from a conviction[719] might be contravened, Rule 77 should be amended so that all prosecutions for false testimony or other offences against the administration of justice are heard before the Trial Chamber. In the interim, any such prosecution should be referred to the Trial Chamber in accordance with the existing provisions of Rule 77.

False testimony has been considered at both the ICTY and ICTR. The ICTR Trial Chamber I dealt with the constituent elements of false testimony in *Prosecutor v. Bagilishema*.[720] The Chamber, making reference to a decision in *Prosecutor v. Akayesu*,[721] stated:

> "[T]he constituent elements of false testimony are:
> - the witness must make a solemn declaration;
> - the false statement must be contrary to the solemn declaration;
> - the witness must believe at the time the statement was made that it was false; and
> - there must be a relevant relationship between the statement and a material matter within the case."[722]

Moreover the burden of proving each of these elements is on the party alleging false testimony.

With respect to false testimony, it also should be noted that part VIII of the Ratification Act penalises as a criminal offence any attempt wilfully to obstruct, pervert or defeat the course of justice in relation to the Court or the impartiality and independence of Court's officials. Moreover, part VIII of the Ratification Act specifically makes it a criminal offence to intimidate witnesses and officials of the Court or to attempt misleading the Court by perjury or incitement to perjury. These offences may be prosecuted only in the national courts of Sierra Leone and not before the Special Court.

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719 See, e.g., International Covenant on Civil and Political Rights 1966, art. 14(5).

720 *Prosecutor v. Bagilishema,* Case No. ICTR-95-A-T, Decision on the Request of the Defence for the Chamber to Direct the Prosecutor to Investigate a Matter with a View to the Preparation and Submission of an Indictment for False Testimony, 11 July 2000.

721 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Decision on the Defence Motions to Direct the Prosecutor to Investigate the False Testimony of Witness "R", 9 March 1998.

722 *Prosecutor v. Bagilishema*, Case No. ICTR-95-A-T, Decision on the Request of the Defence for the Chamber to Direct the Prosecutor to Investigate a Matter with a View to the Preparation and Submission of an Indictment for False Testimony, 11 July 2000, at para. 4.

D. Confessions

Rule 92 provides:

> "A confession by the suspect or the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 43 and Rule 63 were complied with, be presumed to have been free and voluntary."

There are two differences between this rule and the corresponding provisions at the ICTY and ICTR, which are themselves identical. First, the word "strictly", as in "strictly complied with", has been removed from the rule applicable in the Special Court. Second, the phrase, "unless the contrary is proved", which appears in ICTY and ICTR Rule 92, has been deleted from Special Court Rule 92. These amendments are both troubling. The first means that strict compliance by the Prosecutor with the provisions dealing with questioning of the accused is no longer required for the confession to be admissible. The second means that where the requirements have been broadly (i.e., not strictly) complied with, then the Defence is not permitted to challenge the presumption that the confession has been free and voluntary.

At the ICTR, the appropriate time for the Defence to challenge whether the requirements of Rule 63[723] have been complied with by the prosecution would be if and when the Prosecution seeks to use the confession as evidence.[724] It would then be for the Trial Chamber to decide whether to hold a *voire dire* on the admissibility of the statements.[725]

E. Alternative proof of facts

Rule 92*bis* provides that a Chamber may admit as evidence "information" in lieu of oral testimony if it decides the information "is relevant to the purpose for which it is submitted and … its reliability is susceptible of confirmation." Rule 92*bis*(C) provides further that if a party wishes to submit information as evidence, it must give 10 days notice to the opposing party, which has five days to submit any objection.

A comparable rule on alternative proof of facts was first introduced in the ICTY Rules in November 1999 and subsequently introduced into the ICTR Rules. Both rules, however, are confined to discussion of the submission of "written statements", as opposed to the broader "information" referred to in the Special Court's rule. Both rules also provide a key safeguard for the accused – not included in the Special Court rule – by requiring that alternative proof of facts may only be admitted to prove a matter "other than the acts and conduct of the accused as charged in the indictment". In further contrast to the Special Court's rule, they set out factors to be considered that militate in favour and against admission of alternative proof of facts. They also require a declaration by the witness of the truthfulness of the information submitted. Consequently, the Special Court's rule – which does not limit the purpose for which alternative proof of facts may be submitted, set out criteria regarding admission, or require any declaration by the witness – is clearly less protective of the accused's right to examination of the witnesses against him or her that is specifically recognised in article 17 of the Statute. The Special

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723 For a discussion of Rule 63, see part VII of the Guide.

724 *Prosecutor v. Nyiramasuhuko and Ntahobali*, Case No. ICTR-97-21-T, Decision on the Defence Motion to Suppress Custodial Statements by the Accused, 8 June 2001, at para. 15.

725 *Ibid.*

Court rule also provides practitioners with less certainty about the conditions of admissibility and may even prolong trials, as it opens the door to lengthy arguments about admissibility.

Given the broad discretion reserved for the Judges of the Special Court under this rule, it is submitted that they should be very cautious in admitting alternative proof of facts into evidence. In this regard, it is worth bearing in mind the criticism of the extensive use of affidavit evidence at the Tokyo Military Tribunal[726] and the warnings of former ICTY Judge Patricia Wald that the credibility of a criminal court depends largely on how written evidence is admitted.[727]

F. Evidence of consistent pattern of conduct

Rule 93 provides:

> "Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice."[728]

It also requires the Prosecutor to disclose to the Defence any acts tending to show a pattern of conduct pursuant to Rule 66, which deals with the Prosecutor's disclosure obligations.[729]

Rule 93 is identical to the corresponding ICTR and ICTY provisions, which were adopted in order to permit the admission into evidence of background facts relating to crimes against humanity, namely to prove a widespread or systematic practice of abuses.[730]

G. Judicial notice

Judicial notice is the means by which a court may take certain facts as proven without hearing evidence.[731] Rule 94(A) takes this a step further and provides that a Trial Chamber of the Special Court does not require proof of "facts of common knowledge" and *must* take judicial notice thereof. Rule 94(B) provides that:

> "At the request of a party or its own motion, a Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Special Court relating to the matter at issue in the current proceedings."

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726 Evan J. Wallach, 'The Procedural and Evidentiary Rules of the Post-War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?', *Columbia Journal of Transnational Law*, vol. 37, no. 3, 1999, pp. 875-6.

727 Patricia Wald, 'To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings', *Harvard International Law Journal*, vol. 42, 2001, p. 553.

728 Rule 93(A).

729 See part VII of the Guide for a discussion of Rule 66.

730 See John R. W. D. Jones and Steven Powles, *International Criminal Practice*, Oxford University Press/Transnational Publishers, 3rd ed., 2003, at para. 8.5.722.

731 *The Concise Oxford Dictionary of Law*, 2nd ed., 1992, p. 223.

The ICTR has interpreted its comparable sub-rule (A) to mean that it is mandatory for a Trial Chamber to take judicial notice of "facts of common knowledge".[732] These facts are defined as those "so notorious, or clearly established or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary."[733]

In sub-rule (B), however, the Chamber has discretion regarding the taking of judicial notice of "adjudicated facts or documentary evidence". The ICTR has stated that "adjudicated facts" and "facts of common knowledge" are not necessarily the same.[734] With respect to "adjudicated facts", the ICTY also has held that such facts cannot be derived from judgements that are the subject of an uncompleted appeal[735] or facts based on guilty pleas or admissions made by the accused during trial.[736]

An Expert Group that reviewed the practice of the ICTR and ICTY suggested that the tribunals should consider a greater use of judicial notice in order to reduce time or to eliminate the need for identical repetitive testimony and exhibits in successive cases.[737] It is submitted, however, that the Trial Chamber of the Special Court, in exercising its discretion, should be guided by three cumulative considerations: (1) judicial economy; (2) consistency of the case law; and (3) the right of the accused to a fair trial.[738]

H. Testimony of expert witnesses

The Agreement, Statute and Rules of the Special Court do not provide a definition of an expert or a procedure for determining whether a witness qualifies as an expert. Of the Court's significant documents, only the Headquarters Agreement provides a definition, stating:

> " 'Expert' means a person referred to as such in Article 15 of the Agreement establishing the Special Court and appearing at the instance

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732 *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44, Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rule 94, 16 April 2002, at para. 12.

733 *Prosecutor v. Semanza*, Case No. ICTR-97-20, Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rule 94 and 54, 3 November 2000, at para. 25.

734 *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, at para. 28.

735 *Prosecutor v. Simić et al.*, Case No. IT-95-9, Decision on the Pre-Trial Motion by the Prosecutor Requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, 25 March 1999, p. 3; *Prosecutor v. Kupreškić et al.*, IT-95-16-AC, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant To Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001.

736 *Prosecutor v. Milošević*, IT-02-54-T, Decision On Prosecution's Motion For Judicial Notice Of Adjudicated Facts Relevant To The Municipality Of Brcko, 5 June 2002, at para. 3.

737 Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634, at para. 35.

738 See *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, para. 28; *Prosecutor v. Simić et al*, Case No. IT-95-9, Decision On The Pre-Trial Motion By The Prosecution Requesting the Trial Chamber To Take Judicial Notice of the International Character Of The Conflict In Bosnia-Herzegovina, 25 March 1999; *Prosecutor v. Semanza*, ICTR-97-20-T, Decision on the Prosecutor's Further Motion for Judicial Notice Pursuant to Rules 94 and 54, 15 March 2001.

> of the Special Court, a suspect or an accused to present testimony based on special knowledge, skills, experience or training".[739]

At the ICTR, an expert witness is defined in the Guidelines on the Remuneration of Expert Witnesses appearing before the International Criminal Tribunal for Rwanda, 1 January 1995, as:

> "Anyone with specific and relevant information on and/or knowledge of the matter brought before the Tribunal. Such specific information or knowledge which qualifies an individual to appear as an expert witness may have been acquired through training or actual studies, special aptitudes, experience or some reputation in the field or through any other means considered by the party calling the witness to give testimony as being necessary and sufficient to qualify him [sic] as an expert witness."[740]

This definition has subsequently been restricted by an ICTR decision, which provides that expert testimony is to be used "to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field."[741] In the same decision, the Judges stated that an expert witness has to be a recognised expert in his or her field and must also be impartial; thus, it was held that a co-accused indicted for similar crimes, even if an expert in his or her field, could not appear as an expert witness, because of the suspected partiality that status implied.[742]

With respect to expert witnesses, the guidance provided by the Rules of the Special Court is restricted to the procedure for submission of a statement of an expert witness. Rule 94*bis* provides that a party calling an expert witness must disclose the witness' full statement to the opposing party as early as possible and must file the statement with the Trial Chamber at least 21 days prior to the date on which the expert is expected to testify. Within 14 days after the statement is filed, the opposing party must file a notice with the Trial Chamber stating: "(i) It accepts the expert witness statement; or (ii) It wishes to cross-examine the expert witness."[743] If the opposing party accepts the statement, the Trial Chamber may admit the statement into evidence without calling the witness to testify in person.

In the absence of specific guidance from the Court, it appears that any challenge to the qualification of a witness as an expert and the scope of such expertise would need to be raised by motion after the witness statement is disclosed to the opposing party or on cross-examination.

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739 Headquarters Agreement, art. 1(f).

740 The ICTY also has issued a directive on the use of expert witnesses: Directive on Allowances for Witnesses and Expert Witnesses, 5 December 2001, UN Doc. IT/200. A similar directive or guideline has yet not been issued by the Special Court.

741 *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998.

742 *Ibid.*

743 Rule 94*bis*(B).

I. Exclusion of evidence

Rule 95 states: "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute."

The wording of this rule differs from the corresponding ICTR and ICTY rules, which provide:

> "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."

At the ICTY, the Defence made a challenge under this rule to the admission of evidence collected by the Prosecution in an armed search and seizure operation in Bosnia and Herzegovina without that State's express permission.[744] The Trial Chamber ruled that the Prosecution acted within its powers under the ICTY Statute and rejected the Defence's motion.[745]

J. Rules of evidence in cases of sexual assault

Rule 96 provides that in cases of sexual violence, the Court is guided by and "where appropriate" must apply the following principles:

> "(i) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
> (ii) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
> (iii) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
> (iv) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of sexual nature of the prior or subsequent conduct of a victim or witness."

Rule 96 differs from the comparable ICTR and ICTY rule and is identical to ICC Rule 70. Thus, unlike the ICTR and ICTY rule, it does not provide binding direction, but leaves the Court to apply the enumerated principles "as appropriate". It also does not contain the directive in the ICTR and ICTY rule that no corroboration of the victim's testimony is required. As a result, it is debatable whether corroborating evidence will be required in prosecutions of sexual violence before the Special Court.

In addition, Special Court Rule 96 does not contain any reference to consent as a defence, a statement that is found in the comparable ICTR and ICTY rule. This may, in part, be in reaction to the decision of the ICTY Trial Chamber that stated that absence of consent is an element of the crime of rape and that consent is consequently not a defence *per se*; in other words, the Prosecution has to prove absence of consent as part of proving

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744 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Decision Stating Reasons for Trial Chamber's Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence, 25 June 1999.

745 *Ibid.*

its case.[746] Rule 96 also dispenses with the ICTY and ICTR rules' requirement that an accused must satisfy the Trial Chamber *in camera* of the relevance and credibility of evidence of consent before it is admitted.

