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CHILD SOLDIERS ACCOUNTABILITY ACT OF 2007

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

S. 2135

APRIL 8, 2008

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CHILD SOLDIERS ACCOUNTABILITY ACT OF 2007

TUESDAY, APRIL 8, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 4:10 p.m., in room 2141, Rayburn House Office Building, the Honorable Robert C. (Bobby) Scott (Chairan of the Subcommittee) presiding.

Present: Representatives Scott, Conyers, and Gohmert.

Staff Present: Ameer Gopalani, Majority Counsel; Veronica Eligan, Majority Professional Staff Member; Kelsey Whitlock, Minority Staff Assistant; and Kimani Little, Minority Counsel.

Mr. SCOTT. The Subcommittee will come to order.

And I welcome you to the hearing before the Subcommittee on Crime, Terrorism, and Homeland Security on S. 2135, the "Child Soldiers Accountability Act of 2007."

[The bill, S. 2135, follows:]

I

110TH CONGRESS
1ST SESSION

S. 2135

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 19, 2007

Referred to the Committee on the Judiciary

AN ACT

To prohibit the recruitment or use of child soldiers, to designate persons who recruit or use child soldiers as inadmissible aliens, to allow the deportation of persons who recruit or use child soldiers, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the "Child Soldiers Ac-
3 countability Act of 2007".

4 **SEC. 2. ACCOUNTABILITY FOR THE RECRUITMENT AND**
5 **USE OF CHILD SOLDIERS.**

6 (a) CRIME FOR RECRUITING OR USING CHILD SOL-
7 DIERS.—

8 (1) IN GENERAL.—Chapter 118 of title 18,
9 United States Code, is amended by adding at the
10 end the following:

11 **"§ 2442. Recruitment or use of child soldiers**

12 "(a) OFFENSE.—Any person who knowingly recruits,
13 enlists, or conscripts a person under 15 years of age into
14 an armed force or group or knowingly uses a person under
15 15 years of age to participate actively in hostilities—

16 "(1) shall be fined under this title, imprisoned
17 not more than 20 years, or both; and

18 "(2) if the death of any person results, shall be
19 fined under this title and imprisoned for any term
20 of years or for life.

21 "(b) ATTEMPT AND CONSPIRACY.—Any person who
22 attempts or conspires to commit an offense under this sec-
23 tion shall be punished in the same manner as a person
24 who completes the offense.

1 "(c) JURISDICTION.—There is jurisdiction over an of-
2 fense described in subsection (a), and any attempt or con-
3 spiracy to commit such offense, if—
4 "(1) the alleged offender is a national of the
5 United States (as defined in section 101(a)(22) of
6 the Immigration and Nationality Act (8 U.S.C.
7 1101(a)(22))) or an alien lawfully admitted for per-
8 manent residence in the United States (as defined in
9 section 101(a)(20) of such Act (8 U.S.C.
10 1101(a)(20));
11 "(2) the alleged offender is a stateless person
12 whose habitual residence is in the United States;
13 "(3) the alleged offender is present in the
14 United States, irrespective of the nationality of the
15 alleged offender; or
16 "(4) the offense occurs in whole or in part with-
17 in the United States.
18 "(d) DEFINITIONS.—In this section:
19 "(1) PARTICIPATE ACTIVELY IN HOSTILITIES.—
20 The term 'participate actively in hostilities' means
21 taking part in—
22 "(A) combat or military activities related
23 to combat, including scouting, spying, sabotage,
24 and serving as a decoy, a courier, or at a mili-
25 tary checkpoint; or

"(B) direct support functions related to combat, including taking supplies to the front line and other services at the front line.

"(2) ARMED FORCE OR GROUP.—The term 'armed force or group' means any army, militia, or other military organization, whether or not it is state-sponsored, excluding any group assembled solely for nonviolent political association.".

(2) STATUTE OF LIMITATIONS.—Chapter 213 of title 18, United States Code is amended by adding at the end the following:

"§ 3300. Recruitment or use of child soldiers

"No person may be prosecuted, tried, or punished for a violation of section 2442 unless the indictment or the information is filed not later than 10 years after the commission of the offense.".

(3) CLERICAL AMENDMENT.—Title 18, United States Code, is amended—

(A) in the table of sections for chapter 118, by adding at the end the following:

"2442. Recruitment or use of child soldiers.";

and

(B) in the table of sections for chapter 213, by adding at the end the following:

"3300. Recruitment or use of child soldiers.".

1 (b) GROUND OF INADMISSIBILITY FOR RECRUITING
2 OR USING CHILD SOLDIERS.—Section 212(a)(3) of the
3 Immigration and Nationality Act (8 U.S.C. 1182(a)(3))
4 is amended by adding at the end the following:

5 "(G) RECRUITMENT OR USE OF CHILD
6 SOLDIERS.—Any alien who has committed, or-
7 dered, incited, assisted, or otherwise partici-
8 pated in the commission of the recruitment or
9 use of child soldiers in violation of section 2442
10 of title 18, United States Code, is inadmis-
11 sible.".

12 (c) GROUND OF REMOVABILITY FOR RECRUITING OR
13 USING CHILD SOLDIERS.—Section 237(a)(4) of the Immi-
14 gration and Nationality Act (8 U.S.C. 1227(a)(4)) is
15 amended by adding at the end the following:

16 "(F) RECRUITMENT OR USE OF CHILD
17 SOLDIERS.—Any alien described in section
18 212(a)(3)(G) is deportable.".

19 (d) WITHHOLDING OF REMOVAL.—Section
20 241(b)(3)(B) of the Immigration and Nationality Act (8
21 U.S.C. 1231(b)(3)(B)) is amended by adding at the end
22 the following: "For purposes of clause (iii), an alien who
23 is removable under section 237(a)(4)(F) or inadmissible
24 under section 212(a)(3)(G) shall be considered an alien

1 with respect to whom there are serious reasons to believe
2 that the alien committed a serious nonpolitical crime.".
3 (e) ASYLUM.—Section 208(b)(2)(B) of the Immigra-
4 tion and Nationality Act (8 U.S.C. 1158(b)(2)(B) is
5 amended by adding at the end the following:
6 "(iii) RECRUITMENT AND USE OF
7 CHILD SOLDIERS.—For purposes of clause
8 (iii) of subparagraph (A), an alien who is
9 removable under section 237(a)(4)(F) or
10 inadmissible under section 212(a)(3)(G)
11 shall be considered an alien with respect to
12 whom there are serious reasons to believe
13 that the alien committed a serious non-
14 political crime.".

Passed the Senate December 19 (legislative day, December 18), 2007.

Attest: NANCY ERICKSON,
Secretary.

Mr. SCOTT. In at least 18 countries around the world, children are direct participants in war. Many of these child soldiers, some as young as 8 years old, are abducted or recruited by force and often are compelled to follow orders under harsh duress. Contrary to popular belief, in many conflicts, girls make up more than 30 percent of child soldiers and are often raped. Once recruited, these children, boys and girls, participate in all forms of combat, even wielding AK-47s and M-16s, as portrayed in the media.

The prevalence and nature of the child soldier problem is not going away any time soon. It continues to plague the international community. In Uganda, a rebel group has abducted at least 20,000 children and has forced them to work as laborers, soldiers and sex slaves. We hear about ongoing persecution and atrocities in Burma, but what has escaped media attention is the use of child soldiers there. The Government has recruited up to 70,000 children—more than any other country in the world.

There is a clear legal prohibition on recruiting and using child soldiers. Over 110 countries, including the United States, have ratified the Optional Protocol to the Convention on Rights of the Child, which prohibits recruitment and use of child soldiers under the age of 18. But individual recruiters continue to operate with impunity, violating their countries' policies and treaty obligations.

So we must ask ourselves why this so. Is it a failure of the law or of will or both? This hearing will probe ways in which we may, as a country, contribute to prevention and punishment of recruiting and using child soldiers.

Recruiting and using child soldiers does not now violate the United States Criminal Code. To this end, Senator Durbin and Senator Coburn introduced the Child Soldiers Accountability Act, legislation designed to amend title 18 of the U.S. Code to create a criminal provision aimed at those who recruit or conscript children under the age of 15 into armed conflict. The bill will establish criminal penalties up to 20 years in prison and up to life imprisonment if death results from the crime.

Finally, the bill would extend U.S. jurisdiction to perpetrators of the crime who are present in the United States, regardless of their nationality and regardless of where the crime takes place, so that those who commit these crimes cannot use this country as a safe haven from prosecution. This type of jurisdiction exists for similar crimes, such as laws against torture and genocide, which allow for extraterritorial jurisdiction for crimes committed outside of the United States.

We overwhelmingly passed the Genocide Accountability Act last year to end the immunity gap in the genocide law. We should explore doing the same for those who maliciously recruit and use innocent children in warfare.

With that said, it is my pleasure to recognize the Ranking Member of the Subcommittee, the gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. I do want to thank you for scheduling this hearing. This is an atrocious practice that has been carried out in countries around the world. And we are honored to welcome a distinguished panel of witnesses to share their views on this timely issue.

Children are currently used as soldiers apparently in over 20 countries. An estimated 200,000 to 300,000 children are used as soldiers for rebel groups, militias and government armed forces.

The individuals who recruit children do so because children are physically vulnerable and easily intimidated. Many children are recruited by force and often compelled to follow orders under threat of death.

When faced with issues such as combatting the recruitment of child soldiers, many in Congress are interested in enacting legislation that attempts to address the problem. I believe the Committee has good intentions in addressing this issue.

Our colleagues in the Senate have already passed S. 2135, the "Child Soldiers Accountability Act of 2007." The Child Soldiers Accountability Act makes it a Federal crime to recruit or use child soldiers in an armed conflict. The bill also gives the Government the authority to deport or deny admission to any individual who recruited or used children or a child as a soldier under the age of 15.

Advocates for this bill state that it sends a message to the world that the United States does not condone the use of child soldiers. They also state this bill ensures that our soldiers will not serve as a sanctuary for human rights violators.

However, I wonder if adding another statute to the Federal Criminal Code is the best way for this Committee and ultimately this Congress to combat the use of child soldiers. To date, there have only been a total of 14 prosecutions involving a charge of recruiting child soldiers worldwide. All 14 cases have been held in international war crimes tribunals. None of the 14 defendants were American. None of the conduct that led to the 14 prosecutions occurred on American soil.

These facts lead me to wonder if a child soldier recruitment case would ever be brought in a U.S. Federal Court. It may be prudent for Congress to consider other ways to combat the use of child soldiers, but I remain interested in hearing from our witnesses on this issue.

Congress should take action to pressure violating countries to end this practice. Another possibility is to deny foreign assistance to nations or groups that use child soldiers. I believe there are a variety of options to be considered that may be better than adding another statute to the Federal Code. But again, I understand the position that the United States needs to set an example, and so I remain interested to hear your testimony here today.

Thank you, Mr. Chairman. I yield back.

Mr. SCOTT. Thank you.

The Chairman of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Scott, Judge Gohmert.

This is important. This is one of the few bills that are self-descriptive: to prohibit the recruitment or use of child soldiers; to designate persons who recruit or use child soldiers as inadmissible aliens; to allow the deportation of persons who recruit or use child soldiers.

So what that means is that anybody that has done that and comes to this country is still subject to prosecution. And it is a very, I think, excellent step forward in this grisly and inhumane

practice in which some quarter of a million or more children are exploited each day in state-run armies, in paramilitaries and in guerilla groups around the world. They are soldiers, they are human mine detectors, they are sex slaves, they are porters. And they suffer, being in their vulnerable position, a higher mortality rate. They are more prone to disease. Their injuries in combat situations are always higher than adults.

And so we feel that this a very important step forward to help in every way. As Judge Gohmert suggests, there may be other additional steps that we may take. And it is to that end that I commend the Chairman and the Ranking Member for these hearings.

And I ask unanimous consent that my statement be included in the record.