K. Lawyer-client privilege

Rule 97 states that "[a]ll communications between lawyer and client" are "privileged" and provides that such communications may only be ordered disclosed if:

> "(i) The client consents to such disclosure; or
> (ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.
> (iii) The client has alleged ineffective assistance of counsel, in which case the privilege is waived as to all communications relevant to the claim of ineffective assistance."

Based on the plain language of Rule 97, it appears to protect as privileged communications not only between a defence counsel and a suspect or accused but also between any lawyer and client. It also is important to note that, while the first and second instances in which a privileged communication may be ordered disclosed are included in the ICTY and ICTR rule, the third is not.

Finally, as the Rules are silent regarding other potentially privileged communications, such as communications between spouses or within other professional relationships, it is possible that the principles of Rule 97 might be extended to other situations.[747] In this regard, the Special Court could be guided by ICC Rule 73, which sets out criteria that must be satisfied for other communications to qualify as privileged.

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Overall, the Special Court's rules of evidence are notable for increasing the discretion of Judges with respect to the admission of evidence. This posture, however, places a greater burden on the Judges of the Special Court. It also comes with a risk to the rights of the accused, which are more clearly protected by some of the provisions of the ICTR and ICTY's rules of evidence.

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[746] *Prosecutor v. Kunarac et al.*, IT-96-23&23/1, Trial Chamber, Judgement, 22 February 2001, at paras. 461-4.

[747] Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, Oxford, 2003, p. 243.

Part X
Penalties and Sentencing[+]

The Statute of the Special Court for Sierra Leone provides for penalties including imprisonment, forfeiture of property and, in the case of juveniles, various measures for rehabilitation and reintegration into society. This part examines each of these penalties in light of relevant guidance from international criminal tribunals, and discusses the various aims of punishment. This part also examines the procedure for sentencing, the factors relevant to sentencing, enforcement of sentences, supervision of sentences, and pardon and commutation of sentence.

A. Penalties

1. Imprisonment

The Statute of the Special Court provides for the penalty of imprisonment for a specified number of years. Specifically, article 19(1) states: "The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years."[748] Thus, as is the case with the ICTY Statute and the ICTR Statute, the Statute of the Special Court implicitly rules out the death penalty and, by limiting sentencing provisions to imprisonment, tacitly excludes corporal punishment.

In determining terms of imprisonment, article 19(1) of the Statute provides further that the Trial Chamber has recourse to the practice regarding prison sentences in the Sierra Leone courts as well as the ICTR. This provision is similar to the one in the ICTR Statute referring to the courts of Rwanda[749] and the one in the ICTY Statute referring to the former Yugoslavia.[750]

Guidance from international courts and tribunals with respect to imprisonment – indeed with respect to all penalties – is limited. The post-World War II war crimes trials established many important principles, which have helped to define and clarify international criminal law, but the considerations relating to penalties were explained in less detail. The military tribunals occasionally appended a perfunctory paragraph to their judgements reviewing "mitigating features",[751] but otherwise there was little else to serve as precedent to assist the more recent international tribunals in the arena of sentencing. Even today, unlike domestic criminal justice systems, international law relating to sentencing is still in an embryonic state.

[+] Part X was prepared thanks to substantial contributions of research and writing from Richard Rogers. NPWJ remains nonetheless responsible for the views expressed herein as well as any errors or omissions.

748 This provision is echoed in Rule 101, which provides, without reference to article 19(1) of the Statute, that a "person convicted by the Special Court, other than a juvenile offender, may be sentenced to imprisonment for a specific number of years."

749 ICTR Statute, art. 23(1).

750 ICTY Statute, art. 24(1).

751 See *Trial of the Major War Criminals before the International Military Tribunal*, vol. 22, 1946, p. 524 (Goering at para. 527, Keitel at para. 536, Jodl at para. 571, Speer at para. 579, Von Neurath at para. 582); *Trial of War Criminals before the Nuremburg Military Tribunals*, vol. 5, 1948, p. 193 (Klemm at para. 1107, Rothaug at para. 1156, Oeschey at para. 1170).

The lack of guidance within the provisions of the tribunals has been criticised by academics and practitioners alike. Whilst acknowledging the need to ensure discretion, there is concern that insufficient guidelines may undermine confidence in the tribunals and cause inconsistency.[752] Indeed, the fact that this wide discretion has been entrenched by the ICTY in a number of cases[753] may be a cause for uncertainty for years to come.[754]

One of the most discussed issues within the jurisprudence of the international tribunals has been ICTY Rule 101 and ICTR Rule 101, which provide that a convicted person may be sentenced to imprisonment for a term of up to and including the remainder of life. To date, the ICTY has not sentenced any convicted person to life imprisonment, preferring instead to pass sentences of fixed terms (notwithstanding that such fixed terms are likely to amount to life for all practical purposes). However, ICTY Rule 101 has been the subject of some controversy; it has been argued that its implementation contradicts the obligation to have recourse to sentencing practice in the former Yugoslavia, which provides for a maximum term of imprisonment of 20 years. This issue was touched upon in the *Tadic* sentencing appeals judgement[755] in response to submissions by the appellant that the 20-year sentence imposed by the Trial Chamber failed to take sufficient account of the sentencing practice of the courts of the former Yugoslavia. The Appeals Chamber dismissed the submissions noting that, "a Trial Chamber's discretion in imposing sentence is not bound by any maximum term of imprisonment applied in a national system". The Appeals Chamber further noted that that at the time of the offences, the death penalty could have been imposed under Yugoslav law for similar offences.[756]

There is further discussion of this issue in the *Delalić* Trial Judgement,[757] but opinions still vary. In the view of some commentators the issue is a philosophical one, namely, whether life imprisonment can be considered as the same or even graver than the death penalty.[758] The same arguments have not arisen at the ICTR, presumably because life

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752 See Marlise Simons, 'Plea Deals Being Used to Clear Balkan War Tribunal's Docket', *New York Times*, 18 November 2003, p. A1 (ICTY Appeals Chamber Judge Hunt criticises the introduction of "plea bargaining" at the ICTY, noting that it has led to sentences much lighter than those previously imposed for comparable crimes).

753 See *Prosecutor v. Delalić* et al, Case No. IT-96-21-A, Appeals Judgement, 20 February 2001, at para. 757: "This is not to suggest that a Trial Chamber is bound to impose the same sentence in the one case as that imposed in another case simply because the circumstances between the two cases are similar"; see also *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Judgement, 15 March 2002, at para. 526, observing the need to protect this "important discretion" and "to ensure that sentence imposed is appropriate to the specific circumstances of the particular case".

754 On the other hand it has been clearly recognised that consistency of sentencing (at least within tribunals) is important. See *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Appeals Judgement, 5 July 2001, at para. 96, noting "that a sentence should not be capricious or excessive, and that, in principle, it may be thought to be capricious or excessive if it is out of all reasonable proportion with a line of sentences passed in similar circumstances for the same offences".

755 *Prosecutor v. Tadic*, Case No. IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, 26 January 2000, at para. 21.

756 *Ibid.*

757 *Prosecutor v. Delalić et al*, Case No. IT-96-21-T, Trial Chamber Judgement, 16 November 1998, at paras. 1208-1212.

758 See John R. W. D. Jones and Steven Powles, *International Criminal Practice*, Oxford University Press/Transnational Publishers, 3rd ed., 2003, p. 794.

imprisonment was permitted in the courts of Rwanda.[759] Nor should it arise at the Special Court given that neither the Statute nor the Rules provides for a "remainder of life" sentence,[760] although in any case, life imprisonment is permitted in the courts of Sierra Leone.[761]

2. Other Penalties

Article 19(3) of the Statute states: "In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone".[762] Rule 104 states that following a judgement of conviction containing a specific finding of unlawful taking of property,[763] at the request of the Prosecutor or by its own initiative, the Trial Chamber may hold a special hearing on the question. In the meantime, the Trial Chamber may order provisional measures for the preservation and protection of the property or proceeds.[764] If such property or its proceeds are in the hands of a third party not otherwise connected to the crime, they have the right to appear before the Trial Chamber and to be given the opportunity to justify their claim to the property or the proceeds.[765] Section 22 of Sierra Leone's Special Court Agreement Ratification Act specifies that forfeited property, proceeds or assets delivered to Sierra Leone shall be used as specified in the Special Court's forfeiture order, used to address the consequences of the armed conflict in Sierra Leone, or deposited in the War Victims Fund established pursuant to the Lomé Agreement.

There are no direct rights within the Statute of the Special Court, or the ICTR Statute and ICTY Statute, which allow victims to obtain compensation. However, they each provide that the Registrar shall provide for the transmission to the competent authorities of the State concerned the judgement finding the accused guilty of a crime.[766] It will be for the victim to claim compensation before the national court. In the case of Sierra Leone and the Special Court, section 45 of the Ratification Act provides that such claim may be made in the courts of Sierra Leone in accordance with the Criminal Procedure Act, 1965.[767]

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759 See *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgement and Sentence, 4 September 1998; *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgement and Sentence, 21 May 1999, at para. 31 (imposing four concurrent remainder-of-his-life sentences, as distinct from "a life sentence," giving the phrase "remainder of his life" under Rule 101(A) its plain meaning).

760 See Rule 101(A).

761 Bankole Thompson, *The Criminal Law of Sierra Leone*, University Press of America, p. 35.

762 This provision is echoed, without reference to article 19(3) of the Statute, in Rule 104(C). For similar provisions, see ICC Statute, art. 77; ICTY Statute, art. 24; ICTR Statute, art. 23.

763 See Rule 88(B).

764 See Rule 104(A).

765 See Rule 104(B). In comparison, ICTY Rule 105 and ICTR Rule 105 give their trial chambers the power to summon any third party to give them an opportunity to justify their claims. The Rule 104 also does not, unlike ICTY Rule 105 and ICTR Rule 105, expressly state that a trial chamber's determination of ownership should be on the balance of probability.

766 See Rule 105; see also ICTR Rule 106; ICTY Rule 106.

767 See the Criminal Procedure Act, 1965, section 54. In order to obtain compensation in a Sierra Leone court, "the facts constituting the offence amount [must] also to a tort against the person or property": see section 54(1).

The provisions of the Special Court, the ICTR and the ICTY do not provide for the imposition of a fine, except in relation to contempt and false testimony.[768] By contrast, the ICC Statute makes significant headway with regard to financial penalties. It stipulates in article 77(2) that besides imprisonment, the Court may order "a fine under the criteria provided for in the Rules" and a "forfeiture of proceeds, property and assets derived directly or indirectly from the crime, without prejudice to the rights of bona fide third parties". The ICC must, when considering the imposition of a fine, determine "whether imprisonment is a sufficient penalty",[769] and take into account the damage or injury caused and the proportionate gain made by the convicted person.[770] In the event that the fine is not paid, imprisonment may be extended by a maximum of a quarter of the original sentence or five years (whichever is less).[771] Interestingly, the Court may order that money and other property collected through fines or forfeiture be transferred to a trust fund established by decision of the Assembly of States Parties for the benefit of the victims or their families.[772]

Finally, because the Statute of the Special Court allows for jurisdiction over persons between 15 and 18 years of age at the time of the alleged commission of a crime, it provides for specific measures for such individuals.[773] If such a person is convicted by the Special Court, he or she may not be sentenced to imprisonment. Instead, article 7(2) of the Statute provides that the Special Court must order any of the following:

> "care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies."

B. The Aim of Punishment

At the national level, the concepts concerning the object and purpose of sentencing have been debated for centuries and there are detailed opinions and comprehensive legislation on the various aims of sentencing. The same cannot be said for sentencing in international courts and tribunals.

The object and purpose of sentencing at international tribunals is not defined in their provisions. However, it is possible to obtain some understanding of the purpose and object of sentencing at the international level through a review of the jurisprudence of the ICTY and ICTR.

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768 See R. Dixon and K. Kahn, *Archbold International: Practice Procedure and Evidence of International Criminal Courts*, 2003, pp. 442-443.

769 See ICC Rule 146(1).

770 See ICC Rule 146(2).

771 See ICC Rule 146(5).

772 See ICC Statute, art. 79.

773 It is highly unlikely, however, that such measures would need to be used since the Court has not indicted any person who was between 15 and 18 years of age at the time of the alleged commission of a crime. Moreover, the central factor guiding the Prosecutor in his decision to prosecute – whether that person bears the greatest responsibility for crimes committed within Sierra Leone – would appear to exclude anyone below 18 years of age.

1. Retribution and Deterrence

The early jurisprudence of the ad hoc tribunals would appear to indicate that retribution and deterrence are the main purposes of punishment.[774] In *Delalić*[775] and in *Aleksovski*,[776] the ICTY Appeals Chamber was of the view that retribution and deterrence should constitute the main principles for sentencing in relation to crimes under international law.

The Trial Chambers have tended to follow the same approach. For example, in *Todorović*, the ICTY Trial Chamber took the view that those two notions, or as it termed them "purposive considerations", formed the backdrop against which the sentence of an individual must be determined.[777] The Chamber went on to hold that the principle of retribution "must be understood as reflecting a fair and balanced approach to the exacting of punishment for wrongdoing. This meant that the penalty imposed must be appropriate to wrong doing; put another way – the punishment must fit the crime." In other words retribution is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community. This has been widely recognised both at the ICTY and ICTR[778] and was expressly recognised in relation to the Special Court by H.E. President Alhaji Dr. Ahmad Tejan Kabbah in his letter to the UN Secretary-General, in which he said, "I believe that crimes of the magnitude committed by the RUF in this country are of concern to all persons in the world, as they greatly diminish respect for international law and for the most basic human rights."[779]

Nevertheless, an equally important – if not more important – purpose is that the people of Sierra Leone are able to achieve retribution through the Special Court for the crimes committed against them. The thread running throughout the negotiations on the establishment of the Special Court, which is reflected in the constituent documents and in the mode of establishment and operations of the Court, is that the Special Court is intended to be an instrument to deliver accountability to the people of Sierra Leone. Again, the words of President Kabbah express this very clearly: "It is my hope that the United Nations and the international community can assist the people of Sierra Leone in bringing to justice those responsible for those grave crimes."[780]

As for deterrence, the Chamber in *Todorović*[781]understood this to mean "the penalties imposed by the International Tribunal must, in general, have a deterrent value to ensure

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774 See *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Sentencing Judgement, 6 December 1999, at para. 456; *Prosecutor v. Serushago*, Case. No. ICTR-98-39-S, Sentencing Judgement, 5 February 1999, at para. 20.

775 *Prosecutor v. Delalić et al*, Case No. IT-96-21-A, Appeals Judgement, 20 February 2001, at para. 806.

776 *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Judgement, 24 March 2000, at para. 185.

777 *Prosecutor v. Todorovic*, Case No. IT-95-9/1-S, Sentencing Judgment, 31 July 2001, at para. 28.

778 See John R. W. D. Jones and Steven Powles, *International Criminal Practice*, Oxford University Press/Transnational Publishers, 3rd ed., 2003, p. 771; see also *Prosecutor v. Tadic*, Case No. IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, 26 January 2000, at para. 48, cautioning that no "undue prominence" should be given to deterrence as a sentencing factor.

779 Letter from the President of Sierra Leone to the President of the United Nations Security Council, annexed to the Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/786.

780 *Ibid.*

781 *Prosecutor v. Todorovic*, Case No. IT – 95 -9/1-S, Sentencing Judgment, 31 July 2001, at para. 29.

that those who would consider committing similar crimes will be dissuaded from doing so".[782]

2. Reprobation and stigmatisation

In other cases, the ICTY Trial Chambers have considered reprobation and stigmatisation as among the main purposes of sentences.[783] In *Erdomović*, the ICTY Trial Chamber stated:

> "The International Tribunal sees public reprobation and stigmatisation by the international community, which would hereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions for a crime against humanity".[784]

3. Rehabilitation

In other cases, the tribunals have mentioned the rehabilitation of the accused, particularly when he or she was of a young age. For example, in *Furundžija*, the ICTY Trial Chamber stated that none of the usual purposes of punishment such as retribution, deterrence and stigmatisation were to detract from the "Trial Chamber's support for rehabilitative programmes in which the accused might participate while serving his sentence: the Trial Chamber is especially mindful of the age of the accused in this case."[785]

However, the importance attributed to rehabilitation has depended very much on the individual trial chamber. For example, the ICTY Trial Chamber in *Erdemović* attributed little, if any, weight to rehabilitation as a function of sentencing and noted that such a concern must "be subordinate to that of an attempt to preclude … reoccurrence."[786]

C. Sentencing procedures

Prior to sentencing following a conviction or a guilty plea, Rule 100(A) provides an opportunity for the Prosecutor to submit "any relevant information that may assist the Trial Chamber in determining an appropriate sentence." This must be done no more than 14 days after a conviction or guilty plea.[787] The defendant then has 21 days after the Prosecutor's filing to submit any relevant information for this purpose.[788]

In the case of a guilty plea, Rule 100(B) provides that the Trial Chamber must hear the submissions of the parties at a sentencing hearing. In the case of a conviction, the Trial Chamber has discretion to hear submissions at a sentencing hearing.

Rule 100(C) provides that the "sentence may be pronounced in a judgement in public and in the presence of the convicted person." The Trial Chamber must also indicate

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782 *Ibid.*

783 See *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, 29 November 1996, at para. 65; *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Trial Judgement, 3 March 2000, at paras. 763-764.

784 *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, 29 November 1996, at para. 65.

785 *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgement, 10 December 1998, at para. 291. Note also the Statute, article 7(1), which expressly states rehabilitation as an aim for people aged between 15 and 18 at the time of the alleged commission of the crime.

786 *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, 29 November 1996, at para. 66.

787 Rule 100(A).

788 *Ibid.*

whether multiple sentences are to be served consecutively or concurrently.[789] This should also be specified with respect to any pre-existing sentence. For example, under Sierra Leone law, any sentence of imprisonment imposed on a person who is later sentenced by the Court is deemed to run concurrently with the Special Court sentence, unless the Special Court orders otherwise.[790]

Unless the Court decides otherwise, a sentence begins to run from the day it is pronounced.[791] Rule 102(B) provides further that if the convicted person is on provisional release or is for any other reason at liberty and is not present when the judgement is pronounced, the Trial Chamber must issue a warrant for his or her arrest.[792] Upon arrest, the convicted person must be notified of the conviction and sentence.[793] As soon as possible after the time limit for appeal has lapsed, the convicted person must then be transferred to the place of imprisonment.[794]

D. Factors that determine sentence

It is for the Trial Chamber to establish the prison sentence it considers appropriate, taking into account "such factors as the gravity of the offence and the individual circumstances of the convicted person."[795] Clearly, the factors enumerated are not exhaustive and are supplemented by aggravating and mitigating circumstances outlined in both the Statute and the Rules.

Article 6(2) of the Statute states: "The 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."[796] Nevertheless, the fact that an accused acted pursuant to an order of a government or of a superior, while not relieving him or her of criminal responsibility, "may be considered in mitigation of punishment if the Special Court determines that justice so requires."[797] Special Court Rule 101, as well as the comparable rule at the ICTY and ICTR, provides additional guidance insofar as it expressly cites "substantial cooperation with the Prosecutor" as a mitigating factor to be taken into account by the Trial Chamber.

The ICC Rules take a step further and provide that the sentence imposed "must reflect the culpability of the convicted person"[798] and must also "balance all the relevant factors including any mitigating and aggravating factors and consider the circumstances of both the convicted person and the crime."[799]

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789 Rule 101(C).
790 Special Court Agreement Ratification Act, s. 36(1).
791 Rule 102(A).
792 For a discussion of arrest, see part VII of the Guide.
793 Rule 102(B).
794 Rule 103(B).
795 Statute, art. 19(2); see ICTY Statute, art. 24(2); ICTR Statute, art. 23(2); ICC Statute, art. 78(1).
796 See ICTY Statute, art. 7(2); ICTR Statute, art. 6(2).
797 Statute, art. 6(4); see ICTY Statute, art. 7(4); ICTR Statute, art. 6(4).
798 ICC Rule 145(1)(a).
799 ICC Rule 145(1)(b).

As seen from these guidelines, the discretion enjoyed by international courts and tribunals is a wide one,[800] but it is not unlimited.[801] The nature of the discretion has been variously described, but it is probably fair to say that the opinion of the ICTY Appeals Chamber in *Jelisic* conforms to the accepted view: "The Trial Chamber has a broad discretion as to which factors it may consider in sentencing and the weight to attribute to them."[802]

The gravity of the offence has, unsurprisingly, been affirmed in a number of cases as the primary consideration in the sentencing exercise.[803]

Finally, the Special Court must take into account prior service of penalties imposed for the same act and any period of detention pending proceedings at the Special Court. Specifically, article 9(3) of the Statute provides that the Special Court must "take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served".[804] Rule 101(D) provides: "Any period during which the convicted person was detained in custody pending his surrender to the Special Court or pending trial or appeal, shall be taken into consideration on sentencing."

E. Aggravating circumstances

Rule 101(B)(i) obliges the Trial Chamber to take into account any aggravating circumstances when determining the appropriate sentence.[805] There are a number of factors that have been determined to be aggravating factors by international tribunals. These include: the accused's superior position; the nature of the crime, including how it was committed and the effect on the victims; the nature of the participation; and, in certain circumstances, premeditation.

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800 See *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000, at para. 52 (referring to "unfettered discretion … to decide whether to take into account certain factors in the determination of the sentence"); *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Trial Judgment, 4 September 1998, at para. 29: "[F]or it is true that among the joint perpetrators of an offence or among the persons guilty of the same type of offence, there is only one common element: the target offence which they committed with its inherent gravity. Apart from this common trait, there are of necessity, fundamental differences in their respective personalities and responsibilities: their age, their background, their education, their intelligence, their mental structure."

801 See *Prosecutor v. Delalić et al*, Case No. IT-96-21-A, Appeals Judgement, 20 February 2001, at para. 717: "Trial Chambers exercise a considerable amount of discretion (although it is not unlimited) in determining an appropriate sentencing."

802 *Prosecutor v. Jelisić*, Case No. IT-95-10, Appeals Judgement, July 5, 2001, at para. 100.

803 See *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Judgement, 24 March 2000, at para. 182: "Consideration of the gravity of the conduct of the accused is normally the starting point for consideration of an appropriate sentence. The practice of the International Tribunal provides no exception"; see also *Prosecutor v. Delalić et al*, Case No. IT-96-21-T, Trial Judgement, 16 November 1998, at para. 1225: "The most important consideration which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence"; *Prosecutor v. Kupreškic*, Case No. IT-95-16-T, Trial Judgement, 14 January 2000, at para. 852: "The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of participation of the accused in the crime."

804 This provision is acknowledged in Rule 101(B)(iii).

805 For comparable rules, see ICTR Rule 101(B)(i); ICTY Rule 101(B)(i); ICC Rule 145(1)(b).

1. The accused's superior position

The direct participation of a high-level superior in a crime is an aggravating circumstance, although to what degree depends on the actual level of authority and the form of participation.[806] Superiority is an important factor in determining sentence and has been closely linked to the stated objective of deterrent sentencing.[807]

While a superior position can generally be considered to be an aggravating factor in the circumstances where the accused is convicted under the doctrine of command responsibility,[808] there is some doubt as to whether this is appropriate given that a superior position is, in any event, an essential element of that form of liability. It is difficult to justify that a prerequisite for liability should also at the same time be an aggravating factor.[809]

2. Abuse of authority

The abuse of authority has been considered to be an aggravating factor. Indeed, the abuse of a superior position and the trust that is placed in the institution of authority "clearly constitutes an aggravating factor."[810] However, this broad statement of principle must be seen in light of the need for a Trial Chamber to consider an accused's actual participation[811] within the broader context of a conflict.[812]

3. Victim impact

A Trial Chamber must, when determining sentence, make an assessment (as far as possible) of the number of victims and the suffering inflicted upon them.[813] Thus, where the offences are characterised by particular cruelty,[814] or where the victims are young,[815] or where there numerous victims,[816] these will be considered to be aggravating factors. However, it may be argued that where the impact on the victims is part of the definition of the offence, it may not be taken as an aggravating factor. In such a case, the extent of the long-term physical, psychological and emotional suffering of the immediate victims is instead relevant to the gravity of the offences.[817]

4. Premeditation

Premeditation, except where it is an element of the crime itself, can be an aggravating factor. A Trial Chamber needs to examine closely whether in a specific case

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806 See *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgement, 2 August 2001, at para. 708.

807 See *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Trial Judgement, 26 February 2001, at para. 853; *Prosecutor v. Krnojelac*, Case No. IT-97-25, Trial Judgement, 15 March 2002, at para. 514.

808 See *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Trial Judgement, 3 May 2000, at para. 789.

809 See John R. W. D. Jones and Steven Powles, *International Criminal Practice*, Oxford University Press/Transnational Publishers, 3rd ed., 2003, pp. 782-784.

810 *Prosecutor v. Todorovic*, Case No. IT-95-9/1-S, Sentencing Judgment, 31 July 2001, at para. 61.

811 See *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgement, 2 August 2001, at para. 721.

812 See *Prosecutor v. Tadic*, Case No. IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, 26 January 2000, at para. 55.

813 See *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgement and Sentence, 4 September 1998, at para. 42; *Prosecutor v. Krnojelac*, Case No. IT-97-25, Trial Judgement, 15 March 2002, at para. 512.

814 See *Prosecutor v. Todorovic*, Case No. IT-95-9/1-S, Sentencing Judgment, 31 July 2001, at para. 65.

815 See *Prosecutor v. Foča*, Case No. IT-96-23-T, Trial Judgement, 22 February 2001, at para. 864.

816 *Ibid*, para. 866.

817 See R. Dixon and K. Kahn, *Archbold International: Practice Procedure and Evidence of International Criminal Courts*, 2003, p. 490. For a discussion of those crimes that involve the impact on the victim as an element, see generally part II of the Guide.

premeditation, in fact, existed and the extent to which it determines the accused's culpability.[818]

F. Mitigating circumstances

Although cooperation with the Prosecutor is the only factor expressly provided for in the provisions of the tribunals, a Trial Chamber has the discretion, when determining sentence, to take into account any factor it considers to be of a mitigating nature. To this extent mitigating factors, like aggravating factors, are open-ended.[819]

The reduction of sentences for cooperation with the Prosecutor is intended to provide extra incentive for those who would be inclined to cooperate. Given the fact that some of the accused are faced with the prospect of a remainder of life sentence, the incentive thus provided cannot be underestimated.[820]

Rule 101(B)(ii) expressly provides for "substantial cooperation with the Prosecutor" as a mitigating factor. There is, however, no definition of "substantial cooperation". At the ICTY, the Appeals Chamber has held that such definition is left to the discretion of the Trial Chamber, which is responsible for weighing the circumstances in order to determine whether credit may be giving for cooperation.[821]

When determining this issue, a Trial Chamber will be interested in ascertaining the true nature of the cooperation given to the Prosecution. It will wish to ascertain not only the quality of the assistance offered, but also the spirit in which it is lent. In other words, a Trial Chamber will not only evaluate the extent of the assistance offered, but also whether the accused has offered it spontaneously and selflessly.[822]

In many jurisdictions a guilty plea is considered to be a significant mitigating factor; the international tribunals are no exception to this general principle. The reasons for this are numerous and well known. Remorse has also been recognised in a number of cases to be a mitigating factor.[823]

Although the three factors – substantial cooperation with the Prosecution, guilty plea and remorse – are three separate considerations, there is often considerable overlap between them. As regards the first two, a Trial Chamber may wish to consider the true motivation of the accused. In short, a Trial Chamber may wish to assess whether the accused is motivated by sincere remorse or by self-interest. If a Trial Chamber concludes that the remorse (expressed either explicitly or implicitly through the cooperation with

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818 See *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgement, 2 August 2001, at para. 711.