Mr. SCOTT. Thank you. Without objection, so ordered.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

The use of child soldiers has been reported in at least 21 conflicts around the world since 2001, including conflicts in Colombia, Uganda, the Democratic Republic of Congo, and Sierra Leone. It's estimated that up to 250,000 children are currently serving as soldiers or in some combat support capacity.

As you might imagine, the lives of these youngsters are constantly in danger as a result of their forced labor as combatants, porters, human mine detectors, and sex slaves. Their precious childhoods are permanently scarred by such experiences—experiences we would not wish to endure, at any age.

The "Child Soldiers Accountability Act" seeks to deter this horrible practice by taking several important steps to end the use of child soldiers.

First, the bill makes it a federal crime to recruit or to actually use child soldiers, under the age of 15, in hostilities. The concept of individual criminal responsibility in this area is supported worldwide. The United States is a party to several treaties, including the Convention on the Rights of the Child, that prohibit this practice. The bill imposes penalties of 20 years to life in prison for this heinous crime.

Second, the bill facilitates the swift prosecution of perpetrators, regardless of where the crime was committed. Last fall we passed the William Wilberforce modern anti-slavery bill, which provided the State Department international aid and monitoring mechanisms to combat the use of child soldiers.

But fighting this heinous crime overseas is not enough. This bill brings the power of the Justice Department to bear, in recognition that this is an offense against international law that every country has a responsibility to prosecute when it is discovered, just like torture and slavery.

In fact, the House recently passed a bill, subsequently enacted into law, that would authorize genocide prosecutions against those found present in the United States who committed genocide abroad. We did this to avoid a situation where perpetrators of genocide could reside in the United States as a safe haven from prosecution. Similarly, we should not allow those who recruit or use child soldiers to find a safe haven in our Nation.

Third, this Act will send a forceful message that child soldier recruiters will be prosecuted. And, for the future, it will be a forceful deterrent against the abuse of innocent children around the world.

The United States has been a key participant in global law enforcement efforts against genocide, war crimes, and other crimes against humanity. By supporting the "Child Soldiers Accountability Act," we extend these critical efforts into punishing and deterring the use of child combatants.

Mr. SCOTT. We have a distinguished panel of witnesses here to help us consider the important issues before us.

Our first witness will be Grace Akallo, who is a graduate of Gordon College with a degree in communications and has worked for World Vision on behalf of children worldwide. She was abducted by Ugandan rebels at the age of 15 and dragged into Sudan. She wit-

nessed numerous atrocities committed by the rebels. And although she witnessed the murder of those who attempted to escape, she managed a heroic escape back home. She is now internationally renowned as a spokesman and one who has testified before the House Committee on Foreign Affairs. She has also appeared on the "Oprah" television show. She is the author of "Girl Soldier: A Story of Hope for Northern Ugandan Children."

Our next witness after that will be Tom Malinowski, who has served as the Washington advocacy director for Human Rights Watch since 2001. He is responsible for the organization's overall advocacy effort. Prior to joining Human Rights Watch, he served as a special assistant to President Bill Clinton and as a senior director of foreign-policy speechwriting at the National Security Council. He holds degrees in political science from the University of California at Berkeley and Oxford University.

And our final witness will be Professor David M. Crane, appointed as a professor of practice at Syracuse University College of Law in the summer of 2006. From 2002 to 2005, he was the chief prosecutor of the Special Court for Sierra Leone in an international war crimes tribunal and was appointed to that position by Secretary General of the United Nations Kofi Annan. He has served in public service for over 30 years in various capacities, such as senior inspector general at the Department of Defense and the assistant general counsel of Defense Intelligence Agency.

So we begin our testimony with Ms. Akallo. Your entire written statement will be made part of the record. We would ask you to summarize your statement in 5 minutes or less. And there is a lighting device at the table which will go from green to yellow when there is 1 minute left and to red when the 5 minutes are up.

Ms. Akallo?

TESTIMONY OF GRACE AKALLO, FORMER CHILD SOLDIER, ADVOCATE FOR CHILD SOLDIERS, WORCESTER, MA

Ms. AKALLO. Thank you, Mr. Chairman, Members of the Subcommittee, for allowing me to testify before you today on behalf of many of the children who are being brutally forced to become soldiers and killers. Your concern on the issue of child soldiers is very vital for the children who have suffered and continue to suffer around the world.

On the night of October 9, 1996, the Lord's Resistance Army, rebels fighting the Government of Uganda, dashed into my school dormitory. Some of those rebels were younger than me; I was 15 years old. Within an hour, the rebels tied up girls in my dorm and forced 139 of us into the cold night. It was pricking cold. It felt unreal. No stars shown. Dawn was far off. No moon lit our way, only dark clouds announcing our fate.

Our silent fear had come true. Nothing could prepare us for it. For 20 years, war has been no stranger among us. Our capture could have happened on any other day. But this particular day was a day of celebration and singing in my country—such irony—for October 9th was our celebration of Uganda's independence. That night, led like slaves, we were taken to a life of torment. We left our independence behind.

We moved the whole night. Sister Rachelle, the deputy headmistress of Saint Mary's College in Aboke, who had hidden behind the banana plantation during our capture, tracked our footprints and caught up with us. Sister Rachelle, eyes swollen with grief, walked by our side for the whole day, pleading with the rebel commander for our release. 109 were released, and 30 of us were kept. And some of us were never to come back to see our homeland and feel the warmth of our parents' love again, never to see the rise and setting of the sun.

We were taught to dismantle, clean and assemble the gun. We were taught to kill, abduct and loot people's property. Many of these abducted children who could not walk were killed, and those who tried to escape were brutally killed in front of me and the others. Five of my friends were killed, and two are still missing. I have seen heads smashed. I have seen people beaten until their sockets swallow their eyes. I have seen children turn into monsters against their will. I have survived being buried alive.

Mr. Chairman, the recruitment and forceable abduction of children into the army continues today because their voices are never heard. We have failed to see their tears. The day I was abducted, the world stood still, and that is what every child forced to become a child soldier faces. It is beyond fear, Mr. Chairman.

I am not here to evoke emotions without action but to plead with you, Mr. Chairman and Members of the Subcommittee, to make the Child Soldiers Accountability Act become law. The perpetrators of child-soldiering crime must be held accountable. They should be brought to justice everywhere in the world. It pains my heart when the perpetrators are given safe haven here in the United States and other parts of the world or given amnesty. In some countries where some of the perpetrators have been given amnesty, they live like kings, yet their victims suffer injustices.

On November 20, 1989, the United Nations approved a Convention on the Rights of the Child. And article 35 provides the right to protection from being abducted, sold or trafficked. Article 36 provides the right to protection from all other forms of exploitation. And article 38 provides the right, if below 15 years of age, not to be recruited into the armed forces nor engaged in direct hostility.

Mr. Chairman, this has not been obeyed by numerous countries that still abduct, recruit and exploit children because they face no consequence for their action. Making the Child Soldiers Accountability Act become law would send a strong message to those involved now and those planning in the future to recruit and abduct children below 15 years of age into armed forces.

Mr. Chairman and Members of the Subcommittee, I thank you for the opportunity to testify today and argue to continue to be leaders in the protection of children around the world. The enactment of the Child Soldiers Accountability Act will send a signal to those country's armies and state and nonstate actors who intend to arm and threaten the life of children—children who need education opportunities and plowshares, not swords, thrust in their arms.

I will be happy to answer questions about my experience as a child abducted into soldiering and my quest now to speak on behalf of those gone, forgotten and now bearing arms against their will.

[The prepared statement of Ms. Akallo follows:]

PREPARED STATEMENT OF GRACE AKALLO

Thank you Mr. Chairman and members of the subcommittee for allowing me testify before you today on behave of many of the children who are being brutally forced to become soldiers and killers. Your concern on the child soldiers is very vital for the children who have suffered and still suffering. On night of October 9, 1996 the lord's resistance army, rebels to the government of Uganda, dashed into my dormitory. And Some rebels were younger than me, then 15 years old. Within an hour the rebels tied up girls in my dormitory, and forced 139 girls into the cold night. It was pricking cold. It felt unreal. No stars shone. Dawn was far off. No moon lit our way. Only dark clouds announcing our fate. Our silent fear had come true; nothing could prepare me for it. For 20 years, war has been no stranger amongst us. Our capture could have happened on any other day. But this particular day of celebration and singing in my country? Such irony. For October 9, 1996, was our independence. That night, led like slaves, we were taken to the life of torment. We left our independence behind. We moved the whole night. Sister Rachelle, the deputy headmistress who had hidden behind the banana plantation, tracked our footprints and caught up with us. Sister Rachelle, swollen with grief, walked by our side for the whole day pleading with the commander for our release. 109 were released and the 30 of us were kept behind and some of us were never to come back to our homeland, and feel the warmth our parents' love again, never to see the rise and setting of the sun again. We were taught to dismantle clean and assembled the gun. We taught to kill abduct and loot people property. Many of the kids who could not walk were killed and those who tried to escape were brutally killed in front of the others. Five of my friends were killed and two are still missing.

I have seen heads smashed. I have seen people beaten until their sockets swallow their eyes. I have seen children turned into monsters against their will. I have survived being buried alive.

Dear Mr. Chairman, the recruitment and forcible abduction of children into the army continues, because their voices are never heard, we have failed to see their tears. The day I was abducted, the world stood still and that is what every child forced to become child a soldiers encounters, it is beyond fear Mr. Chairman.

I am not here to evoke emotions without action, but to plead with you Mr. Chairman and members of the subcommittee to make child soldier accountability act became law. The perpetrators of child soldiering crime must be hold accountable. They should be brought to justice anywhere in the world. It pains my heart when the perpetrators are given safe havens here in the United States and others parts of the world or given amnesty as in the case in country where some of the perpetrators have been given Amnesty, they live like kings yet the victims continue to suffer injustices.

On November 20th, 1989 the United Nations approved the Convention on the right of the child and in article 35 states; the right to protection from being abducted, sold, or trafficked. 36 states; the right to protection from all other forms of exploitation and 38 states; the right, if below 15 years of age not to be recruited into the armed forces nor engage in direct hostilities. Mr. Chairman this has not been obeyed by some countries that still abduct, recruit and exploit children, because they do not face any consequences of their action. By making the Child soldier accountability act 2007 become law, it would send a strong massage to those involved now and those planning in the future to recruitment and abduct children below 15 years of age into armed forces.

Mr. Chairman and the members of the Subcommittee, I believe that as you decide on this piece of legislation whether to adopt it or not, you would be thinking of own your family, your children, if they were the once being forced to become soldiers what would do, what would want people do for you and your family.

Thank you Mr. Chairman.

Mr. SCOTT. Thank you very much. Thank you.

Mr. Malinowski?

TESTIMONY OF TOM MALINOWSKI, WASHINGTON ADVOCACY DIRECTOR, HUMAN RIGHTS WATCH, WASHINGTON, DC

Mr. MALINOWSKI. Thank you, Mr. Chairman, Members, for having us here and for looking at this very, very important issue.

Children are recruited to serve and to fight in armed conflict in at least 18 countries around the world. Human Rights Watch, my organization, has investigated the use of kids in armed conflict in

Colombia, where they are used by both paramilitary groups and left-wing rebels; in northern Uganda, where Grace is from; in Sri Lanka, where both sides in the civil war use children; in Burma, Somalia, Rwanda, Liberia. The list unfortunately goes on and on.

No one knows the exact number of child soldiers in the world, but the U.N. estimates there may be as many as a quarter-million serving in conditions of armed conflict worldwide.

Children are recruited because they are vulnerable, because they are easily intimidated, because they make obedient soldiers. Many are recruited by force, like Grace was. Others join out of desperation, as their communities break down, as they are separated from their families, driven from their homes, left with no opportunities, no one to care for them or to protect them. But regardless of how they are recruited, child soldiers are denied a childhood, and they are often subjected to horrific violence.

How do we fight this problem? There is no magical solution. But what we can do is what we have done for generations in trying to curb the worst, most inhumane excesses of war: We can try to set a standard, and then we can try to enforce that standard, until a practice that still appears normal in many parts of the world begins to be seen as wrong, subject to punishment and ultimately, we hope, unthinkable.