819 *Ibid*, at para. 713.

820 Compare *Prosecutor v. Kambanda*, Case No. ICTR-95-23-S, Trial Judgement, 4 September 1998, at para. 36.

821 *Prosecutor v. Jelisić*, Case No. IT-95-10, Appeals Judgement, 5 July 2001, at para. 124.

822 See *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Trial Judgement, 3 May 2000, at para. 774; see also *Prosecutor v. Todorovic*, Case No. IT-95-9/1-S, Sentencing Judgment, 31 July 2001, at para. 86 (for the view that merely because the accused has something to gain from cooperation does not mean that it cannot be mitigation). This must logically be correct or else an accused would not ever obtain the advantage offered by Rule 101(B) (ii).

823 See *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, 29 November 1996, at paras. 96-98; *Prosecutor v. Todorovic*, Case No. IT-95-9/1-S, Sentencing Judgment, 31 July 2001, at para. 89; *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Trial Judgement, 3 May 2000, at para. 775.

the Prosecution) and/or the plea of guilty is not sincere, it may attach less or even no weight to these factors.[824]

Finally, according to article 19 of the Statute,[825] the personal circumstances of the accused may also be considered. In this regard, a number of factors have been determined by the ICTR and ICTY to be mitigating, such as: good character; poor health; poor family background; diminished responsibility at the time of the offence; age; and immaturity.[826]

G. Enforcement of sentences

International courts and tribunals do not have their own prisons in which to detain convicted persons in the long-term, or their own police to enforce forfeiture orders or other remedial measures. Consequently, they must rely on individual States.

With respect to enforcement of prison sentences, article 22 of the Statute specifically provides for imprisonment within Sierra Leone;[827] Sierra Leone has made legal provisions for such imprisonment.[828] However, this provision is subject to the caveat contained within article 22(1), which provides:

> "If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons."

Article 21(1) also provides that the Special Court may conclude similar agreements for the enforcement of sentences with other States.[829]

Similarly, article 26 of the ICTR Statute allows detention within Rwanda, stating:

> "Imprisonment shall be in Rwanda or in any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons; such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda."

Article 27 of the ICTY Statute provides: "Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons."

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824 See *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgement, 14 December 1999, at para. 127.

825 For comparable provisions, see ICTR Statute, art. 23; ICTY Statute, art. 24.

826 See *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment II, 5 March 1998, at para. 16(i); *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgement, 2 August 2001, at para. 714; *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000, at paras. 59-68; *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Appeals Judgement, 5 July 2001, at para 128; *Prosecutor v. Delalić et al*, Case No. IT-96-21-A, Appeals Judgement, 20 February 2001, at para. 827.

827 Statute, art. 22(1): "Imprisonment shall be served in Sierra Leone".

828 See Special Court Agreement Ratification Act, ss. 32-6.

829 These provisions are echoed, without reference to article 22(1) of the Statute, in Rule 103(A).

H. Supervision of imprisonment

Article 22 of the Statute provides that imprisonment, wherever it takes place, should be supervised by the Court.[830] The ICTY Statute and ICTR Statute similarly provide for continuing supervision of sentences by those international tribunals.[831]

The meaning of a tribunal's duty under the Statute and Rules of ICTY was considered in *Erdemović*, in which the court noted that, "the penalty imposed as well as the enforcement of such penalty must always conform to the minimum principles of humanity and dignity which constitute the inspiration for the international standards governing the protection of the rights of the convicted persons."[832] The court emphasised that a convicted person is not automatically stripped of all his or her rights, but rather only those "that are demonstrably necessitated by the fact of incarceration" and that the penalty imposed "must not be aggravated by the conditions of its enforcement".[833]

In a case of supervision of imprisonment in Sierra Leone, section 34 of the Special Court Agreement Ratification Act has already put in place legal measures providing for the Special Court to communicate with the prisoner, have access to the prisoner and obtain reports about the prisoner.

I. Reduction or commutation of sentence

While article 22(2) of the Statute provides that the State of enforcement of imprisonment is bound by the duration of the sentence,[834] article 23 of the Statute allows for pardon or commutation of a sentence of imprisonment, if the law of the State of imprisonment provides for it.[835] Similar provisions regarding pardon and commutation of sentence exist in the ICTY Statute and the ICTR Statute.[836]

These provisions must be read in light of the relevant rules of procedure and evidence. In the case of the Special Court, Rules 123 and 124 set out the procedure to be followed in the event that a prisoner, under the law of the State in which he or she is imprisoned, becomes eligible for pardon or commutation of sentence.[837] The decision remains within the jurisdiction of the Special Court – specifically the President in consultation with the other Judges – whose role, once eligibility has been notified pursuant to the Rules,[838] is to determine "on the basis of the interests of justice and the general principles of law" whether there shall be the suggested pardon or commutation.[839]

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830 Imprisonment also is governed by the law of the State of enforcement: Statute, art. 22(2).
831 See ICTY Statute, art. 27; ICTR Statute, art. 26.
832 *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment II, 5 March 1998, at para. 74.
833 *Ibid.*
834 Sierra Leone has incorporated this obligation into its national laws. See Special Court Agreement Ratification Act, s. 32.
835 Sierra Leone also has made provision for pardon or commutation of sentence by order of the Special Court. See Special Court Agreement Ratification Act, s. 35.
836 See ICTY Statute, art. 28; ICTR Statute, art. 27.
837 For comparable rules at the ICTY and ICTR, see ICTY Rules 123, 124 and 125; ICTR Rules 124, 125 and 126.
838 See Rule 123.
839 Rule 124.

In contrast, in the case of the ICTR and the ICTY, this determination is made on the basis of whether pardon or commutation is "appropriate".[840] ICTR Rule 126 and ICTY Rule 125 also provide:

> "In determining whether pardon or commutation is appropriate, the President shall take into account, inter alia, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor."

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As at the time of writing, the provisions of the Statute and Rules of the Special Court regarding penalties and sentencing remain untested. Thus, the Special Court may use the time available to continue learning from the experiences of the ICTY and the ICTR with their similar provisions and to ensure that its provisions are imbued with due regard for applicable international human rights standards. It also is hoped that the Court will use this time to develop respectful mechanisms whereby victims of crimes might participate in the sentencing process and to cooperate with Sierra Leone on plans for the enforcement and supervision of sentences of imprisonment.

[840] See ICTR Rule 125; ICTY Rule 124. ICTR Rule 125 differs from ICTY Rule 124 insofar as there is an obligation under ICTR Rule 125 to notify the Government of Rwanda before determination of the appropriateness of a pardon or commutation. There also is no explicit obligation to notify the Government of Sierra Leone before determination of the appropriateness of a pardon or commutation in the Rules of the Special Court.

Part XI
Appellate and Review Proceedings[+]

This part discusses proceedings involving the appeal or review of a decision, judgement or sentence. It examines appellate proceedings, including the grounds of appeal, the procedure for submission of a notice of appeal, the effects of an appeal on the status of an acquitted or convicted person, the general and expedited appellate procedures and judgement and sentencing on appeal. It then examines review proceedings, discussing the grounds for review and the procedures regarding an application for review.

A. Appellate proceedings

Article 20 of the Statute provides: "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor".[841] The Rules also provide for the Appeals Chamber to hear appeals from decisions regarding misconduct of counsel and applications for bail.[842] In addition, the Rules permit the Appeals Chamber to hear interlocutory appeals from decisions on motions if the Trial Chamber gives leave to appeal.[843]

The Rules further provides for the Trial Chamber to refer certain preliminary motions to a bench of Judges of the Appeals Chamber for determination.[844] Such proceedings, however, are not appellate proceedings as they are the first proceedings in which a final decision is reached on the merits of such preliminary motions.[845]

In undertaking its appellate functions, the Appeals Chamber may "affirm, reverse or revise" the decisions of the Trial Chamber.[846] In reference to the similar provisions of the ICTY Statute, the Appeals Chamber in *Prosecutor v. Kupreskic* noted that an appeal is not an opportunity for the parties to reargue their cases; it does not involve a trial *de novo*, in which a matter is tried anew, nor is it a rehearing.[847]

The Statute also mandates that the Judges of the Appeals Chamber must be guided by the decisions of the Appeals Chamber of the ICTY and the ICTR.[848] It further provides that in the interpretation and application of the laws of Sierra Leone, the Judges must be guided by the decisions of the Supreme Court of Sierra Leone.[849]

[+] Part XI was prepared thanks to substantial contributions of research and writing from Abdul Tejan Cole. NPWJ remains nonetheless responsible for the views expressed herein as well as any errors or omissions.

841 This provision is acknowledged in Rule 106.
842 See Rules 46 and 65, which regulate leave for appeal in each instance. For a discussion of these issues, see also parts VII, VIII and XII of the Guide.
843 See Rule 73, which regulates leave for appeal of a motion. For a discussion of this issue, see also part VIII of the Guide.
844 See Rule 72.
845 For a discussion of preliminary motions, see part VII of the Guide.
846 Statute, art. 20(2). This provision is acknowledged in Rule 106.
847 *Prosecutor v. Kupreskic*, Case No. IT-95-16, Appeal Judgement, 23 October 2001, at para. 22.
848 Statute, art. 20(3).
849 *Ibid.*

1. Grounds of appeal

Article 20 of the Statute states that the Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

(a) A procedural error;
(b) An error on a question of law invalidating the decision;
(c) An error of fact which has occasioned a miscarriage of justice.[850]

This provision is similar to article 24 of the ICTR Statute and article 25 of the ICTY Statute, which provide for appeal on the grounds of an "error on a question of law invalidating the decision" and an "error of fact which has occasioned a miscarriage of justice".

With respect to an "error on a question of law invalidating the decision", the ICTY Appeals Chamber in *Prosecutor v. Kupreskic* stated: "a party who submits that the Trial Chamber erred in law must at least identify the alleged error and advance some arguments in support of its contention."[851] The Appeals Chamber also specified: "It is not sufficient to simply duplicate the submissions already raised before the Trial Chamber without seeking to clarify how these arguments support a legal error allegedly committed by the Trial Chamber."[852] In *Prosecutor v. Furundzija*, the ICTY Appeals Chamber stated that it is then responsible to "determine whether there was such a mistake".[853] This means that, even if a party's arguments do not support the contention that there was an error, the "Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law."[854] Furthermore, the ICTY Appeals Chamber in *Prosecutor v. Furundzija* stated that it may only reverse or revise a decision if the error of law invalidates the decision: "It is not any error of law that leads to a reversal or revision of the Trial Chamber's decision; rather, the appealing party alleging an error of law must also demonstrate that the error renders the decision invalid."[855]

Regarding an "error of fact which has occasioned a miscarriage of justice", the ICTR Appeals Chamber in *Prosecutor v. Serushago* indicated that there are two burdens that must be discharged: "[The Appellant] must show that the Trial Chamber did indeed commit the error, and, if it did, [the Appellant] must go on to show that the error resulted in a miscarriage of justice".[856] In discharging the second burden, the ICTY Appeals Chamber in *Prosecutor v Kupreskic* stated: "The appellant must establish that the error of fact was critical to the verdict reached by the Trial Chamber, thereby resulting in a 'grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime'."[857]

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850 This provision is acknowledged in Rule 106.
851 *Prosecutor v. Kupreskic*, Case No. IT-95-16, Appeal Judgement, 23 October 2001, at para. 27.
852 *Ibid.*
853 *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Appeals Chamber, Judgement, 21 July 2000, at para. 35.
854 *Ibid.*
855 *Ibid*, para. 36.
856 *Serushago v. Prosecutor*, Case No. ICTR-98-39-A, Reasons for Judgement, 6 April 2000, at para. 22.
857 *Prosecutor v. Kupreskic*, Case No. IT-95-16, Appeal Judgement, 23 October 2001, at para. 29; see also *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Appeals Chamber, Judgement, 21 July 2000, at para. 37.

Additionally, the ICTY Appeals Chamber has repeatedly held that it "must give a margin of deference to a finding of fact reached by a Trial Chamber".[858] As stated in *Prosecutor v. Furundzija*: "The reason the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known; the Trial Chamber has the advantage of observing witness testimony first-hand, and is, therefore, better positioned than this Chamber to assess the reliability and credibility of the evidence".[859] In this regard, it also is important to mention that the ICTY Appeals Chamber has repeatedly noted "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence".[860] Therefore, as the Appeals Chamber in *Prosecutor v. Kupreskic* stated: "Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber".[861]

Furthermore, the ICTY Appeals Chamber and ICTR Appeals Chamber have held that they also may hear appeals regarding issues that do not strictly fall within the stated statutory grounds. In *Prosecutor v. Tadic*, the ICTY Appeals Chamber stated it may consider such an issue if it is "a matter of general significance for the Tribunal's jurisprudence".[862] It then proceeded to consider a trial chamber's findings that crimes against humanity cannot be committed for purely personal motives, despite these findings not having a bearing on the verdict.[863] It also considered a Trial Chamber's findings that all crimes against humanity enumerated in the ICTY Statute require a discriminatory intent, even though the Prosecutor did not appeal the verdict or sentence in this regard.[864] In *Prosecutor v. Akayesu*, the ICTR Appeals Chamber also stated that it "may consider issues *proprio motu*".[865]

2. Notice of appeal

In general, a notice of appeal regarding a judgement or sentence must be served on the other parties and filed with the Registrar within 14 days of receipt of the full judgement and sentence.[866] The notice must set forth the grounds of appeal.[867]

In the case of a judgement or sentence regarding contempt or false testimony under solemn declaration, however, a notice setting forth the grounds of appeal must be filed within seven days of receipt of the decision.[868]

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858 *Prosecutor v. Tadic*, Case No. IT-94-1, Appeals Chamber, Judgment, 15 July 1999, at para. 64; see also *Prosecutor v. Kupreskic*, Case No. IT-95-16, Appeal Judgement, 23 October 2001, at para. 30; *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Appeals Chamber, Judgement, 21 July 2000, at para. 37; *Prosecutor v. Aleksovski*, IT-95-14/1, Appeals Chamber, Judgement, 24 March 2000, at para. 63.

859 *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Appeals Chamber, Judgement, 21 July 2000, at para. 37.

860 *Prosecutor v. Tadic*, Case No. IT-94-1, Appeals Chamber, Judgment, 15 July 1999, at para. 64; see also *Prosecutor v Kupreskic*, Case No. IT-95-16, Appeal Judgement, 23 October 2001, at para. 30; *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Appeals Chamber, Judgement, 21 July 2000, at para. 37.

861 *Prosecutor v. Kupreskic*, Case No. IT-95-16, Appeal Judgement, 23 October 2001, at para. 30.

862 *Prosecutor v. Tadic*, Case No. IT-94-1, Appeals Chamber, Judgment, 15 July 1999, at paras. 247 and 281; see also *Prosecutor v. Kupreskic*, Case No. IT-95-16, Appeal Judgement, 23 October 2001, at para. 22.

863 See *Prosecutor v. Tadic*, Case No. IT-94-1, Appeals Chamber, Judgment, 15 July 1999, at paras. 247-72.

864 See *ibid*, at paras. 281-305.

865 *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgement, Appeals Chamber, 1 June 2001, at para. 17.

866 Rule 108(A).

867 *Ibid.*

868 Rule 108(B).

In the case of a decision regarding misconduct of counsel, a bail application, or a motion involving "exceptional circumstances" in which an appeal is necessary "to avoid irreparable prejudice to a party", a notice setting forth the grounds of appeal must be filed within seven days of receipt of the decision to grant leave to appeal.[869]

3. Status of the acquitted or convicted person

Rule 99 provides that an accused, acquitted by the Trial Chamber, may be detained pending determination of an appeal. Rule 99(B) states:

> "If, at the time the acquittal is pronounced, the Prosecutor advises the Trial Chamber in open court of his intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, on application of the Prosecutor and upon hearing the parties, in its discretion, issue an order for the continued detention of the accused, pending the determination of the appeal."

In the case of a convicted person, Rule 102 provides that as soon as notice of appeal is given, the enforcement of the judgement is stayed until the decision on the appeal is delivered. It also provides that, pending decision on the appeal, the convicted person remains in detention.[870]

4. General provisions of appellate procedure

In general, the rules of procedure and evidence that govern proceedings in the Trial Chamber apply to proceedings in the Appeals Chamber.[871] Detailed aspects of appellate procedure may be set forth in practice directions issued by the President, in consultation with the Vice-President.[872]

In preparing an appeal for consideration by the Appeals Chamber, the Presiding Judge may designate a judge of the Appeals Chamber as a Pre-Hearing Judge.[873] The tasks of the Pre-Hearing Judge are to ensure there is no undue delay of the proceedings and deal with procedural matters.[874] These tasks include issuing decisions, orders and directions to ensure a fair and expeditious hearing.[875] They also include recording the points of agreement and disagreement on matters of law and fact, and ordering the filing of additional written submissions, if necessary.[876] The Appeals Chamber itself may also perform the tasks of a Pre-Hearing Judge.[877]

With respect to written submissions, where a notice of appeal has been filed:

- the appellant's submissions must be served on the other party, or parties, and filed with the Registrar within 21 days;[878]
- the respondent's submissions must be served on the other party, or parties, and filed with the Registrar within 14 days thereafter;[879] and

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869 Rule 108(C).
870 For a discussion of penalties and sentencing, see part X of the Guide.
871 Rule 106(C).
872 Rule 107.
873 Rule 109(A).
874 Rule 109(B).
875 *Ibid.*
876 Rule 109(C).
877 Rule 109(D).
878 Rule 111.

- the appellant's reply submissions, if any, must be filed within five days thereafter.[880]

No further submissions may be filed except with the leave of the Appeals Chamber.[881]

Following the expiration of the time limits for filing submissions, the Appeals Chamber may set a date for a hearing in open court or may rule on the appeal based only on the parties' submissions.[882]

The record on appeal consists of the parts of the trial record as designated by the Pre-Hearing Judge and as certified by the Registrar.[883] At least 15 days before any hearing, however, a party may serve on the other party and file with the Registrar a motion to present additional evidence, which was not available at trial.[884] If the Appeals Chamber considers that the interests of justice so require, it must authorise the presentation of such evidence.[885]

All of the above time limits may be extended by the Appeals Chamber based on a motion that makes a showing of good cause.[886]

5. Expedited procedures

Rule 117 asserts that the general provisions of appellate procedure regarding a Pre-Hearing Judge, record on appeal, submissions, date of hearing and sentencing, and as set forth in Rules 109 to 114 and 118 (D), do not apply to:

- a preliminary motion referred to the Appeals Chamber under Rule 72(E) or (F);[887]
- an appeal of a decision regarding misconduct of counsel under Rule 46;[888]
- an appeal of a decision regarding a bail application under Rule 65;[889]
- an appeal of a decision regarding a motion involving "exceptional circumstances" in which an appeal is necessary "to avoid irreparable prejudice to a party" under Rule 73(B);[890]
- an appeal of a judgement or sentence for contempt under Rule 77;[891] and
- an appeal of a judgement or a sentence for false testimony under Rule 91.[892]

In these instances, Rule 117(A) states that these matters "shall be heard expeditiously and may be determined entirely on the basis of written submissions". Rule 117(B) further

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879 Rule 112.
880 Rule 113(A).
881 Rule 113(B).
882 Rule 114.
883 Rule 110.
884 Rule 115(A).
885 Rule 115(B).
886 Rule 116.
887 For a discussion of preliminary motions, see part VII of the Guide.
888 For a discussion of misconduct of counsel, see part XII of the Guide.
889 For a discussion of bail applications, see part VII of the Guide.
890 For a discussion of motions, see part VIII of the Guide.
891 For a discussion of contempt, see part VIII of the Guide.
892 For a discussion of false testimony, see part IX of the Guide.

provides that any time limits not otherwise provided for in the Rules shall be fixed by a practice direction issued by the Presiding Judge.

6. Judgement and sentence on appeal

Article 18 of the Statute provides that a judgement of the Appeals Chamber must be rendered by a majority of the judges of the Chamber.[893] It also states that the judgement must be delivered in public.[894] Rule 118(E) provides that the parties and their counsel are entitled to be present at the public pronouncement of the judgement and must be given notice thereof. Indeed, if the accused is not present when the judgement is delivered, the Appeals Chamber, unless it pronounces his or her acquittal, may order the arrest or surrender of the accused.[895]

Rule 118(A) states that such judgement is on the basis of the record on appeal and any additional evidence presented to the Appeals Chamber.

Pursuant to article 18 of the Statute, the judgement must be accompanying by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.[896] Rule 118(F) also provides that the written judgment must be filed and registered with the Registry.

Rule 118(C) states that, in appropriate circumstances, the Appeals Chamber may order that the accused be retried before the Trial Chamber.

Rule 118(D) also foresees the possibility of reversal of an acquittal by the Trial Chamber, and provides that, except in matters under expedited procedures, the Appeals Chamber must proceed to sentence of the accused in such circumstances.[897] Upon pronouncement of the sentence by the Appeals Chamber, the sentence is enforced immediately.[898]

B. Review proceedings

Article 21 of the Statute of the Special Court, and Rules 120 to 122, provide for review proceedings. As noted by the ICTR Appeals Chamber, a mechanism for review of previous decisions is not a novel concept, but a facility that exists at the national and international level.[899]

Article 21 of the Statute provides that the Prosecutor or a convicted person may submit to the Appeals Chamber an application for review of a judgement where a new fact has been discovered that was not known at the time of proceedings before the Trial Chamber or Appeals Chamber and that could have been a decisive factor in reaching the

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893 This provision is restated, without reference to article 18 of the Statute, in Rule 118(B).
894 This provision is rephrased, without reference to article 18 of the Statute, in Rule 118(E).
895 Rule 119(B).
896 This provision is rephrased, without reference to article 18 of the Statute, in Rule 118(B), which alters this requirement, stating that the judgement may be "followed as soon as possible by a reasoned opinion".
897 Rule 118(D).
898 Rule 119(A).
899 *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, 31 March 2000, at para. 37.

decision.[900] The Appeals Chamber is then responsible to determine if the application is meritorious.[901] If the Appeals Chamber considers the application unfounded, it may reject the application.[902] If the Appeals Chamber determines that the application is meritorious, it may either reconvene the Trial Chamber or retain jurisdiction over the matter.[903] If the Trial Chamber reaches a judgement on review, Rule 123 provides that such judgement may be appealed in accordance with the ordinary appeals procedure.

In considering similar criteria for applications for review, the ICTY in *Prosecutor v. Jelisic* stated that a new fact may be defined as "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings".[904] In *Prosecutor v. Delic*, it further noted: "[I]t is irrelevant whether the new fact already existed before the original proceedings or during such proceedings. What is relevant is whether the deciding body and the moving party knew about the fact or not".[905] These statements also were noted with approval more recently by the ICTY Appeals Chamber in *Prosecutor v. Tadic*.[906]

In addition, both the ICTR Appeals Chamber in *Barayagwiza v. Prosecutor*[907] and the ICTY Appeals Chamber in *Prosecutor v. Tadic*[908] have stated that only a final judgment may be reviewed.

It also is worth noting that the rules of the ICTR and ICTY contain additional criteria for applications for review that are not found in the Statute or Rules of the Special Court. Pursuant to the rules of the ICTR and ICTY, a motion for review of the judgement carries the additional burden of showing that the new fact "was not known at to the moving party at the time of the proceedings … and could not have been discovered through the exercise of due diligence".[909] Nonetheless, in *Barayagwiza v. Prosecutor*, the ICTR Appeals Chamber held that in "wholly exceptional circumstances" and in order to prevent "a miscarriage of justice" a chamber may grant a motion for review based solely on the existence of a new fact that could have been a decisive factor in reaching the original decision.[910] This holding was repeated by the ICTY Appeals Chamber in *Prosecutor v. Tadic*.[911]

The rules of the ICTR and the ICTY also require that any application by the Prosecutor be made "within one year after final judgement has been pronounced".[912]

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900 These provisions are restated, without reference to article 21 of the Statute, in Rule 120 and Rule 121.
901 Statute, art. 21(2). This provision is restated, without reference to article 21(2), in Rule 121.
902 *Ibid.*
903 *Ibid.*
904 *Prosecutor v. Tadic*, Case No. IT-94-1-R, Decision on Motion for Review, 30 July 2002, at para. 25, quoting *Prosecutor v. Jelisic,* Case No. IT-95-10-R, Decision for Motion for Review, 2 May 2002, p. 3.
905 *Prosecutor v. Tadic*, Case No. IT-94-1-R, Decision on Motion for Review, 30 July 2002, at para. 25, citing *Prosecutor v. Delic*, Case No. IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002, p.7.
906 *Prosecutor v. Tadic*, Case No. IT-94-1-R, Decision on Motion for Review, 30 July 2002, at para. 25.
907 *Prosecutor v. Barayagniza*, Case No. ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, 31 March 2000, at para. 49.
908 *Prosecutor v. Tadic*, Case No. IT-94-1-R, Decision on Motion for Review, 30 July 2002, at para. 24.
909 ICTR Rule 120; ICTY Rule 119.
910 *Prosecutor v. Barayagniza*, Case No. ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, 31 March 2000, at para. 65.
911 *Prosecutor v. Tadic*, Case No. IT-94-1-R, Decision on Motion for Review, 30 July 2002, at paras. 26 and 27.
912 ICTR Rule 120; ICTY Rule 119. See *Prosecutor v. Tadic*, Case No. IT-94-1-R, Decision on Motion for Review, 30 July 2002, at para. 24.

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The provisions of the Statute regarding appellate and review proceedings reflect an effort to learn from the experiences of the ICTY and ICTR. It is therefore expected that the Appeals Chamber of the Special Court ultimately will build on the jurisprudence of these courts. In the absence of active appellate proceedings at the Special Court, however, there is now an opportunity to continue learning from the experiences of the ICTY and ICTR by infusing the Rules with such lessons, particularly those that promote basic human rights, including the rights of accused persons.