Now, we have already gone a long way toward setting a global standard that you can't recruit kids for war. The recruitment and participation in hostilities of children under 15 was first prohibited in 1977 by the additional protocols to the Geneva Conventions. It is recognized as a war crime now by the International Criminal Court. We now have a treaty, which the United States has ratified, forbidding recruitment of children under 18 or their use in hostilities. And that has been ratified by 120 countries, including by us.

The challenge we face is enforcing these norms, for while many governments and even nonstate armed groups have policies on paper stating that their minimum age of recruitment is 18, recruiters who actually violate those policies are rarely held accountable.

Now, a big recent advance has come with the Special Court for Sierra Leone, which David Crane will talk about and which receives, as you know, strong financial support from the United States. The Special Court has begun to prosecute and to convict people who recruited child soldiers in that country's brutal civil war, including Charles Taylor.

The International Criminal Court recently took a case involving a defendant who is accused of conscripting children. And as these trials proceed, as convictions are handed down, we hope that child recruiters get the message that they are going to be held accountable for this kind of behavior. And that is the way to achieve deterrence.

Now, you mentioned, Mr. Gohmert, that thus far it has been mostly the international courts that have taken these kinds of cases. And that is true, but that is precisely because very few countries have criminalized the practice of recruiting and using child soldiers in their national criminal codes. National courts in most countries simply can't do this yet. But we need them to, because the international courts have very limited jurisdiction, only for a

small number of countries, like Sierra Leone or cases that the ICC may take, which are only the most extraordinary ones. Here in the United States, our code doesn't address the issue. So if one of Grace's tormenters were to come to the United States, or any number of people like that, our courts would not be able to act. They would be able to take safe haven here.

Now, that is why we support the Child Soldiers Accountability Act. We think it would send a strong message to child recruiters around the world that they can't find safe haven in the United States. It would enable us to prosecute people who might try to recruit kids from the United States to fight in foreign conflicts. And that is not unthinkable. In the late 1990's, for example, the Kurdistan Workers Party recruited school-children in Europe to serve in PKK forces in southeastern Turkey. And it would set an example for other countries around the world that would also like to adopt similar laws. And I believe the Justice Department would use this law. We can perhaps discuss that later.

We also have precedent for this kind of legislation in existing laws. The Chairman mentioned, I believe, the U.S. Code already makes it a crime for torture to be committed abroad, irrespective of the nationality of the victim or alleged offender. The Senate has passed the Genocide Accountability Act, which allows us to prosecute non-U.S. nationals for acts of genocide. And these kinds of laws have proven useful in real-life cases in the past.

So we are encouraged to see the bill has passed the Senate. We are encouraged by the strong bipartisan support; there is no divide in this Congress or in this country about preventing the exploitation of children. And we do hope that the Subcommittee will act favorably and take this up so it can quickly become law.

Thank you very much.

[The prepared statement of Mr. Malinowski follows:]

PREPARED STATEMENT OF TOM MALINOWSKI

Testimony of Tom Malinowski
Washington Advocacy Director, Human Rights Watch

Hearing on the Child Soldier Accountability Act
House Judiciary Subcommittee on
Crime, Terrorism and Homeland Security
April 8, 2008

Thank you, Mr. Chairman and members of the subcommittee, for the opportunity to testify before you today. Your attention to the exploitation of children as soldiers around the world is both important and welcome.

Human Rights Watch has investigated the recruitment and use of children as soldiers in over a dozen countries since 1994. We have documented the recruitment of children as young as eight into both paramilitary and guerilla forces in Colombia, the kidnapping of children by the Lord's Resistance Army in Northern Uganda, including the use of girls as sex slaves, and abduction of children by both the Tamil Tigers and government-linked armed groups in Sri Lanka's escalating civil war. Human Rights Watch has conducted other investigations on the use of child soldiers in Angola, Burma, Burundi, Chad, Cote d'Ivoire, D.R. Congo, Lebanon, Liberia, Rwanda, Somalia, and Sudan. Our research has found that this is a global problem, affecting girls and boys on nearly every continent. The perpetrators include government armies, armed opposition groups, and paramilitaries and militias linked to government forces. No one knows the exact number of child soldiers, but the United Nations estimates there may be as many as 250,000 worldwide.

While many children are recruited by force, others join armed groups out of desperation. As communities break down during war, children are often separated from their families, driven from their homes, and left with no opportunity to go to

school. In situations of extreme insecurity, many believe that joining an armed group is their best chance of protection or survival.

Regardless of how children are recruited, the military commanders that exploit them as soldiers put them at extreme risk. Many child soldiers participate directly in hostilities, and even those serving in support roles can be legitimate targets of attack, and may be subject to injury, disability, and death. Child soldiers are often exposed to extreme levels of violence that result in life-long emotional and psychological scars.

One of the reasons why child recruitment has persisted as an awful aspect of contemporary warfare is the impunity enjoyed by individual recruiters. While many governments and even non-state armed groups have policies on paper stating that their minimum age of recruitment is 18, recruiters who violate these policies are rarely held accountable. As a consequence, recruiters continue to prey upon children, as these are often the most vulnerable recruits, and the most susceptible to threats and coercion.

Human Rights Watch firmly supports the Child Soldiers Accountability Act. It is an important tool for addressing the impunity that child recruiters too often enjoy, and for holding perpetrators accountable for their crimes. It sends a strong and important message to military commanders worldwide that they cannot recruit children into their forces and then seek safe haven in the United States.

In the last decade, progress has been made in establishing criminal responsibility for the recruitment and use of child soldiers. The recruitment and participation in hostilities of children under the age of 15 was first prohibited by the 1977 Additional Protocols to the Geneva Conventions. In 1998, governments negotiating the Rome Statute of the International Criminal Court recognized that this prohibition had achieved the status of customary international law. They agreed that the conscription, enlistment, or use in hostilities of children under the age of 15 should be considered a war crime under the Court's jurisdiction, whether carried out by members of national armed forces or non-state armed groups. Significantly, delegates drafting the treaty agreed that the Statute's definition would apply not

only to the use of children for direct participation in combat, but also their active participation in military activities linked to combat such as scouting, spying, sabotage, their use as decoys, couriers, or at military checkpoints, and direct support functions such as carrying supplies to the front line.

In May 2004, international jurisprudence on this issue advanced further when the Appeals Chamber of the Special Court for Sierra Leone ruled that the prohibition on the recruitment and use of children below age 15 had crystallized as customary international law prior to 1996, and found that the individuals responsible bear criminal responsibility for their acts. In its decision, the Court stated that:

> The practice of child recruitment bears the most atrocious consequences for the children. Serious violations of fundamental guarantees lead to individual criminal responsibility. Therefore the recruitment of children was already a crime by the time of the adoption of the 1998 Rome Statute for the International Criminal Court, which codified and ensured the effective implementation of an existing customary norm relating to child recruitment rather than forming a new one.

With these developments, individual commanders now have begun to be prosecuted for the crime of recruiting and using child soldiers. The most active pursuit of child recruitment cases has come through the Special Court for Sierra Leone, a court which benefits from major support by the United States. The use of child soldiers was included in the indictments against each of the nine defendants tried by the court, including leaders of the Civil Defense Forces, the Armed Forces Revolutionary Council, and the Revolutionary United Front, and former Liberian President Charles Taylor. Last year, four defendants were convicted of this crime, and are now serving up to 50 years in prison. These were the very first convictions by an international judicial body for the crime of using child soldiers.

The International Criminal Court recently initiated prosecution against Thomas Lubanga of the Democratic Republic of Congo (DRC), paving the way for its first-ever trial of war crimes. Lubanga is charged with enlisting and conscripting children as

soldiers and using them to participate actively in the conflict in Ituri, in the eastern DRC. He is currently in custody in The Hague, awaiting trial.

As trials proceed, convictions are handed down, and these cases become known, Human Rights Watch hopes that these prosecutions will send a clear message that child recruiters bear criminal responsibility for their actions, and that the consequences could entail a lengthy jail sentence. Only when individuals are held accountable through the rule of law will we establish a successful deterrent to the recruitment and use of child soldiers.

However, international tribunals or hybrid courts such as the Special Court for Sierra Leone can try only a very small number of perpetrators, and have limited jurisdictions. Yet, so far, national courts have barely played a role in prosecuting these crimes. The only known example of criminal prosecution at the national level is from the DRC, where in March 2006 Jean Pierre Biyoyo, a leader with an armed group known as Mudundu 40, was sentenced to five years in prison for child recruitment and illegal detention of children in South Kivu in April 2004. However, he later escaped from prison and remains at large.

A limitation to the current state of the law is that very few countries have criminalized the recruitment or use of child soldiers under their national criminal code. Here in the United States, the Federal Criminal Code currently does not address the issue of child recruitment, nor allow prosecution of an individual who has recruited or used child soldiers in another country and then attempts to take safe haven in this country.

The Child Soldier Accountability Act would address this gap. It would make it a federal crime to recruit or use child soldiers under the age of 15, and allow the prosecution of individuals for this crime, whether committed here or abroad by either US citizens or non-citizens present in the United States. The bill imposes penalties of up to 20 years to life in prison, and also allows the US to deport or deny entry to individuals who have recruited children as soldiers. The adoption of this legislation would provide an important avenue to hold these perpetrators accountable.

The Child Soldiers Accountability Act would enable the United States to prosecute military commanders who exploit children as soldiers abroad, and then seek refuge in this country. It would also enable the United States to prosecute individuals who may attempt to recruit children from the United States to fight in foreign conflicts. Such recruitment from Western countries is not unknown: in the late 1990s, for example, the Kurdistan Workers' Party (PKK) recruited children from schools in Sweden to serve in PKK forces in southeast Turkey.

Precedent for this type of legislation already exists in federal law. For example, Chapter 113c of Title 18, the Crimes and Criminal Procedure of the US Code makes it a crime for torture to be committed abroad irrespective of the nationality of the victim or alleged offender where the alleged offender is present in the US. The provision imposes severe criminal penalties on "whoever outside the United States commits or attempts to commit torture." Jurisdiction over this crime applies whether the alleged offender is a national of the United States, or is present in the United States, irrespective of the nationality of the victim or alleged offender. (Sec. 2340A.) The first person to be charged under this law, Charles "Chuckie" Taylor, Jr., son of former Liberian president Charles Taylor, was indicted in December 2006 and is currently facing trial in Miami.

Another precedent, Mr. Chairman, is the Genocide Accountability Act, which you introduced and was just adopted by the US Senate on March 29 of this year. This act, which Human Rights Watch supports, amends the Genocide Convention Implementation Act to allow prosecution of non-US nationals who are in the US for acts of genocide committed outside the United States.

Mr. Chairman, we were very encouraged to see the Child Soldier Accountability Act adopted unanimously by the U.S. Senate in December 2007. We believe this demonstrates the broad, bi-partisan concern regarding the global scourge of child recruitment, and the desire by members of both parties to effectively address this terrible exploitation of children. We hope to see the subcommittee act favorably on the Child Soldier Accountability Act, so that it can quickly become law.

Thank you, Mr. Chairman.

Mr. SCOTT. Professor Crane?

TESTIMONY OF DAVID CRANE, SYRACUSE UNIVERSITY COLLEGE OF LAW, SYRACUSE, NY

Mr. CRANE. Thank you, Mr. Chairman, and thank you for this opportunity to address this Committee on what I feel to be an important international issue that impacts our country and its security, and that is the scourge of children used as soldiers in armed conflict.

For the first time in history, those who bear the greatest responsibility for war crimes, crimes against humanity and other serious violations of international humanitarian law that took place during recent wars have been charged with the use of child soldiers under the age of 15 into an armed force.

The use of children in armed conflict is an age-old issue, of course. Modern international norms, however, have identified and outlawed their use. International tribunals, such as the Special Court for Sierra Leone, of which I was the founding chief prosecutor, are now on the cutting edge of international criminal law and holding accountable those warlords, commanders and politicians who turn to children, some as young as the age of 6 years old, to carry out orders that, in some cases, result in war crimes and crimes against humanity. Only in the past 10 years has the international community begun to grapple with this international problem.

A favorite tactic to induce children to join their force was for the rebels to move in and surround the village in Sierra Leone. The children were made to kill their parents and then were driven into the bush and forced to serve as soldiers, in many instances for years. The numbers are not fully known, but it was in the thousands. These children, ranging from 6 to 18 years of age, roamed the battlefields, hopped up on cocaine or marijuana, destroying their own country. Over time, the various warring factions became their home and their families. Many forgot their real names or even where they came from.

All sides to the conflict in Sierra Leone used children. When that horrific conflict staggered to its bloody conclusion in 2002, just shortly before my arrival in country, an entire nation lay in ruins. These child fighters found themselves with no families, little to no education, and a society unable to assist them in starting to rebuild their lives. Many were physically and psychologically damaged. The lost generation of Sierra Leone now sits by pockmarked roads with no hope waiting for the next "Pa" to lead them back into the only life they know: fighting, raping, pillaging and murdering their fellow citizens.

The Child Soldiers Accountability Act of 2007, passed by the United States Senate in December of last year, is an important signal to the world that this country will not tolerate those who recruit mere children into armed forces of whatever kind. Moreover, it gives our Government the legal tools to deal with those who are in this country or seek to enter this country to deal with them by prosecution, exclusion and/or deportation.

I will close with a story of thousands that I personally was involved with in my 3 years in West Africa relating to just one child

soldier. And I quote this from my opening statement to the tribunal against the leadership of the Revolutionary United Front.

It was a clear, hot day. The meeting hall in the school for the deaf located up country near Makeni rippled with the heat of over 500 persons. I had been speaking to the students, faculty and others in one of my many town hall meetings I conducted throughout Sierra Leone. The purpose of the meetings were to provide a vehicle for the people of this small and fragile nation to talk to their prosecutor about the war, the crimes, their pain and other issues related to our work.

As I finished answering a question from a student near the front, a shy, small arm was raised in the middle of the hall. I walked back to the student. He meekly stood up, head bowed, and he mumbled loud enough for those around him to hear, "I killed people. I am sorry. I didn't mean it." I went over to him, tears in my eyes, and I hugged him and said, "Of course you didn't mean it. I forgive you."

Thank you, Mr. Chairman, for this opportunity to address you today about holding accountable those who destroy children's lives by recruiting them into armed forces. I welcome your questions, sir.

[The prepared statement of Mr. Crane follows:]

PREPARED STATEMENT OF DAVID M. CRANE

House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

PROSECUTING THE USE OF CHILDREN
IN TIMES OF CONFLICT

The Lost Generation of Sierra Leone

Testimony of

DAVID M. CRANE[1]
Professor
Syracuse University College of Law

8 April 2008

Introduction
The Scourge of Child Soldiers Must Be Dealt With!

It was a clear hot day. The meeting hall in the school for the deaf located up country near Makeni rippled with the heat of over five hundred persons. I had been speaking to the students, faculty, and others in one of my many town hall meetings I conduct throughout Sierra Leone. The purpose of the meetings are to provide a vehicle for the people of this small and fragile nation to talk to their Prosecutor about the war, the crimes, their pain and other issues related to our work. As I finished answering a question from a student near the front, a shy and small arm was raised in the middle of the hall. I walked back to the student. He meekly stood up, head bowed and he mumbled, loud enough for those around him to hear, "I killed people, I am sorry, I did not mean it." I went over to him, tears in my eyes, and hugged him and said, "Of course you didn't mean it. I forgive you."[2]

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[1] David M. Crane was appointed The Chief Prosecutor, Special Court for Sierra Leone by the Secretary General of the United Nations, Kofi Annan, April 2002. In July of 2005 he stepped down as the founding Chief Prosecutor. He lived and worked in Freetown, Sierra Leone for 36 months.
[2] The event took place in March of 2004 in Makeni, Sierra Leone. The child was twelve years old and was deaf. The catholic sister who was headmistress told me that this young man had never spoken of his involvement in the civil war, but he had been a behavioural problem, running away, sometimes for weeks. This is just one story from the lost generation that is the children of Sierra Leone in the 1990's.

For the first time in history those who bear the greatest responsibility for war crimes, crimes against humanity, and other serious violations of international humanitarian law that took place during the horror that was the conflict in Sierra Leone, have been charged with the use of child soldiers.[3] The use of children in armed conflict is an age old issue.[4] Modern international norms, however, have identified and outlawed their use. The Special Court for Sierra Leone is now on the cutting edge of international criminal law in holding accountable those warlords, commanders, and politicians who turn to children, some as young as six years old, to carry out orders that in some cases result in war crimes and crimes against humanity.

Only in the past ten years has the international community begun to grapple with this international problem.[5] A report to the Secretary General in 1996 laid out a comprehensive program for immediate action to protect children during the times of armed conflict.[6] The report in its introduction dramatically declared:

These statistics are shocking enough, but more chilling is the conclusion to be drawn from them: more and more of the world is being sucked into a desolate moral vacuum. This is a space devoid of the most basic human values; a space in which children are slaughtered, raped, and maimed; a space in which children are exploited as soldiers; a space in which children are starved and exposed to extreme brutality. Such

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[3] Statute of the Special Court for Sierra Leone, Art. 4c, Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

[4] The UN Convention on the Rights of the Child states: "For the purposes of the present Convention, a child is every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Convention on the Rights of the Child, Article 1, adopted November 20, 1989 (entered into force September 2, 1990). As to child soldiering, see, generally, Graca Machel, *The impact of war on children: A review of progress*, Hurst & Co., 2001 at 7: "A child soldier is any child—boy or girl—under the age of 18, who is compulsorily, forcibly or voluntarily recruited or used in hostilities by armed forces, paramilitaries, civil defence units or other armed groups. Child soldiers are used for forced sexual services, as combatants, messengers, porters and cooks. Also, the Cape Town Principles, adopted 30 April 1997: "Child soldier…means any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including, but not limited to cooks, porters, messengers and those accompanying such groups, other than purely as family members. It includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms. 'Recruitment' encompasses compulsory, forced and voluntary recruitment into any kind of regular or irregular armed force or armed group."

[5] Conscripting or enlisting children under the age of 15, or using them to participate actively in hostilities, is a war crime now and is within the jurisdiction of the International Criminal Court (ICC). Rome Statute, article 8(2)(b)(xxvi) and (e)(vii).

[6] Report of the expert of the Secretary General, Ms. Grac'a Machel, submitted pursuant to General Assembly resolution 48/157, 27-29 August 1995, *Promotion and Protection of the Rights of Children, Impact of armed conflict on children.*

unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink.[7]

Though the use of child soldiers is a problem worldwide, this submission will highlight as a case study the ground-breaking efforts by the Special Court for Sierra Leone, hereinafter the Court, to bring to justice those who destroyed a generation of children in that struggling and hapless backwater of a country during the 1990's, thus underscoring **the importance of the United States' leadership in facing down the scourge of using children in combat by enacting into law *S2135, The Child Soldiers Accountability Act of 2007.***

However, it will first be important to step back and discuss the conflict in general and to understand the role children played in the tragedy that was the civil war in Sierra Leone. We will then discuss the indictments themselves followed by the various charges against the accused currently on trial. From there we will review the current state of the law regarding the use of child soldiers and finish with a look into the haze of an uncertain future. It is respectfully submitted that a clear and unequivocal message by the United States must be sent to the international community that those who recruit, enlist, and use children in armed forces will be brought to justice and/or not be allowed to live in this country.[8]

The Conflict

Sierra Leone sits along the West African coast that stretches from Senegal to Nigeria before turning gently south into Central Africa.[9] It is a small nugget in a corroded string of nations along this coast linked together by a colonial past, with a history of bad governance, conflict, and disease. The common thread that holds this odd geographic necklace together is varying degrees of corruption.[10]

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[7] Ibid. at 5.
[8] The issue of using children in combat should be one of bi-partisan concern. It is hoped my testimony will assist the Committee on the Judiciary in recommending to the House that S.2135 be passed and forwarded to the President for signing into law.
[9] John L. Hirsch, *Sierra Leone. Diamonds and the Struggle for Democracy,* 2001 at 22-24. See, generally, Talabi Lucan, *A Visual History of West Africa, 1981*; Peter K. Mitchell, *Africa South of the Sahara 2000.*
[10] Ibid. at 25-28.

West Africa, generally, and Sierra Leone in particular, possesses vast natural resources.[11] Rich in diamonds, rutile and bauxite, among other minerals, these important commodities are Sierra Leone's curse. It was corruption and diamonds that were the catalysts that ignited a conflict that resulted in the murder, maiming, mutilation, and rape of over a half a million human beings in Sierra Leone.[12]

Living in a failed state, Sierra Leoneans have no faith in their governmental institutions or in the rule of law. Since independence, the leprosy of corruption has eaten the country alive for over forty years, the last decade in the convulsive throes of an internal armed conflict. Currently at the bottom of the human development index, Sierra Leoneans struggle daily just to survive to the end of the week. For many of these citizens there is no hope. It was this very loss of hope that warlords, criminal organizations, and cynical politicians took advantage of as part of their plan to execute the civil war in the 1990's.

Fresh from the terror training facilities and camps in Libya, young ruthless leaders were sent south to begin a decade long campaign to take over politically, by force if necessary, the entire region of West Africa. Lying prostrate before Muammar Gaddafi, the struggling former colonies of France and Great Britain were vulnerable to unrest, conflict, and overthrow. This decade long plan of unrest started in 1990 and 1991. Charles Taylor, an escaped detainee from the United States, slipped quietly into Liberia and began years of civil war there. Along with another graduate of the Libyan terror camps, a former wedding photographer and corporal in the Sierra Leonean Army, Foday Sankoh, Taylor looked west over the border of Sierra Leone to the alluvial diamond fields in the Kono and Koinadugu districts. Diamonds would help keep both his revolution and his bank account well financed.[13]

With backing and planning assistance from Ghaddafi and Blasé Campore, President of Burkino Faso, Taylor assisted Sankoh in launching two strikes into the eastern portion of Sierra Leone in March of 1991. He was admonished by Taylor to vigorously recruit the civilian population to the cause, by terror and force, if necessary. What followed after that day

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[11] Sierra Leone Country Handbook, USMC at 52-55.
[12] Ibid.
[13] For an excellent general overview of the conflict within Sierra Leone. see: *Conflict Mapping in Sierra Leone, Violations of International Humanitarian Law from 1991 to 2002,* No Peace Without Justice, 2004.

was a back and forth death struggle that lasted over ten years between various warring factions, each brutalizing civilians, particularly women and children. Never really having a political purpose or goal, this internal armed conflict, started by Charles Taylor and the Revolutionary United Front, evolved into a terror campaign in the hope of gaining and maintaining control of not only the diamond fields, but the entire nation for this joint criminal enterprise.

During this bizarre spectacle pain, suffering, and agony reached new dimensions. The atrocities committed almost defied description in any language. "Believe the unbelievable" is what the chamber responsible for the trial of the leadership of the Civil Defense Force was told by me in the opening statement that began their prosecution. No more horrific a tale is the one just told in the introduction, however this is only illustrative of years worth of using boys and girls as soldiers and support personnel who raped, maimed, mutilated, and murdered their way across Sierra Leone in such military operations as "Pay Yourself" and "No living thing".

A favourite tactic to induce children to join their force was for the rebels to move in and surround a village. The children were made to kill their parents and then were driven into the bush and forced to serve as soldiers, in many instances for years. The numbers are not fully known, but it was in the thousands. These children, ranging from six to eighteen years of age, roamed the battlefields hopped up on cocaine or marijuana destroying their own country. Over time the various warring factions became their home and their families. All sides to the conflict in Sierra Leone used children.