Part XII
Practical Information for Counsel[+]

Like any court, the Special Court for Sierra Leone has its own combination of rules, directives and practices that regulate the day-to-day work of counsel. This part introduces these practical matters by providing general information about the Court. It next discusses the protocol for filing documentation, document requirements and courtroom protocol. It then continues with discussions of the resources available to counsel, privileges and immunities of counsel and counsel's expenses and fees.

A. General information

The Special Court is located within a secure compound in the New England area of Freetown, the capital of Sierra Leone. The majority of the Court's offices are housed in pre-fabricated structures that are grouped in two distinct areas of the compound. On one side of the compound are the offices of the Registry, including those of the Defence Office, and the offices of the Chambers. In this area are also located the Court's offices of security, administration and finance, as well as the Court's library. On the opposite side of the premises, within a separate security-fenced area, are the several buildings that comprise the Office of the Prosecutor.

Another separate area of the compound contains the detention facility, which is housed in a number of refurbished buildings. Within this area is the temporary courthouse. A permanent courthouse, which will have two courtrooms and a number of other facilities, is in the process of being constructed and is expected to be complete in March 2004.

The contact details for the Special Court are as follows:

Address: Special Court for Sierra Leone
Jomo Kenyatta Road
Freetown, Sierra Leone

Phone: +232 22 297 000 (via Sierra Leone)
+39 08 31 257 000 (via United Nations in Italy)
+1 212 963 9915, Ext. 178 7000 (via United Nations in the USA)

Fax: +232 22 297 001 (via Sierra Leone)
+39 08 31 257 001 (via United Nations in Italy)
+1 212 963 9915, Ext. 178 7001 (via United Nations in the USA)

Email: scsl-mail@un.org

Website: www.sc-sl.org

[+] Part XII was prepared thanks to substantial contributions of research and writing from Rupert Skilbeck and research assistance from Ibrahim Koroma. NPWJ remains nonetheless responsible for the views expressed herein as well as any errors or omissions.

B. Protocol for filing of documentation

The Special Court has adopted stringent procedures for the filing of documentation that come from the practice at the ICTY and ICTR. The Practice Direction on Filing Documents before the Special Court for Sierra Leone (the Practice Direction on Filing Documents), which entered into force on 27 February 2003, outlines the specific requirements.

1. Court Management Section

The Court Management Section of the Registry is responsible for both the issuing of judicial forms and also the receiving and distribution of documents produced in litigation.[913] The Court Management Section copies and distributes documentation that has been filed with it to the Judges, the parties and the Press and Public Affairs Unit.[914] Where third parties are involved, such as the Attorney-General of Sierra Leone, counsel must ensure that the Court Management Section is prepared to distribute the documentation to third parties or at least make sufficient copies for such distribution.

2. Receipt of documents

The Court Management Section receives documents by hand, post or fax. Documents must go to the Court Management Section only and anything sent to the general office of the Registry will not be considered as filed until the general office is able to transmit it to the Court Management Section.[915] The standard hours of the Court Management Section are 09:00 to 17:00 every weekday, excluding public holidays.[916] Documents can be filed out of hours by special arrangement with the Court Management Section, although the filing date will be recorded as the following day.[917]

Documents may be received by fax. However, anyone who files a document by fax is required to deliver the signed original documents to the Court Management Section "within a reasonable period",[918] which normally means as long as it takes to send the original documents to the Court by international courier service.

Any document received is date-stamped and signed by the staff member of the Court Management Section that receives it.[919]

3. Opening a case

When a case is newly filed with the Court Management Section, it assigns a case number, which is formulated in accordance with article 6 of the Practice Direction on the Filing of Documents. An example of a case number is SCSL-03-01-PD.

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913 Practice Direction on Filing Documents, arts. 3 and 4.
914 *Ibid*, art. 3.
915 *Ibid*, art. 5.
916 *Ibid.*
917 *Ibid*, art. 12.
918 *Ibid*, art. 10.
919 *Ibid*, art. 8.

The following table can be used to assist in interpretation of case numbers:

SCSL-				Special Court for Sierra Leone
	-03-			Year of indictment (e.g., "03" for 2003)
		-01-		Sequential number of case (e.g., "01" for the first case before the Court)
			-PD	Provisional detention proceedings
			-I	Indictment proceedings
			-D	Deferral proceedings
			-PT	Pre-Trial proceedings
			-T	Trial proceedings
			-A	Appeal proceedings (followed by rule if necessary, e.g., AR108 for appeal proceedings pursuant to Rule 108)

C. Document requirements

1. Cover page

Each document filed with the Court Management Section must have a cover page in order to instruct the Court Management Section as to what the document is and what needs to be done with it. The regulations are strictly enforced and documents that are not filed with the proper cover page or in the correct format are rejected. The Court Management Section also cannot correct any mistakes by hand and corrected documents must be re-filed.[920] Once a document is filed, the Court Management Section sends counsel a copy of the cover sheet in order to check that it was properly filed.

Each cover page must include the following information:

- the case number;
- the Chamber or Judge for whom the document is intended;
- the date the document is signed and submitted for filing;
- the short title of document;
- whether document is public or confidential or *ex parte* (for *ex parte* motions, the name of the excluded party must not appear on the cover sheet); and
- the list of other parties that should receive the document, e.g., prosecution, defence and third parties, such as the Attorney-General of Sierra Leone, embassies and so on.[921]

Any document that needs to be considered urgently must be accompanied by a note marked "**URGENT**" in bold, capital letters and brought to the attention of the Court Management Section, which then processes the document on an expedited basis and forwards a copy to the appropriate Judge or Chamber immediately.[922]

920 *Ibid*, art. 14.
921 *Ibid*, art. 7.
922 *Ibid*, art. 13.

2. Document format

All documentation – specifically indictments, briefs and motions – must be in a standard format. This requires the following:

- *A4 Paper.* This is a different size from North American "letter-sized" paper.
- *Times New Roman, 12-point size font, 1.5 line spacing and 2.5 cm margins on all four sides.*
- *Page numbers.* They must be on all pages except the cover sheet.
- *English.* The documents must be in the official language of the Court, which is English. If not, they must have an official translation attached.
- *Case number.* Each page should have the case number as a header or footer.
- *One sided.*
- *Unbound, unstapled.* No post-it notes, dividers or flags are permitted. The document is supposed to be ready to copy.
- *Colour copies.* Where the document does contain colour pages, it is recommended that sufficient colour copies be filed at the same time as the document itself in order to speed up the copying process.
- *Pseudonyms.* Any public documents will be copied to the Press and Public Affairs Unit and so no confidential information should be included, such as witnesses' names where pseudonyms are being used.
- *Signature.* The document must be signed, with the details of the person who has signed it.[923]

3. Specific requirements for motions

Any motion must be filed in the proper form. If it is not done properly, the Court Management Section may return the documentation with instructions so that it can be correctly filed.[924] The Practice Direction on Filing Documents requires that counsel filing a motion must provide the following:

- *A Notice of Motion.* This must state what the application is and what is sought.
- *Memorial/Brief of Argument.* The format of this document tends to reflect the national tradition of counsel who drafts it. Thus, UK lawyers tend to file what would be regarded as a skeleton argument, whereas North American lawyers tend to file full written arguments.
- *Supporting Affidavit/Declaration.* This must include full details of any disputed facts where a determination is sought from the Chamber.
- *Book of Authority.* In general, a copy of each authority relied upon in argument must be provided to the Court together with an index listing the authorities. If this is not done, counsel may be prohibited from relying upon missing authorities in argument and the Judge may require the missing documents to be filed within a certain time frame.
- *Draft Order.* This should set out the specific terms of the relief requested.
- *Back sheet.* The top left corner should contain the details of the Chamber before which the case is being heard. The case name should be aligned centrally in the middle of the page, together with the case number. The title of the document is contained in lines below the case name and number. At the bottom of the page the details of counsel are given.

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923 *Ibid*, arts. 7, 9 and 11.

924 *Ibid*, art. 8.

4. Page limits

Article 9 of the Practice Direction on Filing Documents imposes page and word count limits on motions and supporting briefs that are filed. Whichever is greater – page number or word count – is the applicable limit. Any party may apply to the Chamber to extend the limits, explaining the exceptional circumstances for doing so. The following table outlines the limits for simple briefs:

Document	Pages	*Words*
Pre-trial brief	50	15,000
Final trial brief	200	60,000
Motions	10	3,000
Responses and replies	10	3,000

The page and word count limits apply to headings, quotations and footnotes, but not to any addendum containing verbatim quotations of the Statute or Rules, or any appendix or book of authorities.[925] The appendix or book of authorities contain non-argumentative material in support of the argument. The appendix should be of reasonable length, which is limited to three times the relevant page limit for the brief.[926]

The complex page limits for interlocutory appeals and merits appeals that are within the Practice Direction on Filing Documents, article 9(3)(D) and (E), were repealed by a subsequent practice direction issued by the President, which states: "There are no restrictions or requirements in respect of the length of legal submissions".[927]

5. Time limits

Rule 7 of the Rules of the Special Court provides that time runs from the day after the Registry, counsel for the accused or the Prosecutor *receives* notice of the occurrence of the event.[928] Time limits expressed in days mean ordinary calendar days and include not only weekdays but also Saturdays, Sundays and public holidays.[929] However, where a time limit expires on a Saturday, Sunday or a public holiday, the time limit is automatically extended to the subsequent working day.[930] The standard time limit for filing a response to a motion is 10 days and any reply to the response must be filed within five days of that.[931]

925 *Ibid*, art. 9.
926 *Ibid.*
927 Practice Direction on Filing Documents under Rule 72 of the Rules of Procedure and Evidence before the Appeals Chamber of the Special Court for Sierra Leone (Practice Direction on Filing Documents under Rule 72), art. 4. The Practice Direction on Filing Documents under Rule 72 entered into force on 22 September 2003.
928 Rule 7(A).
929 Rule 7(B).
930 *Ibid.*
931 Rule 7(C).

D. Courtroom protocol

1. Courtrooms

The temporary courtroom is arranged in a standard common law format. The judge or judges' raised bench is located at the front and immediately beneath it is a table and chair for the courtroom clerk. The defendant sits to the side of the courtroom, opposite the translators, who provide consecutive translation, and the video crew. Facing the bench, the desk for prosecution counsel is on the right and the desk for defence counsel is on the left. At the rear of the courtroom, there is public seating.

It is anticipated that the permanent courthouse, which is expected to be complete in March 2004, will contain two courtrooms. The two new courtrooms will be in a semi-circular format, with places for defence counsel and the prosecution arranged around the central well of the court, facing the raised judicial bench. At the back of the courtroom will be a large public seating area. There will be facilities for concurrent translation and limited facilities for legal consultation with defendants in the secure area of the courthouse. There also will be one room per courtroom for defence and one for prosecution, where materials and robes can be left.

2. Courtroom attire

Court dress consists of a robe, either of the common law style, with winged collars and bands, or of the international full-length style with a white jabot, which is also worn by the Judges. A wig is generally not worn.

By contrast, in the national courts of Sierra Leone, the standard practice is to wear a robe of the common law style and a wig.

3. Terms of address

A Judge of the Special Court is referred to as "Your Honour". Counsel is normally expected to address the Presiding Judge. Counsel tend to revert to national traditions when addressing each other, using terms such as "colleague" or "learned friend".

4. Oral argument

In the Trial Chamber, the procedure is essentially governed by the Presiding Judge. Due to the substantial written submissions for legal issues, however, legal argument is shorter than it might be in some common law courts.

Before the Judges of the Appeals Chamber, counsel for each party may be allocated a "short time" for oral argument, which is defined as normally "no more than 2 hours", and counsel should ensure that the Judges have "a reasonably comprehensive account of the legal argument in written form".[932] One copy of all authorities must also be provided to the Legal Officer of the Appeals Chamber at least three days before the hearing.[933]

Instructions issued by the President[934] provide that counsel must speak from a central lectern and address the Court only when called upon by name. Counsel speaking first in

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932 Practice Direction on Filing Documents under Rule 72, art. 4.

933 *Ibid.*

934 Court Management Memorandum, Note to Counsel Appearing before Appeals Chamber, 31 October – 6 November 2003.

any application must announce the names of the other lawyers with whom he or she appears, the appearances on the other side and any amicus curiae. Before beginning his or her oral submission, counsel also may submit to the Judges speaking notes or an outline of no more than 10 pages.

The instructions further warn counsel to expect to have arguments tested at the hearing. It is worth noting that at previous oral arguments before the Judges of Appeals Chamber, the bench has been quite prepared to interrupt counsel at any point in his or her submission and ask questions.

In some circumstances, the Court may permit addition written submissions; the instructions state that this is possible only if permission is sought at the hearing and such additional submissions can be provided within two weeks.[935]

5. Professional conduct

Rule 44(B) provides that counsel are subject to the relevant provisions of the Agreement, Statute, Rules of Procedure and Evidence, Rules of Detention, Headquarters Agreement, Code of Professional Conduct and their own codes of practice and ethics that govern their profession, i.e., their national codes of conduct. Counsel for the Defence also are subject to the Directive on the Assignment of Defence Counsel.