When the conflict staggered to its bloody conclusion in 2002, an entire nation lay in ruins. These child fighters found themselves with no families, little to no education, and a society unable to assist them in starting to rebuild their lives. Many were physically and psychologically damaged. The lost generation of Sierra Leone now sits by pocked-marked roads with no hope, waiting for the next "Pa" to lead them back into the only life they know--fighting, raping, pillaging, and murdering their fellow citizens.[14]

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[14] See *Youth, Poverty and Blood. The Lethal Legacy of West Africa's Regional Warriors*. Human Rights Watch, Vol. 1, No. 5(A), March 2005. The report in its opening paragraph sums up the problem at 1: "Since the late 1980's, the armed conflicts in Liberia, Sierra Leone, Guinea and Cote d'Ivoire have reverberated across each country's porous borders. Gliding back and forth across these borders is a migrant population of young fighters—regional warriors—who view war as mainly an economic opportunity.

A forty-two year old secretary told a Human Rights Watch researcher, in an interview on May 20, 1999, about child soldiers used in the invasion and destruction of Freetown in January of that same year: *We feared them. They were cruel and hard hearted; even more than the adults. They don't know what is sympathy; what is good and bad. If you beg an older one you may convince him to spare you, but the younger ones, they don't know what is sympathy, what is mercy. Those who have been rebels for so long have never learned it.*[15]

The Special Court for Sierra Leone

The Special Court is an innovative step in the evolution of international war crimes tribunals designed to prevent future atrocities. Even with the establishment of the International Criminal Court, the Court is a model that can work in the future to combat impunity in troubled areas of the world.

The Court is a new kind of "hybrid" tribunal that is independent of the United Nations and any state.[16] It is considered the next generation of war crimes tribunal. Established through an agreement between the United Nations and the Government of Sierra Leone in January 2002, the Court is both international and national.[17] The signing of the treaty was the culmination of a year and a half of discussions started in August 2000 following a United Nations Security Council resolution directing the Secretary-General to enter negotiations to create the Court. The national parliament passed a law to implement the treaty in March 2002.[18]

Their military 'careers' most often began when they were abducted and forcibly recruited by rebels in Liberia or Sierra Leone, usually as children."

[15] Human Rights Watch Report, Vol. 11, No. 3(A)-June 1999, *Getting Away with Murder, Mutilation, and Rape.*_ New Testimony from Sierra Leone at 54. Adama, goes on in the interview, declaring: "Once a rebel, a small boy in full combats, couldn't have been more than twelve, called everyone out of the house across the street. The papa of the family, Pa Kamara, said, "please my son, leave my family," but the boy said, "listen, we can do anything we want in Freetown. We don't have mothers, we don't have fathers. We can do anything we wanna do." And that is how Pa Kamara died: the rebel boy shot him, in front of his wife, his children, his grandchildren. They are wicked, those boy soldiers. They spare no human life."

[16] Security Council Resolution 1315 (2000) of 14 August 2000. See, also, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000.

[17] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002. See, also, The Special Court Agreement, 2002, Ratification Act, 2002.

[18] Ibid.

The Court's first Registrar, Robin Vincent from the United Kingdom, and the Prosecutor were appointed by the United Nations Secretary-General in April of 2002. He left that post in 2005. The Deputy Prosecutor, Desmond DeSilva was appointed by the Government of Sierra Leone in the fall of 2002.[19] The Court's Chambers are a combination of five international and national justices in the Appellate Chamber and three international and national justices each in the two Trial Chambers. The first eight justices (five in the Appeals Chamber and three for trial chamber one) were sworn into office in early-December 2002. The second Trial Chamber was sworn in January 2005.[20]

The Court's mandate is to try those who "bear the greatest responsibility" for serious violations of international humanitarian law, including the laws of war; crimes against humanity, including widespread or systematic murder, enslavement, rape, sexual slavery and other forms of sexual violence, torture, and other inhumane acts; and certain crimes under Sierra Leone law.[21] Cases can be brought against anyone who committed crimes or was responsible for crimes committed in the territory of Sierra Leone since 30 November 1996. [22]

Unlike the two existing ad hoc international criminal tribunals, the Court's budget is drawn mainly from voluntary contributions rather than assessments from UN member-states. The entire initial four year budget for the Court, including the construction of a permanent court site, was around $100 million. Thus far, over 30 countries have generously provided financial or in-kind contributions. With an annual budget of around $25 million, a tenth of what the other tribunals spend each year, the Court must be more efficient and operate with a leaner staff and less resources.

Most importantly, the Special Court sits in the country where the violations occurred. This is exactly the right place for the Court to be – in the heart of Sierra Leone, delivering justice directly for the people who

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[19] In May of 2005, Mr. DeSilva was appointed by the Secretary General of the United Nations to succeed David M. Crane as Prosecutor for the Special Court for Sierra Leone. He served until the fall of 2006.
[20] Article 11, Organization of the Special Court, Statute of the Special Court for Sierra Leone.
[21] Art. 1, para. 1 Statute of the Special Court for Sierra Leone: The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.
[22] Ibid.

suffered during the civil war. The courtroom is open to the public. An ambitious outreach and public information program is in place to keep Sierra Leoneans informed and engaged in the work of the Court. This is, first and foremost, their Court.

The Court hopes to make a lasting contribution to promoting accountability and the rule of law long after its work has finished. Thus, capacity-building and legacy activities constitute an important part of our work. Courtroom facilities will be turned over to the people of Sierra Leone at the conclusion of the trials. In addition, the Court hired a high percentage of Sierra Leonean professionals and it has have reached out to the local legal community to design initiatives to bolster legal reform in the country. These include facilitating scholarship opportunities and training programs in international humanitarian law, as well as a fruitful partnership with the local law school.[23] The trials may end, but the Special Court will never truly leave Sierra Leone.

The Indictments and the Charges

As the Prosecutor, I arrived in Sierra Leone early-August 2002. Criminal investigations began two weeks later according to plan.[24] On March 3, 2003, eight indictments were signed.[25] These indictments were confirmed by a trial chamber judge in London on March 7th. At noon on Monday, March 10 – just seven months after his arrival -- members of the investigations team, along with the Sierra Leone Police launched "Operation

[23] The Legacy Program for the Office of the Prosecutor (OTP) for 2005/2006 consists of putting various Sierra Leonean Legal texts on DVD and distributing them to the law school and the bar association; a monthly lecture series for the local bar given by members of the OTP; a street law program teaching high school students key aspects of Sierra Leonean criminal law; and a codification project of customary law. The major legacy initiative started back in 2004 that continues to this day is the innovative witness management program. This program trains Sierra Leonean Police (SLP) the nuances of caring for, protecting, and monitoring witnesses' pre-trial, trial, and post trial. The unit formed in the OTP will be transferred in total to the SLP and become a first-ever organization caring for witnesses within the jurisdiction of the SLP.

[24] The Prosecutor developed a general prosecutorial strategy in May of 2002 which he presented for the first time at a roundtable sponsored by the United States Institute of Peace that same month. While doing this he also developed a ten-phase plan that detailed the milestones and sequence of critical events that would take place in the set-up, investigation, indictment, pre-trial, and trial stages of the Court's mandate. Currently they are in phase ten and have started executing a "phase 11" called the exit strategy.

[25] In a moving ceremony in the office of the Chief Prosecutor eight indictments were signed in front of all of the investigators and trial counsel. I recall saying to them in a short opening before I signed the indictments that "the ghosts of a 100,000 people stand with us in this room today." Some of my staff were weeping openly. Beethoven's "Ode to Joy" was being played on my stereo as we signed the indictments one at a time.

Justice," taking down simultaneously all the indictees who were in Sierra Leone at the time, including the now deceased Minister of Interior, Samuel Hinga Norman. A total of 13 indictments have been issued. The six indictees arrested in March 2003, plus three more over a period of several months, are in a detention facility at the Court compound in Freetown having faced three joint criminal trials. The leadership of the Armed Forces Revolutionary Council and the Civil Defense Forces have been convicted of war crimes and crimes and crimes against humanity, to include the unlawful recruitment of children under the age of 15 into an armed force. They have been sentenced and their cases are currently on appeal. The joint criminal trial against the Revolutionary United Front is finishing. Former President Charles Taylor is also being tried for his complicity in Sierra Leone on an 11 count indictment, to include the recruitment of child soldiers. [26]

We have been encouraged by the response to the indictments by the people of Sierra Leone. The peace has held and many have spoken out in support of our work. According to polls, over two-thirds of the population believe the Special Court is necessary, with another two-thirds believing it will deter future conflict. [27]

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[26] As mentioned, most of the indictees have been jointly and severally charged with and convicted for the use of child soldiers among other international crimes. The extent of that involvement was widespread and systematic. Each of the indictees had command responsibility of the combatants that they led, to include child soldiers. The various combatants over the period of the conflict had small boy units (SBU's). Some of these SBU's had specific duties to perform. In the burning of Freetown, January 1999, children were part of squads specifically ordered to mutilate, to burn, and to pillage. Child soldiers were seen throughout the three weeks of occupation carrying burlap bags full of body parts, trailing blood along the way. They were required to bring the bags to their commanders.

The leadership of the Revolutionary United Front are charged in Count 12 of their amended indictment for the recruitment and use of child soldiers, specifically conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities. Similarly, the leadership of the Armed Forces Revolutionary Council are charged in their further amended indictment in Count 12, as well. The dreaded leadership of the Civil Defense Forces are charged in Count 8 of their indictment.[26] The former President of Liberia, Charles Taylor is charged with the recruitment and use of child soldiers and so is the fugitive indictee, Johnny Paul Koroma. The deceased indictees Foday Sankok and Samuel Bockerie were likewise charged.

All of the indictees we alleged, are individually criminally liable for the use of children in times of armed conflict both under the aiding and abetting theory, Article 6.1 of the Statute of the Special Court for Sierra Leone (hereinafter the Statute) or in the alternative command responsibility, Article 6.3 of the Statute. Each of the indictees is charged with the recruitment and use of children during all times relevant to the indictment. As Charles Taylor had directed Foday Sankoh in Liberia in February of 1991, children were rounded up early to bulk up the forces in Sierra Leone. Later in the conflict the Civil Defense Force, particularly the Kamajors, initiated children into their ranks. Children served on all sides throughout the conflict that lasted 10 long years.

[27] An informal poll taken by an NGO, June 2003.

The various charges in the indictments stemmed from the enumerated crimes within the Statute. The specific crime on the use of child soldiers can be found in Article 4 of the Statute, other serious violations of international humanitarian law. This provision allowed the Prosecutor to indict a person for three international crimes that range from intentionally attacking civilians (Article 4a), various crimes against peacekeepers or humanitarian assistance workers (Article 4b), and the recruitment and use of child soldiers (Article 4c). The Prosecutor used all three in the various joint criminal indictments.

The Challenges to this New International Crime

During the pre-trial phase, in the summer of 2003, several of the indictees made various jurisdictional challenges to the charges in the indictments and to the Court itself. On 26 June 2003, one of the indictees, Hinga Norman, specifically challenged the charge against him relating to the use of child soldiers as not being a crime at the time of its alleged commission. Another indictee intervened as well. This preliminary motion was referred to the Appeals Chamber pursuant to Rule 72(E) of the Rules of Procedure and Evidence of the Special Court (hereinafter the Rules) after the response by the Prosecutor which was filed on 7 July 2003. Various amicus briefs were allowed to be filed by the University of Toronto, International Human Rights Clinic, as well as inviting UNICEF to submit an amicus curiae brief. An oral hearing was held on 6 November 2003, with a follow on post hearing submission by the Prosecutor on 24 November 2003.[28]

On 31 May 2004, the Appeals Chamber of the Court issued the decision on the preliminary motion based on lack of jurisdiction (child recruitment) dismissing the motion. The Appeals Chamber held that child recruitment had crystallized under customary international law by the time

[28] Amicus Curiae Brief of University of Toronto International Human Rights Clinic and interested International Human Rights Organizations, 3 November 2003. Also, Amicus Curiae Brief of the United Nations Children's Fund (UNICEF), 21 January 2003. "State practice demonstrates full awareness and abhorrence to the practice of recruiting children, and a firm commitment to ensuring that those responsible for such recruitment are held liable under criminal law. The prohibition on recruitment and use of child soldiers below 15 has been universally recognized. Most States have enacted legislation for the implementation of their minimum age for recruitment and use of children in hostilities. Some States have explicitly criminalized child recruitment. The prohibition was therefore well established and its violation considered a criminal act. [...] and demonstrates opinio juris in the acceptance by States that this norm is legally binding."

frames relevant to the indictment, thus protecting the legality and specificity principles questioned by Norman. For the first time in legal history a high court had ruled that the recruitment of child soldiers was a crime under international law.[29]

The State of the Law

The decision by the Appeals Chamber correctly reflects the state of the law. [30] The case of children in warfare is not a new phenomenon. Children have followed armies for centuries as support personnel—pages, water carriers, and as musicians, particularly as drummers. In navies throughout Europe children were seconded to warships by nobility to learn a trade and careers as officers, and others were pressed into seamanship.

With the advent of the various Hague rules governing weapons in war in the late 19th and early 20th centuries, the rules of warfare began to take on a universal status, and coupled with the Red Cross movement the role of the combatant became a legal term of art. The status of the non-combatant also began to take shape.[31]

Yet the specifics as to the age of combatants were not well defined early in the regulation process. The focus of the international community was more on the regulation of weapons that would cause unnecessary suffering and the types of targets combatants could engage.[32]

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[29] Prosecutor against Sam Hinga Norman (Case No. SCSL-2004-14-AR72(E)). Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004: *Therefore, child recruitment was criminalized before it was explicitly set out in treaty law and certainly by the time frame relevant to the indictments. The principle of legality and the principle of specificity are both upheld.* Justice Gelaga King wrote a separate concurring opinion and Justice Geoffrey Robertson, dissented stating that the crime of child recruitment did not enter into international criminal law until the Rome Treaty [for the International Criminal Court] in July 1998, thus declaring that the applicant should not be prosecuted for any offense of enlistment before that date. For an interesting point of view related to the Norman decision, see A. Smith, *Child Recruitment and the Special Court for Sierra Leone*, Journal of International Criminal Justice 2 (2004), 1141-1153.

[30] See, generally, Alison Smith, ibid, at 1141-1153. See also, the 1977 Protocols Additional, Geneva Conventions of 1949, the 1989 Convention on the Rights of the Child and its Second Optional Protocol of 2000, the 1998 Rome Statue for the International Criminal Court and the 1999 ILO Convention No. 192 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

[31] Hague Convention No. III Relative to the Opening of Hostilities, 18 October 1907; Hague Rules No. IV Respecting the Law and Customs of War on Land, 18 October 1907; Annex to Hague Convention No. IV embodying the Regulations Respecting the Laws and Customs of War on Land, 18 October 1907; Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907.

[32] For a general review of the history of the development of the laws of armed conflict, see: Leon Friedman, *The Law of War—A Documentary History,* Vol. II (23 October 1962);Lothar Kotzsch, *The Concept of War*

After World War I and into World War II, the shift away from universal rules relating to weapons and targets began, and by the end of the horrors of these two world wars the focus was now rightfully on non-combatants. With the founding of the United Nations (UN) in 1945, there was now a permanent body that could be a voice for non-combatants, particularly for children.

Shortly after the founding of the UN, with its broad charter to assist mankind in peace and security, the universal rules began to narrow and define in more specific terms the special status of non-combatants. The cornerstone to these rules became the Geneva Conventions of 1949, which by their nature, were devoted to persons who are "out of the combat"—prisoners of war, the shipwrecked, and civilians.[33] It is here that we begin to see that children become protected under international law. Also, by this time the international commitment to the principles of human rights were laid out in the Universal Declaration of Human Rights, which echoed the fundamental principles of the dignity of human beings found in the Geneva Conventions as well. [34]The world plunged then into the Cold War with a new standard of protection of the rights and status of non-combatants in times of war.

However, the tragedy of the cold war was the third world "flashpoints" that resulted in various conflicts. Children were once again the victims. In the middle of the Cold War many colonies became independent and the long process of having these new emerging nations, struggling just to feed their populations, review, debate, and adapt the universal principles related to the governing of armed conflict began in third world capitals.

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in Contemporary History and International Law (1956); Julius Stone, *Legal Controls of International Conflict* (1954); John Norton Moore, *National Security Law* (1990); L. Oppenheim, *International Law Vol. II Disputes, War and Neutrality* (7th ed. 1952); Gerhard von Glahn, *Law Among Nations* (1992); Michael Walzer, *Just and Unjust Wars* (1977); Dept. of Army, Field Manual 27-10, The Law of Land Warfare (18 July 1956).

[33] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949; Geneva Conventions Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

[34] Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. The first clause of the Preamble to this important document declares: "Whereas the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world..."

In the 1970's the world paused long enough to reconsider the Geneva Conventions of 1949, to shape them to reflect the realities of modern armed conflict. The debate was significant and the results important, as it brought into the fold much of the third world by their agreeing to the two new protocols.[35] Once again the bar had been identified and, indeed, it had been raised. Most of the Nations of the world agreed to the new standards.[36]

In the protocols we see the specific prohibition of the use of children in armed conflict. The criminality of the act of using children in conflict, however, is not specifically laid out; yet the implication is that the violation of the Geneva Conventions related to civilians as non-combatants, coupled with the protocols additional, implies a grave breach when using children in combat. Such breaches impose a duty to investigate and prosecute upon all the signatories to the conventions and the protocols.[37]

The subsequent Convention on the Rights of the Child (CRC) began to highlight the prohibition against the use of children in armed conflict.[38] The CRC appears to criminalize the concept of child recruitment. By this time one certainly could argue that the act of child recruitment as a crime had crystallized into customary international law.

Despite this political and legal recognition by states that child recruitment was a universal crime, child recruitment went on unabated. Millions of children died in the 1980's and 1990's, mostly in Africa where children played a significant role in various armed conflicts.[39] In 1996, the already cited Marcel Report stunned the United Nations, highlighting the full

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[35] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 10 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, 19 June 1977.

[36] The United States, for example, has not ratified either of the protocols.

[37] The obligation to prosecute grave breeches of the laws of armed conflict or extradite can be found in the Geneva Conventions of 1949: Wounded and Sick (GWS), art.49, cl.2; GWS Sea, art. 50, cl.2; Prisoners of War (GPW), art. 129, cl.2; Civilians, art. 146, cl. 2. Universality of jurisdiction over those who commit grave breaches of the customary principles of the laws of armed conflict has been around even prior to 1949. See Israel v. Eichman, Israel District Court of Jerusalem, Dec. 12, 1961, reprinted in II Leon Friedman, *The Law of War: A Documentary History* 1627, 1631-35 (1972); see also William B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 Cal. L. Rev. 177-218 (1945).

[38] The 1989 Convention on the Rights of the Child and its Second Optional Protocol of 2000.

[39] Recently it was revealed that women and children some of them around eight years of age were part of a force that attacked and killed several dozen fellow Congolese in the Ituri Province of the Congo. Wilma Stassen, AP.

extent of the problem throughout the world. There were calls for action and a plan began to evolve to monitor the recruitment of child soldiers.

In the late 1990's the world once again sat down together and began to develop a mechanism to prosecute war crimes and crimes against humanity. The Rome Statute created the International Criminal Court which is now mankind's attempt to stamp out impunity wherever it rears its ugly head. The Rome Statute specifically states that the recruitment of children under the age of 15 is an other serious violation of international humanitarian law.[40]

At the same time the Rome Statute was being drafted, the President of Sierra Leone was reaching out to the UN for help in punishing those who committed atrocities in the conflict that had ravaged his country in the 1990's. Children had played a special and tragic role in the conflict. They were recruited or conscripted under great duress to fight as soldiers or act as support personnel. Many committed war crimes, some of them unimaginable for a child. The people of Sierra Leone lost an entire generation of children.

As stated earlier, the international treaty that created the world's first hybrid war crimes tribunal listed in Article 4 the now universally recognized crime of child recruitment. It mirrors the Rome Statute. Again, all of the indictees were charged and convicted of the crime of recruiting child soldiers. It is an historic first, indeed.

Conclusion--The Future

Despite the assertion that the recruitment of child soldiers is an international crime, even today, the tragedy continues worldwide, particularly in Africa. Forty-two armed groups in eleven countries were specifically singled out in a February of 2005 report. The United Nations Secretary General's special envoy for children in armed conflict, Olara Otunu, stated that these groups should be punished for war crimes or crimes against humanity for what they have done to children.[41] S. 2135, The Child

[40] International Criminal Court, UN doc. ICC-ASP/1/3, Art. 8(2) (e) (vii).

[41] Otunnu's office was set up after the Machel report of 1996. The issue of child soldiers has been on the United Nation's Security Council's agenda since 1998. Otunnu is quoted in a Reuter's report, 10 Feb.2005: "…atrocities against children and impunity for violators continue largely unabated on the ground." Otunnu estimated that "there are 300,000 child soldiers around the world". Kofi Annan, Secretary General of the United Nations who declared this year that there is a need to "transform words into deeds, protective

Soldiers Accountability Act would be a logical domestic step for the United States in support of this recommendation.

The *Norman* decision by the Appellate Chamber of the Special Court for Sierra Leone will certainly assist in the advancement of the jurisprudence in the area of child recruitment. The International Criminal Court, which has an identical provision in its statute related to the recruitment of children under the age of 15, as is found in the Special Court's Statute, will look upon the groundbreaking work of the Special Court for Sierra Leone as the cornerstone in their charging of cynical warlords, politicians, and governments who continue to ignore the clear prohibition for this criminal conduct. [42]

Between 1986 and 1996 over two million children were killed in armed conflict.[43] There have been countless more killed since then, many of them in places such as Sierra Leone. Only when the rule of law is enforced will abusers of children be held accountable at the international level (and hopefully the domestic level) thus assisting in making the perpetration of this horrific crime diminish. It is time for the United States to assist in making this happen.

The report by the United Nations called for monitoring and reporting of children in armed conflict to ensure that the law is complied with worldwide. This is spelled out in the action plan of the report.[44] It highlights six "grave violations" that should particularly be monitored.[45] The report also lays down standards that constitute a basis for monitoring, the types of parties whose activities should be monitored, and the responsibilities of who is to gather, vet, and compile information at the country level.[46] This will mainly be done by the field teams in the various countries where the United Nations is located.[47]

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instruments and standards into enforcement on the ground, and condemnations into accountability." Inter Press Service News Agency 15 Feb. 2005.

[42] See Amicus Curiae Brief of the United Nations Children's Fund (UNICEF), related to the Fourth Defense Preliminary Motion on Lack of Jurisdiction (Child Recruitment), The Prosecutor against Sam Hinga Norman. SCSL-2003-08, 21 January 2004 at 8.

[43] The Machal Report at 5. A/51/306, 26 August 1996, *Impact of Armed Conflict on Children*.

[44] *Children in armed conflict*, Report of the Secretary General, A/59/695-S/2005/72, 9 February 2005 at14.

[45] Ibid at 16. The grave violations are: killing and maiming of children; recruiting or using child soldiers; attacks against schools or hospitals; rape or other grave sexual violence against children; abduction of children; and, denial of humanitarian access to children.

[46] Ibid at 16-17.

[47] Ibid at 18.

Certainly there is an increasing awareness of the scourge of child soldiers and a shift internationally towards action. The United States must be in the forefront of this effort, as should the United Nations Security Council to take swift and decisive action when confronted with the issue. International courts will have to aggressively charge this crime in future indictments or the practice of using child soldiers will not stop. Children need to play and grow in a nurturing environment so that they will "strike terror no more".[48]

S. 2135, The Child Soldiers Accountability Act of 2007, is a correct step in this direction as it seeks to prohibit the recruitment or use of child soldiers, to designate persons who recruit or use child soldiers as inadmissible aliens, and to allow the deportation of persons who recruit or use child soldiers.

As I declared to the tribunal in Sierra Leone in the summer of 2004 in my opening statement against the leadership of the infamous Revolutionary United Front:

I will close with another tragedy in this 10-year long tale of horror...