Rule 46 deals with misconduct by counsel and applies both to prosecution and defence counsel and to counsel appearing as *amicus curiae*.[936] Under this rule, a Judge or Chamber may impose sanctions against or refuse audience to counsel, after a warning.[937] Sanctions or refusal of audience can be imposed for offensive or abusive conduct, for obstructing the Court's proceedings, or in the interests of justice.[938] A Chamber also may determine that counsel is no longer eligible to represent a suspect or an accused pursuant to Rule 45.[939] Where a Chamber considers that counsel is advancing frivolous motions or acting in any other way that amounts to an abuse of process, it may withhold fees or impose fines.[940] Any decision by the Trial Chamber sanctioning or refusing audience to counsel, determining that counsel is ineligible to represent a suspect or accused, or withholding fees or imposing fines may be appealed with leave of the Trial Chamber.[941] If leave is refused, the party may apply to the Appeals Chamber for leave.[942]

With the approval of the President of the Court, a Judge or a Chamber also may communicate with the professional body in the State where counsel is admitted to practice law.[943]

Rule 46(G) provides for a Code of Professional Conduct to be drawn up by the Registrar of the Special Court and subsequently be adopted by a plenary meeting of the Judges. Any amendments to that Code of Professional Conduct must be made in consultation

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935 *Ibid.*
936 Rule 46(F).
937 Rule 46(A).
938 *Ibid.*
939 Rule 46(B).
940 Rule 46(C).
941 Rule 46(H).
942 *Ibid.*
943 Rule 46(D).

with representatives from the Prosecution and the Defence and must also be approved by a plenary meeting. This rule also allows the Registrar to report counsel to the President of the Special Court for breaches of the Code of Professional Conduct. As yet, there is no Code of Professional Conduct for the Special Court, but a code is expected to be adopted at the plenary meeting of the Judges in March 2004.

In the current absence of a code at the Special Court, it is worth briefly describing a possible reference for such a code – the ICTR's Code of Professional Conduct for Defence Counsel.[944] The Code of Conduct of the ICTR is much shorter than many domestic codes and enumerates general obligations to act in a proper way with respect to the client, to maintain confidentiality and to avoid conflicts. It also deals with behaviour before the chambers, both in general terms, such as the necessity of courtesy, but also specific requirements, such as the necessity of the veracity of evidence put before a chamber. Remedies involve complaints to a Judge or a Chamber and there is some case law that has arisen out of such complaints.

E. Resources available to counsel[945]

The Defence Office is required under Rule 45(B)(iii) to provide facilities for counsel to prepare his or her client's defence. The Defence Office has office space for counsel in Freetown and also has telephone and fax communications, together with computer and photocopying facilities. The library on the premises of the Court has books and material available for reading and research for the officials and staff of the Court and also for defence counsel.

Article 26 of the Directive on the Assignment of Counsel (the Directive on the Assignment of Counsel), which entered into force on 3 October 2003, entitles counsel to the assistance of the Defence Office in the preparation of any motion or other matter and imposes a duty on counsel to make all reasonable efforts to use those facilities. If there is a failure to do so, the Principle Defender can withhold remuneration. The purpose of this article is to prevent the Court from having to pay for each defence team to research the same legal point and to encourage reliance on common research done by the Defence Office.

The Defence Office can also provide counsel with transportation from the general vehicle pool of the Special Court, but has insufficient funds to assign vehicles to counsel. This contrasts with the situation for prosecution counsel, who may have vehicles assigned to them. Assistance with practical arrangements, such as the booking of hotels, is also provided to defence counsel.

F. Privileges and immunities of counsel

Under article 14 of the Agreement, counsel appearing before the Special Court are granted certain privileges and immunities in the performance of their duties. Pursuant to the Agreement, the Government of Sierra Leone has undertaken to ensure that counsel are not subjected to any measure that may affect the free and independent exercise of their functions.

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944 The ICTR's Code of Professional Conduct for Defence Counsel is available at www.ictr.org.

945 See also part IV of the Guide for further discussion on the Defence Office and its functions.

In particular, the Agreement provides for the following privileges:

> "a. Immunity from personal arrest or detention and from seizure of personal baggage;
> b. Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;
> c. Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.
> d. Immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Court and back."[946]

Article 18 of the Headquarters Agreement provides that these privileges and immunities are without prejudice to the disciplinary rules for counsel and states that such immunities may be waived by the President of the Court.

G. Expenses and fees

The Special Court has rejected the system of billable hours that has been used in the past for defence counsel before the ICTR and ICTY in favour of a contract between the Defence Office and individual counsel, modelling the system on that adopted for what are termed "Very High Costs Cases" in England and Wales. This essentially means that counsel are required to present to the Defence Office a plan of action, which is then the subject of a negotiation that results in a final contract.

Part III of the Directive on the Assignment of Counsel deals with the payment of counsel. It explains the process for the payment of provisionally assigned counsel and for the negotiation and payment of a contract for full representation.

1. Provisional assignment

Once counsel has been provisionally assigned to an indigent suspect or accused, the Principal Defender has to negotiate a Provisional Assignment Agreement with counsel dealing with the period of provisional assignment and the length of that initial agreement.[947] A Provisional Assignment Agreement cannot be for more than 90 days and has normally been for a two-month period. For agreements concluded in 2003, the normal fee agreed was a flat rate of 5,000 USD for the period of provisional assignment, together with travel costs to Freetown and a Daily Living Allowance (DLA) of 115 USD per day for days spent in Freetown.

2. Legal Services Contract

The Directive on the Assignment of Counsel requires that "as soon as practicable" after assignment of counsel, and within 90 days, the Assigned Counsel and the Principal Defender must draw up a Legal Services Contract.[948] The basis of the contract is that all

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946 Agreement, art. 14(2).
947 Directive on the Assignment of Counsel, art. 16.
948 *Ibid.*

time spent preparing the case must be agreed in detail, together with any costs that will be incurred, before any work is done. The contract can be negotiated in stages relating to each stage of the trial. The contract is for a specified period and includes details as to the following:

- *Members of the defence team.* In most cases there are lead counsel and at least one co-counsel. In 2003, teams of up to four lawyers have been present for specific hearings. The Principal Defender is entitled to require certain members of the defence team to have specific qualifications, which in the opinion of the Principal Defender are necessary for proper representation of the accused. Experience to date is that defence teams generally contain a mixture of lawyers with different backgrounds.
- *Tasks to be completed.* The contract includes an agreement as to specific tasks that are necessary to be completed as part of the preparation of a defence, together with the hours required for each task, a timetable for the completion of those tasks and the member of the defence team responsible for each task. The Principal Defender is then able to ensure the timetable is maintained.
- *Experts.* The plan includes details for any experts that are going to be required, together with the limits for fees for such an expert.
- *Expenses.* The expenses must include DLA and travel costs.
- *Assessment.* There is provision for an assessment by the Defence Office of the work completed before any payment is made.
- *Payments.* A timetable is set out for payments of fees and other expenses. Under the terms of the Directive on the Assignment of Counsel, once counsel has been away from home for a week or more, advance payments of DLA can be paid.

Counsel also are required to maintain a log of the hours that they work on a case.

3. Travel expenses and DLA

There are specific rules for claiming travel expenses and DLA.[949] All travel must be authorised by the Principal Defender. If travelling from outside Sierra Leone, counsel must travel by the shortest route, using an economy fare. A form has to be completed and sent to the Defence Office together with the original ticket counterfoil, the invoice, the receipt, including any credit card payment receipt, and the boarding cards.

Travel within Sierra Leone will be reimbursed at first class public transport rate, or using the standard UN kilometre rate for car travel by the shortest route. Again, a statement of travel expenses form must be completed and relevant receipts attached.

Any other form of travel, for example, in order to speak to witnesses, can be authorised in the interests of justice, but must be agreed to in advance by the Principal Defender.

There will be limited possibilities for other expense claims and the Principal Defender is unlikely to authorise additional costs such as the cost of travel to the departure airport or other disbursements, which should be paid out of counsel's fees.

[949] *Ibid*, art. 20.

DLA will be paid for any counsel who does not normally reside in Freetown for the duration of his or her stay in accordance with the Legal Services Contract or by prior authorisation given by the Principal Defender.

Appendix I
No Peace Without Justice

No Peace Without Justice (NPWJ) is an international non-profit organisation working for the establishment of an effective international criminal justice system and in support of accountability mechanisms for war crimes, crimes against humanity and genocide, with a view to strengthening democracy and the rule of law worldwide.

Since its creation in 1994, NPWJ has been engaged in activities to promote public awareness on the International Criminal Court (ICC) as well as to pressure Parliaments, Governments and other decision-making bodies with the aim of accelerating the entry into force of the first permanent international jurisdiction on war crimes, genocide and crimes against humanity.

NPWJ's international activities have involved a series of inter-governmental regional conferences in Europe, Africa, Asia and North and Latin America to foster the prompt creation of the ICC. At an academic level, NPWJ has organised a series of seminars and workshops to create a Task Force to enable the participation of developing and less developed countries in the process towards the establishment of the Court. On the eve of the 1998 Rome Diplomatic Conference, NPWJ launched a project of concrete technical cooperation called the Judicial Assistance programme to assist small delegations to participate in ICC-related negotiations. To date, some 15 countries have benefited from this programme, profiting from the competence and expertise of more than 40 jurists, lawyers, law professors and researchers.

In August 1998, NPWJ launched an *ad hoc* campaign to support the activities of the International Criminal Tribunal for the former Yugoslavia (ICTY) concerning the crimes perpetrated in Kosovo. This was followed in 1999 by an extensive humanitarian law documentation project, conducted under the auspices of the International Crisis Group, which gathered statements from witnesses of serious violations of international humanitarian law committed during the Kosovo conflict, primarily for use by the Office of the Prosecutor at the ICTY. In addition, the "analysis" part of the project produced a report generalising the findings and helping to reconstruct chains of command.[950] A third purpose was to build local capacity to continue this work and promote human rights after the project ended in December 1999.

In June 2000, NPWJ also launched a judicial assistance programme related to internationalised courts, including the Serious Crimes Panel established by the United Nations in East Timor after the obtainment of independence and the then-proposed Special Court for Sierra Leone. Following the entry into force of the Rome Statute on 1 July 2002, NPWJ has continued its international activities to universalise the jurisdiction of the ICC aimed at enlarging the membership of the Assembly of States Parties to the Rome Statute and continues to assist developing countries to participate in ICC-related meetings. NPWJ has also expanded its scope of action to other issues such as the fight against Female Genital Mutilation and the promotion of democracy.

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[950] For the report from this project, see "Reality Demands", available on the International Crisis Group website: www.crisisweb.org.

NPWJ projects are carried out in collaboration with a variety of international and regional entities such as the United Nations and the European Union as well as groups of Non-Governmental Organisations such as the International Coalition of NGOs for the ICC and others. NPWJ publishes a quarterly newsletter and operates a web site at www.npwj.org.

Appendix II
No Peace Without Justice in Sierra Leone

NPWJ's most recent Sierra Leone programme, which ran from July 2002 to October 2003, included four principal components: (1) the Judicial Assistance programme, (2) the Outreach programme, (3) the Conflict Mapping programme, and (4) the Legal Profession programme.

(1) Judicial Assistance programme

Since 2000, NPWJ-seconded experts have been working in Freetown and New York, within the Ministry of Foreign Affairs and the Office of the Attorney-General and Ministry of Justice, to assist the Government of Sierra Leone in its negotiations for the establishment of the Special Court for Sierra Leone. This component of the project addresses the consequences of the conflict in Sierra Leone by increasing governmental awareness of accountability mechanisms and enabling the Government to express more effectively its commitment to such mechanisms. Increasing the awareness of the Government and parliamentarians of the benefits of international human rights and humanitarian law increases the likelihood of legislation passing through Parliament, which in turn strengthens the rule of law by providing legal mechanisms by which to seek redress for its violation.

In July 2000, responding to the request of Sierra Leone to provide specialised assistance, NPWJ seconded a legal expert to the Sierra Leone Mission to the UN in New York to continue the work of assisting the Sierra Leone Ambassador to the UN, which had begun during the negotiations for the establishment of the ICC in 1998. In August 2000, a further two legal experts were seconded to the Office of the Attorney-General and Ministry of Justice in Freetown, Sierra Leone. This ensured that the Government, with the advice of NPWJ-seconded personnel, was able to form a co-ordinated response, both in Freetown and in New York, and to convey that response in the best possible way at the best possible time. By maintaining this close contact, NPWJ-seconded legal experts have kept the often delicate negotiations balanced and ensured that the concerns of Sierra Leone are not lost in the debate.

The work of NPWJ-seconded legal experts has centred around advising the Sierra Leone Government on critical issues arising in relation to the Special Court and issues of international criminal justice in general, including representing the Government during meetings and negotiations. This, together with detailed legal and policy analyses and recommendations on a range of issues raised directly and indirectly by the ongoing negotiations, has enabled Sierra Leone to formulate policies and address all the relevant issues in a timely manner.

In addition, NPWJ-seconded legal experts have been assisting the Attorney-General and the Mission with various other tasks relating to international human rights and humanitarian law. For example, in New York the NPWJ-seconded legal experts have been participating in the VI (Legal) Committee of the General Assembly while in Freetown the Government has often taken advantage of the presence of NPWJ-seconded international law experts to provide information and analyses on matters within their areas of expertise, such as requirements of implementing legislation for the International Criminal Court.