It involves a child. He lived in a village in the Kono district. They were told that the rebels were going to attack. The witness will testify that he fled into the bush with his parents and brother, but were caught by the RUF. The rebels took his younger brother and himself to Kaiama along with thirteen other boys. The rebels lined the fifteen children up and offered them a choice: Join one line if they wanted to be a rebel, another line if they wanted to be freed and allowed to go home. All fifteen of these boys, and they were just boys, joined the line for freedom. It was the wrong choice. They were accused of sabotage to the revolution. To keep them from escaping each was held down, screaming, and one-by-one had AFRC and/or RUF carved into their chests with the blade of a sword. The witness was now just marked property and treated as such. He will be in this very chamber to tell

[48] For further reading on children and armed conflict, see, generally: *Amnesty International, In the firing line: War and children's rights,* 1997: Patrick J. Braken and Celia Petty, *Rethinking the trauma of war*, Save the Children, UK, 1998; Rachel Brett and M. McCallin, *Children, the invisible soldier*, Radda Barnen, Grafiska, Punkten. 1996. Graca Machel, *The impact of war on children: A review of progress since the 1996 United Nations report on the impact of armed conflict on children,* Hurst&Co., 2001; *International Criminal Justice and Children,* No Peace Without Justice and UNICEF, Sept. 2002.

his horror story and show you his scarred chest that to this very day bears the letters: ***A-F-R-C R-U-F.***

What took place in SALONE marks the limits of our language to communicate and falls outside the realm of expression. However, we will attempt to do so, one witness at a time, by the dozens, to show how the beast of impunity fed on SALONE.[49]

[49] David M. Crane. The Opening Statement against the Leadership of the Revolutionary United Front in an Amended Joint Indictment, Case No. SCSL—2004-15-PT, Prosecutor versus Sesay, Kallon, Gbao, delivered 5 July 2004 at 15.

Mr. SCOTT. Thank you.

Ms. Akallo, how do recruiters induce the children?

Ms. AKALLO. When they are first abducted, they use—in Uganda, they use kind of a ritual act by putting a batter on the child. That is to initiate the child into the army. And in the second step, the child is beaten until he doesn't know himself or herself. And then he is given a gun and is forced to kill or beat someone to death. And the child goes on, continues, until the child is hardened enough to do it alone.

Mr. SCOTT. Mr. Malinowski, you mentioned Charles Taylor. What did he do relevant to this issue, and how was he prosecuted? And what would this bill do?

Mr. MALINOWSKI. That is actually better directed to the former chief prosecutor who prosecuted him.

Mr. SCOTT. Mr. Crane?

Mr. CRANE. Well, thank you.

Charles Taylor was the linchpin in a 10-year-long geopolitical joint criminal enterprise between himself, Blaise Compaore of Burkina Faso and Muammar Gaddafi of Libya. Charles Taylor told Foday Sanko, who was about to invade Sierra Leone from Liberia, to take over the diamond fields of eastern Sierra Leone, "Recruit everyone, to include women and children," and that he did for 10 years.

And for that I signed an indictment in March of 2003 indicting Charles Taylor, the sitting President of Liberia, on 11 counts of war crimes and crimes against humanity, one of which was the unlawful recruitment of children into an armed force under the age of 15, the first time in history that this had ever been done.

Mr. SCOTT. What is the status of the prosecution?

Mr. CRANE. Well, the Special Court for Sierra Leone is about 90 percent done. Most of the individuals who were charged have been found guilty and have been convicted, to include, all of them, the unlawful recruitment of children under the age of 15 into an armed force.

Charles Taylor—of course the international community had to come to a political decision as to when to hand over a head of state to an international tribunal. They did so in March of 2006. He now sits before Trial Chamber No. 2 of the Special Court for Sierra Leone in The Hague on that 11-count indictment that I signed on the 3rd of March of 2003, sir.

Mr. SCOTT. Now, this is the International Criminal Court?

Mr. CRANE. No. It is a hybrid international war crimes tribunal. It is the first one tried in history.

The ad hoc tribunal concept was too slow, too expensive. The Security Council, with the leadership of this country, I might add, came up with a new hybrid international tribunal to be a little bit more efficient, a little bit more effective, and try those who bear the greatest responsibility for war crimes and crimes against humanity, as opposed to just everyone.

So I narrowed it down to about 13 indictees, and they are completing their work. They should be done about 8 years after we started.

Mr. SCOTT. Are United States citizens subject to this court?

Mr. CRANE. They are not, Mr. Chairman.

Mr. SCOTT. Is there any situation that would justify recruiting children under the age of 15?

Mr. CRANE. Not that I can know of at all. I have found no military reason, moral reason or practical reason.

Mr. SCOTT. Why do we use 15 rather than 18?

Mr. CRANE. That is a good question. That is a debate within the international community, and Tom might be able to address that.

My personal opinion is certainly anybody under the age of 15 should not be in an armed force. Various countries in the world use 17 year olds in their armed forces with consent from parents, but the international standard is under 18. However, the debate continues related to whether a child can commit a war crime; certainly under the age of 15, I would certainly submit to you.

And this act, correctly at this point, cites those who unlawfully recruit under the age of 15.

Mr. MALINOWSKI. I agree. There is an absolute international consensus for under 15. There is an emerging norm that under 18 is prohibited, which the United States has joined. We still recruit—and that is consistent with the treaty—17 year olds, but it is U.S. policy not to involve them in hostilities, in conflict.

Mr. SCOTT. Thank you.

The gentleman from Texas?

Mr. GOHMERT. Thank you, Mr. Chairman.

And I thank the witnesses for your testimony.

Ms. Akallo, obviously nobody here would wish what you went through on anyone. And you have our greatest sympathy.

You did say, "It pains my heart when the perpetrators are given safe havens here in the United States, in other parts of the world, are given amnesty." And I am curious, do you know if any of your perpetrators were given safe haven or amnesty here in the United States?

Ms. AKALLO. I still don't know the people that have been given amnesty here. But the leader of the Lord's Resistance Army is actually asking for the Government of Uganda to allow him to be given a place somewhere. And it can be the United States, it can be anywhere in the world that he can go, and he will be free without being charged.

Mr. GOHMERT. But do you know of anyone who you are aware of forced children to become soldiers, getting safe haven or amnesty in the United States?

Ms. AKALLO. Not in the United States. The second in command in Uganda, the Lord's Resistance Army, was given amnesty in Uganda and lives in Uganda.

Mr. GOHMERT. Okay. Well, I was just curious, because when you said it pains my heart when perpetrators are given safe havens here in the United States, I guess you were talking about in the future, if it ever happened, because you are not aware of it happening so far, correct?

Ms. AKALLO. I am not aware, but it can happen in the future.

Mr. GOHMERT. Okay. Thank you.

Professor Crane, I am really torn here. It is such a moving story about the young man that admitted what he had done as a child. And you had expressed that you forgave him. And I wonder, if it turned out that—you know, as a judge, I saw a lot of child abuse,

and people who abused children were often abused themselves. And I am wondering, if it turns out that most of these people forcing children to become soldiers were forced into being a soldier as a child themselves, should we forgive them and just let it go because they were forced in originally as a child?

Mr. CRANE. That is a good question, Judge, and I appreciate the point.

The bottom line is that, at the international level, you have entire generations of children, 35,000 in Sierra Leone, who were moving around who were child soldiers. I made a political decision, as the chief prosecutor, that I did not have the capacity to prosecute a child for war crimes and crimes against humanity. Frankly, I don't think a child has the mens rea to commit a war crime, and I made that appropriate decision. The entire country issued a collective sigh of relief.

So when I said "forgave," it was a personal forgiveness; it wasn't a legal forgiveness.

Mr. GOHMERT. Because I wonder, because this is an issue that gets debated frequently. And some States, like my own, have laws that if a crime is so atrocious and the facts surrounding it give such an indication that there was clearly mens rea by someone under 17, then he can be certified up to be tried as an adult for such a heinous crime.

And so, anyway, there is an ongoing debate over the issue, but I wondered where you came down on that. You are not asserting that we forgive anybody that was forced in originally, correct?

Mr. CRANE. Not at all. You know, I am an old Federal prosecutor.

Mr. GOHMERT. That is a mitigating factor on sentencing, rather than an outright defense then, as a prosecutor?

Mr. CRANE. Yes, sir. As a prosecutor, I would say that anybody who commits violations of domestic law under our domestic law has the appropriate resolution.

At the international level, when the multiples are far beyond just one or two or a gang or what have you that might be before your court, Judge, that might be a different story. But when you are looking at literally an entire generation, you have to make some hard calls related to who you prosecute and who you don't.

Now, frankly, my mandate from the Security Council was those who bear the greatest responsibility, and that is the guys that actually started it, aided, abetted it.

Mr. GOHMERT. Thank you.

And I know that Human Rights Watch, as I understand it, is a member of the Coalition to Stop the Use of Child Soldiers. As I understand it, that is a group that does want to stop anyone under 18 from becoming a soldier. Is that correct?

Mr. MALINOWSKI. I can tell you that we are absolutely comfortable with the treaty that the United States is part of, which——

Mr. GOHMERT. But isn't that something that the coalition has a stated goal?

Mr. MALINOWSKI. I think there are many, many folks who would say that, yes. I think it is a very narrow distinction now. And you know where we are, as a country, that DOD can recruit at age 17;

17 year olds don't go to the front lines. And we think that is certainly something that we are comfortable with.

Mr. GOHMERT. Okay, you are comfortable with, but would you like to see, personally, eventually no 17 year olds recruited?

Mr. MALINOWSKI. Personally, I would be happier, because I am concerned about setting the clearest example for other countries where this is more of a problem. It is not so much the United States aspect of this that is the problem, but we are the leader, and everything we do is an example, for better or worse, for others.

But, as I said, this is not the major issue in the debate right now. The major issue is how do we get the standard enforced in the countries where it is such an atrocious problem.

Mr. GOHMERT. And truly, it is a problem.

I would expect you would support the bill that I think has been filed here in the House to end any foreign assistance to countries that allow this type of practice, correct?

Mr. MALINOWSKI. Well, that's right. And a version of that is actually already enacted in the Consolidated Appropriations Act that you all passed last December. That bill would make it essentially permanent. And, again, it gives the State Department a powerful tool to press governments that are at the root of the problem to change their practices. And that is vital.

Mr. GOHMERT. Okay. And just to wrap up, I'd note for the record that most all of our attendees at our service academies were recruited and signed up, or at least recruited and made the commitment to application, before they turned 18. I certainly applied for A&M and went into ROTC and turned 18 just before I started school. So maybe you could point to that and say, "Oh, so that's your problem." But anyway, thank you.

I yield back.

Mr. SCOTT. Thank you.

The gentleman from Michigan, Chairman of the Committee?

Mr. CONYERS. Thank you, Chairman Scott.

Can we get into the record the countries that have the most problems with the use of child soldiers? Is that in anyone's testimony or in our prepared material?

Mr. MALINOWSKI. We could provide you with a list of the 18 countries, Mr. Conyers, where we know this to be a significant problem.

Mr. CONYERS. Thank you very much, Mr. Malinowski.

[The information referred to follows:]

Countries Where Child Soldiers Are a Significant Problem

April 2008

Afghanistan – Insurgent groups, including the Taliban and other armed groups, use child soldiers, including in suicide attacks. According to some reports, children are also present in the Afghan National Army.

Burma – Thousands of boys serve in Burma's national army, with children as young as 11 forcibly recruited off the streets. Children also serve with some of the armed ethnic opposition groups.

Burundi – Children serve as soldiers in the Forces Nationales pour la Libération (FNL), an armed rebel group.

Central African Republic – Hundreds of children, some as young as 12, serve with rebel groups, including the APRD, UFDR and FDPC.

Côte d'Ivoire – Rebel forces and militia groups linked to the government used child soldiers until early 2007, but have now demobilized children from their ranks.