(2) Outreach programme

In 2000, NPWJ identified a need in Sierra Leone for public sensitisation and education concerning the Special Court, given that what was being reported in the Freetown media was often wildly inaccurate. The NPWJ Sierra Leone Mission was therefore expanded in 2001 to include an Outreach programme, designed to facilitate public information and sensitisation on the Special Court. The Outreach programme increases awareness of the mandate and operations of the Special Court. This includes promoting knowledge about human rights and humanitarian law issues to the public at large. The Outreach programme works through the medium of local organisations, in particular the Special Court Working Group, by building the capacity of such local organisations to formulate and disseminate information coherently and in simple terms. Part of this process includes working with local organisations to formulate issues in language and ways easily understandable by the general public. This fosters the role of civil society in promoting accountability within Sierra Leonean society and creates a stronger civil society by supplementing it with potent means to raise issues publicly, both in general and in terms of prompting the Government to ensure international standards are promoted. The Outreach programme has included the organisation of "Training the Trainers" workshops throughout the country, seminars, the production of outreach materials in different media, community events including street theatre, and the creation of a robust network of non-governmental organisations centred on issues of accountability.

The Outreach programme commenced with "The Freetown Conference on Accountability Mechanisms for Violations of International Humanitarian Law in Sierra Leone", held in the Lagoonda Complex on 20 to 22 February 2001 and attended by over 100 mainly Sierra Leonean participants. The conference aimed to provide a vehicle for the exploration of mechanisms designed to provide accountability for atrocities committed in Sierra Leone during the course of the conflict. It focussed on the two mechanisms envisaged for Sierra Leone (the Special Court and the Truth and Reconciliation Commission) and the interaction between those institutions, and explored how traditional or customary justice could be incorporated into or operate alongside those mechanisms. Two key recommendations were adopted at the plenary session of the Conference, both based on participants' perceived need for ownership of accountability mechanisms by the people of Sierra Leone: (1) holding training workshops on the Special Court and (2) establishing a coalition of interested Sierra Leonean NGOs to conduct the bulk of public sensitisation and information sharing about the Special Court. This concrete set of recommendations formed the basis for much of the NPWJ's subsequent outreach work.

The "Training the Trainers" seminars presented a detailed overview of the provisions of the then draft agreement and statute for the Special Court. To place the Special Court in context, the seminars began with a brief introduction to the purposes and principles of international humanitarian and criminal law and discussed practical issues surrounding the Special Court. A number of identical workshops were held over a period of days, limiting the number of participants within each session to ensure the maximum opportunity for discussion. This model was employed over a number of months to facilitate holding seminars both in Freetown and in the provinces. The series of seminars held in 2001 attracted a total of over 600 participants from a diverse range of human rights, civil society and other organisations, including the Revolutionary United Front (RUF) and the Civil Defence Forces (CDF). For example, training sessions were held at

the Disarmament Demobilisation and Reintegration (DDR) camp in Lunsar and "extra-ordinary" sessions were held for specialised groups, such as the legal profession and human rights monitors.

An additional motive for the training seminars conducted in March 2001 was to identify those members of Sierra Leone civil society who were interested in establishing a "Special Court Working Group", a coalition of Sierra Leone civil society organisations who were interested in and who could play a crucial role in outreach and sensitisation, including ensuring that information being disseminated about the Special Court by various groups within Sierra Leone would be uniform and consistent. NPWJ organised a number of meetings of the Special Court Working Group (SCWG); over the course of 2001, the number of participants in SCWG meetings grew to a total of 39 members representing as many organisations. The SCWG, which met every two weeks in plenary and more often in smaller specialised groups, discussed the types of messages concerning the Special Court that would need to be directed to specific groups within Sierra Leone, together with the modalities through which the sensitisation programme would be implemented. The SCWG adopted its constitution on 30 June 2001 and held elections for the national executive in July 2001, from which time the Special Court Working Group Sierra Leone was established as an independent entity.

During 2002-2003, the NPWJ Outreach programme gathered momentum and expanded in terms of the range of activities undertaken, its geographical reach and its implementing partners, which at the end of 2003 included the Special Court for Sierra Leone itself. NPWJ continued to work with the SCWG, including facilitating the establishment of 12 District Working Groups and the holding of elections for the national executive in August 2003, as required by the constitution. NPWJ also cooperated with the SCWG to hold "top-up training" for existing and new SCWG members, to ensure people were kept well informed about ongoing developments in relation to the Special Court. As part of the targeted training sessions held in 2002-2003, NPWJ held a seminar for performing artists, some of whom later organised themselves as the "Right Players", a group of Sierra Leonean dramatists who write and perform skits, short plays and songs on themes related to the Special Court. Building on this development and a training held for market women, NPWJ organised a series of market tours for the Right Players, in which they staged short plays about the Special Court. In total, the Right Players performed in 16 markets across the Freetown area with NPWJ staff on hand to answer questions from the audience.

Together with the Peace and Conflict Studies Department of Fourah Bay College, University of Sierra Leone, NPWJ organised a series of public lectures, which commenced with the first public engagement of the newly elected President of the Special Court, Judge Geoffrey Robertson. These lectures were video taped and broadcast on SLBS, the local television station. In addition to television, NPWJ continued to facilitate the SCWG's "Special Court Hour", held every Saturday on Radio UNAMSIL since 2001, and helped to establish and support similar radio shows in five locations across the country. Again in conjunction with the SCWG, NPWJ held a series of training sessions for the newly established "District Working Groups" in 13 locations in the provinces. These sessions were attended by over 520 participants, ranging from NGO and civil society activists to the Sierra Leone Police and Sierra Leone Army, traditional leaders and the local Law Officers' Departments. These were followed by two major conferences in the provinces for the District SCWGs, based on the model adopted

for the Freetown Conference in 2001, that resulted in concrete plans of action for the District Working Groups for the coming months. During August 2003, NPWJ and the Special Court for Sierra Leone built on these seminars and conferences by conducting a major series of training seminars across the country targeting specific groups such as the military, children, women and others.

The Outreach Programme also continued to develop and distribute materials on the Special Court, including production of the "Special Court Times", a newspaper-sized broadsheet on issues related to the Special Court, and its accompanying "Pocket Edition", which contained "Frequently Asked Questions" about the Special Court. In addition, NPWJ produced a number of small informational pamphlets, reproduced the constitutive and supporting legal documents of the Court and assisted the Special Court to put together a booklet covering all aspects of the Special Court, illustrated by local artists. In addition, NPWJ produced a series of informational materials on the International Criminal Court, to accompany two seminars hosted by NPWJ, one for civil society in conjunction with the Coalition for an International Criminal Court and other foreign and local NGOs, and one at the request of Sierra Leonean parliamentarians.

(3) Conflict Mapping programme

In 2002, NPWJ launched the Conflict Mapping programme, which reconstructs the chain of events during the conflict by gathering information in the field and analysing the decision-making processes to ascertain the role of those who bear the greatest responsibility for policies of systematic and massive violations of the laws of war. This analysis is based on testimonial and other data overlaid with order of battle and command structures of the various forces as they evolved over time and space. This chronological and geographical mapping of the conflict, including reconstructing the order of battle and chain of command, serves to prevent denial of those events. An analysis of events according to international law establishes *prima facie* accountability for violations of international humanitarian law. In so doing, it both serves to strengthen the rule of law and to promote and defend human rights by publicising the price for violating them. In addition, establishing the chain of command within the armed forces operating in Sierra Leone and assembling these disparate pieces of information to create the bigger picture of the decade long conflict in Sierra Leone enables the crucial first phase of establishing who bears direct and command responsibility for atrocities committed during the conflict.

Beginning in 2002, the Outreach programme increased its geographic spread. This opened up new channels, networks and possibilities for collaboration and consequently increased the diversity and size of NPWJ's network of partner organisations and individuals. In addition, the Outreach programme deepened NPWJ's pre-existing relationships with many key sectors of society. These factors made it possible to conceive of a field-based nation-wide Conflict Mapping programme in two main ways. NPWJ's extensive and trusted network of partners would be essential in devising and implementing any system of collecting information. Following this, NPWJ's network of partners embedded in communities through the country would also be essential in maximising the possible impact of the project: in encouraging people to participate in the project, in promoting the underlying rationales of accountability and then in disseminating the results.

Building on this, meaningful long-term reconciliation and reintegration can only take place if the accountability process belongs to each and every community – and if each community is able to participate in it. Rehabilitation and reintegration is not simply a matter of locating next of kin and assisting in individual reintegration; it is about enabling society and each community to move forward and to accept individuals back into its fold. The outreach and information gathering processes contribute towards establishing confidence in the accountability mechanisms, by providing victims and witnesses with the opportunity to recount their stories and the stories of others in such a way as to help them understand their personal and their communities' experiences in the context of the war. In the implementation of the Conflict Mapping programme, NPWJ worked closely with local partner organisations with which a relationship have been built over the previous two years. The Conflict Mapping programme has therefore involved as much of the country as possible in conducting sensitisation and documentation in this manner so as to encourage a sense of ownership of the processes by the people of Sierra Leone.

The results of this work, which are found in the report of the NPWJ Conflict Mapping programme, together with the work of organisations in Sierra Leone undertaking human rights reporting, are hoped to support the work of the Truth and Reconciliation Commission and the Special Court. It must however be emphasised that the process in itself is as important as the final document, because the direct involvement of Sierra Leoneans (both as interviewer and interviewee) in this project allows them to be at the heart of the accountability work being carried out in the country.

(4) Legal Profession programme

In 2002, after the Special Court came into existence, NPWJ's Sierra Leone programme expanded to include a Legal Profession programme, aimed specifically at the Sierra Leonean legal profession and working primarily in partnership with the Sierra Leone Bar Association. The Legal Profession programme promotes involvement of the Sierra Leone legal community – including not only practicing lawyers and judges but also legally interested human rights activists and students – in issues of international human rights and humanitarian law, particularly issues with respect to the Special Court for Sierra Leone. A related aim is to encourage the Special Court to involve itself in the legal community so that the Court might make a sustainable contribution to the rule of law in Sierra Leone. The activities undertaken within the Legal Profession programme include facilitation of discussion seminars, organization of training seminars, production of explanatory and critical publications, and development of greater access to relevant library resources.

In December 2002, NPWJ, together with the Sierra Leone Bar Association and the Special Court, held a half-day seminar on the Court's Rules of Procedure and Evidence. During this seminar, selected members of the Bar Association made submissions to the newly sworn in Judges of the Special Court on different aspects of the rules, in particular with reference to the laws of Sierra Leone. Subsequently, NPWJ worked in partnership with Special Court officials and staff, the Sierra Leone Bar Association, and others to develop a potential model for the Defence at the Special Court. These efforts included a discussion seminar involving NPWJ, the members of the Sierra Leone Bar Association and the Registrar of the Special Court. These activities resulted in two reports that were made available to, *inter alia*, the Judges of the Special Court during their first plenary meeting to consult on the rules and the structure of the Defence in March 2003.

The Legal Profession programme also conducted training seminars on the early responsibilities of defence counsel for members of the Sierra Leone Bar Association and legal staff at the Special Court. Working closely with the Outreach programme, a public lecture on the role of the Defence at the Special Court was also organised.

In July 2003, NPWJ, in partnership with the Bar Human Rights Committee of England and Wales, held a five-day seminar on international humanitarian law for members of the Sierra Leone Bar Association and legal staff at the Special Court. The training seminar, which took place at the Special Court for Sierra Leone, combined morning lectures and afternoon workshops. Each of these sessions was led by one or more members of a team of experts in Sierra Leone law and international humanitarian law, many of whom have practiced at the International Criminal Tribunals for the former Yugoslavia and Rwanda. This training resulted in a booklet of lecture notes, which was distributed in Sierra Leone and abroad.

An additional major component of the Legal Profession programme was providing access to relevant library resources through the establishment of the NPWJ International Human Rights and Humanitarian Law Library in Freetown. This library is a continuation of a Book Donation programme commenced in 2000, whereby foreign universities, individuals and others donated legal books and materials to NPWJ's international law reading room and resource centre in Sierra Leone. NPWJ was fortunate to receive a large donation from the Columbia University Human Rights Law Program that was shipped to Sierra Leone in late 2002 and formed the backbone of the library, which also included donations from Penguin Publishers, the Canadian Law Book Company, Geoffrey Robertson QC, Caroline Morgan and others. The library was officially opened at the beginning of 2003 by Desmond de Silva, QC, the Deputy Prosecutor of the Special Court. NPWJ hired a qualified librarian to manage the collection, which included over 3000 print volumes and a wealth of digital resources compiled by NPWJ. The library also contained Internet stations and photocopying facilities. The majority of users consisted of human rights activists and university and secondary school students, who used the library for research on human rights, humanitarian law and related matters. In September 2003, NPWJ embarked on a partnership with the Campaign for Good Governance, which now houses the majority of the collection at its Freetown office and ensures continued public access to these resources. NPWJ also partners with several other organisations – including the Sierra Leone Bar Association, the Law Officers Department of the Ministry of Justice, the Lawyers Centre for Legal Assistance, the Peace and Conflict Studies Program at Fourah Bay College, the Sierra Leone Law School Library, the Special Court for Sierra Leone, and the Special Court Working Group – each of which is housing smaller segments of the NPWJ library's collection.

Finally, NPWJ undertook preparation of the Lawyers' Guide to the Special Court for Sierra Leone, which is intended to provide a sophisticated introduction to the substantive and procedural framework of the Court. Written contributions were sought from members of the Sierra Leone legal community and international law experts. In particular, written contributions were sought from those who had participated in other activities of the Legal Profession programme, either as trainers or students. Thus, it is hoped that the process of preparing the Guide, as well as the Guide itself, may serve as a culmination of the teaching and learning that has taken place under the auspices of the Legal Profession programme.