Chad – Thousands of children have been recruited by the Chadian National Army (ANT) and ANT-integrated rebel forces (the United Front for Change, FUC). Children also fight with village-level defense forces, the rebel UFDD, and Sudanese rebel movements operating in Chad (Justice and Equality Movement and Sudanese Liberation Army).

Colombia – Thousands of children serve in Colombia's irregular armed groups. The majority serve in the FARC guerrillas, with smaller numbers in the UC-ELN guerrillas. The number of children in pro-government paramilitary forces is currently unknown, though recruitment is ongoing.

Democratic Republic of Congo – Thousands of children serve in government forces (Forces Armées de la République Démocratique du Congo (FARDC)), as well as the rebel Forces Démocratiques de Liberation de Rwanda (FDLR) and other armed groups and militias. At the height of DRC's war, the UN estimated that more than 30,000 children were fighting with various parties to the conflict.

India – Naxalite rebels in Chattisgarh use children as soldiers. Government security forces employ children as "special police officers" in anti-insurgency operations.

Iraq – Insurgent groups use children as combatants to plant roadside bombs and act as decoys in suicide car bombings.

Nepal – Thousands of children were recruited and used by the Communist Party of Nepal (Maoist) forces prior to a November 2006 peace agreement, and have not yet been released.

Occupied Palestinian Territories – Fatah, Hamas, Islamic Jihad and the Popular Front for the Liberation of Palestine have all used children as messengers, couriers, and in some cases, fighters. At least ten children have carried out suicide attacks in Israel or the Occupied Territories since 2000.

Philippines – Children are recruited by rebel forces, including the New People's Army, Abu Sayyaf Group, and the Moro Islamic Liberation Front (MILF). Child recruitment is also reported by some paramilitary forces linked to the government.

Somalia – Nearly all factional militias in Somalia use child soldiers. In late 2006, both the Union of Islamic Courts (ICU) and Transitional Federal Government (TFG) used child soldiers during intense fighting for control of Mogadishu.

Sri Lanka – The rebel Liberation Tigers of Tamil Eelam (LTTE) have recruited children as soldiers throughout Sri Lanka's 20-year civil war. Since 2002, UNICEF has documented LTTE recruitment of over 6,000 children, although recruitment rates dropped significantly in 2007. The Karuna Group, an armed group with military support fighting against the LTTE, has abducted hundreds of children as soldiers since 2006.

Sudan – Thousands of children fight with the Sudan Armed Forces and the Sudan People's Liberation Army. In Darfur, the Sudan Armed Forces, the Janjaweed militias, Sudan Liberation Army factions and paramilitary forces all use child soldiers. The Lord's Resistance Army also has child soldiers in Sudan.

Thailand – Separatist insurgents called Pejuang Kemerdekaan Patani (Patani Freedom Fighters) have recruited hundreds of ethnic Malay Muslim children as messengers, couriers, scouts, and in some cases, combatants in the increasingly violent insurgency in Thailand's southern border provinces. Recent reports indicate that some paramilitary forces linked to Thai authorities, such as Ruam Thai Group (Thai United Group), recruit and provide military training to Buddhist Thai children.

Uganda – Over the past 20 years, the rebel Lord's Resistance Army (LRA) has abducted more than 30,000 boys and girls as soldiers, often forcing girls into sexual slavery. Now based in Sudan and engaged in peace talks, the LRA is not currently recruiting children in Uganda. The government has recruited children into its forces, including Local Defense Units.

To view an interactive map on child soldiers worldwide, please visit:
http://hrw.org/children/child_soldiers_map.html

Mr. CONYERS. Now, what do we do if a child soldier is under the age of 15?

Mr. MALINOWSKI. What do we do?

Mr. CONYERS. Yes, if the law says it has to be he is at least 15.

Mr. MALINOWSKI. No, it is under 15.

Mr. CONYERS. It is under 15?

Mr. MALINOWSKI. That's right.

Mr. CONYERS. Okay. Anything under 15?

Mr. MALINOWSKI. That's correct.

Mr. CONYERS. Is there a credible case for making it under 18?

Mr. MALINOWSKI. I think we would be happier if it was under 18. That is the emerging international standard. It is something that the United States has signed up to. Fifteen is a more conservative approach to this, one that is consistent with what everyone around the world has already agreed to criminalize.

So, again, we are comfortable with the bill at 15. We would be happy if the Congress were able to bring that up higher. The most important thing, though, is to criminalize the worst, most egregious violations of the standard. And, obviously, the younger the child, the worse the violation.

Mr. CONYERS. Prosecutor Crane, have you anything to add to this?

Mr. CRANE. Other than to just underscore, Mr. Chairman, the fact that if the United States passes this bill, it rings a bell throughout the world saying, at a minimum, under 15, if you recruit children, if you come to the United States or we find you in the United States, you will either be prosecuted, deported or denied entry.

And as an old prosecutor myself, if I have a tool by which to choose, then that is a useful thing for me. I may choose to do nothing, based on the circumstances, but if I have the opportunity, it would be a terrible thing not to be able to do anything related to a child soldier.

You know, there is a huge diaspora of West Africans in this country who settled around Baltimore, Boston, Philadelphia. In fact, Charles Taylor's son was caught in Miami and currently is sitting in Miami, being prosecuted for an unrelated charge. But he was going to Minnesota, which has a huge Liberian diaspora, to recruit to get his father out of Nigeria, to take him back into Liberia to start the civil war all over again. Some of those were children.

So I would just say as just a factual note, respectfully, if the practice is there, and the opportunity, they will take it.

Mr. MALINOWSKI. If I may add to that, because I think that is the question looming over the discussion: Is this just a symbolic gesture, a way for us to say we are against child soldiers? Or is it something practical that will create legal precedent that will bring perpetrators to justice? And I think the answer is the latter. I wouldn't be here if it was just symbolic.

My understanding is that the Justice Department has, in fact, identified potential cases that they could bring, were this law to be adopted. They are not going to tell us who those individuals are, I think for very appropriate reasons. But that is my understanding.

Is it going to be hundreds of people? Of course not. But one case, such as the case of the son, Chuckie Taylor, as he is known, does

send a very powerful message and creates a precedent about this standard that we are trying desperately to advance around the world.

Mr. CONYERS. Ms. Grace Akallo, are there any other comments you would like to make that occurred to you during this discussion after you made your opening statement?

Ms. AKALLO. Yes. I have been listening about the age limit that children should be recruited in the army that is between 15 and 18. If it was in my power, I think 18 would be the best standard, because even the 15 year olds still deserve the chance for a future. But being recruited into the army—I was recruited at the age of 15. I was in school. My future was basically destroyed. If I had not gotten a chance to survive and come back and continue with education, I wouldn't be sitting here.

And the recruitment of children above 15 years old should not even been forceful; it should be voluntary, if the child is 15 or 18, should be voluntary, not forced. But so many countries force these children. When we talk about recruitment of children, they are forced. They are forced by abduction or by threat of death or killing of their families, and the children join in the army.

And if possible the age limit would be 18, according to me, it would be good. But if the world has come to agreement to that, I will be comfortable for now.

Mr. CONYERS. If I can ask this final question, Chairman Scott, what is the psychological repair of this? Have we been able to engage in any medical examination of how we bring people out?

You, Ms. Akallo, are a unique representative of this phenomenon, because I can tell without an examination of my own question that, for many, this is a difficult and impossible road back to normalcy and sanity.

And so I wanted to ask all of you how we should go about the psychological healing that is so awfully complex.

Ms. AKALLO. The psychological healing of these children—I would begin by myself—is very possible, sir. When a child is taken and put into another world different from where he has been, he believes in that world. But he is not completely destroyed. He still has the memory of the world that he was taken from. So when he comes back or he manages to escape and he is given counseling and given a chance of a future and a chance of responsibility to his community, the child is able to come back to his normal.

But most of the time, when these children come back, their families are destroyed. Like in Uganda, they live in displaced camps that are really bad, bad situation. They are ridiculed. They are abused, because these people live in a compact community camp that is really bad. And the abuse may not be purposefully, but because they are redundant, there is no work to do, so they continue abusing these kids. And then these kids don't get completely get psychologically healed.

But if they are given a chance to a new environment, a new future—and, to me, a new future is education—that if they get and they know the sense of responsibility to their community, they easily can get healed.

Mr. CONYERS. Mr. Malinowski, have you anything—what are you thinking about the healing process?

And this should be relatively easy legislation to enact; the next step is the healing.

Mr. MALINOWSKI. Well, I am not sure what I can add that could possibly be as eloquent as what we just heard from someone who has lived this.

I do know that in the relatively fortunate societies where the active recruitment of children has stopped or is on the decline, like northern Uganda, like Sierra Leone, because of the peace process, there is an opportunity for the brave people that our Government often funds and supports in the aid community to deploy and to provide the kinds of services, particularly education, that kids desperately need to have the opportunity to live a more normal life.

And I know that our Government is engaged in that. And we always love it when Members of Congress ask the State Department what they are doing and encourage them to do more and help them to do more. And I would encourage you to do that.

And, of course, there are societies where there is no opportunity to do that, like, for example, Burma, where this problem continues to rage, and there is no opportunity for good people to go in and hug these kids and to give them a chance to lead a more normal life. And there our focus has to be on stopping it.

So it is a two-pronged effort. We need both.

Mr. CRANE. Just to brief up, Mr. Chairman, I haven't asked this question yet. I have thought about it. In fact, I have had nightmares about it, frankly, sir. But the point is that there is an entire generation in West Africa that has no hope. Have you ever seen a child who looks you in the eye and has no hope? They can't read, they can't write, they have no jobs, there is no basis to even educate them. They don't even know their real names, and they don't even know where they came from.

The 10 percent, maybe 5 percent, that finally work their way back to their village, they have a cleansing ceremony, which I observed. Very moving. A child throws himself to the feet of his elders, seeking forgiveness. The elders ask the community, do they want this now 6-, 5-, 7-year older child, who left at 7 years old, who comes in at 14 or 15 years old. They all nod, and they put him into a cleansing hut, and they take off his clothes, and they ritually wash him, and they give him new clothes, and he walks out, and the community accepts him back into the community. That is, like, one in a thousand. It is the other 999 that bother me.

Frankly, there is nothing we can do, because there is not enough political will. Even though there are many, many groups trying, it just can't be done when you have that amount of—a generation lost. That is why we need to at least put a floor down saying, it is enough, and continue to move forward. Maybe we won't have any further Ugandas, Sierra Leones, Colombias, Cambodias, you name it.

Thank you, sir.

Mr. CONYERS. Thank you very much.

[5:06 p.m.]

Mr. SCOTT. Thank you. I just had a couple of technical questions to, I guess, Professor Crane.

If someone is prosecuted in the United States for a crime that was committed somewhere else, are there due process and evidentiary challenges that we need to address?

Mr. CRANE. Well, certainly, when one commits a crime overseas, there has to be some type of extraterritoriality to the legislation. Obviously, there has to be a jurisdictional hook by which we can bring that person into the United States and prosecute them for violation of any kind of law. I mean, that is just a basic jurisdictional issue.

And so the issue is, if the person is here and it can be shown that they unlawfully recruited a child under the age of 15 into an armed force, for example in Sierra Leone, and they are living in the United States, certainly one could argue that we might have the ability to prosecute that individual.

Mr. SCOTT. I'm not talking about the jurisdiction. I'm talking about just the nuts and bolts of a prosecution. Where do you get your evidence? How does he defend himself? Due process and evidentiary challenges.

Mr. CRANE. Oh, excuse me. Absolutely. Well, certainly evidence is always a challenge, evidence is always an issue, because a lot of the evidence is overseas. However, if you have, for example, an individual who is in the United States on a green card, for example, and was found to have been a combatant in Sierra Leone, it would be largely up to individuals. It is witness testimony. There is nothing in writing. It is individuals saying, "I saw this person kill this"—or recruit so-and-so.

Mr. SCOTT. Have there been such prosecutions? I mean, where do you get your witnesses? Does a defendant have an opportunity to defend himself?

Mr. CRANE. Certainly. Of course, at the international level, we did prosecute. We did present evidence. And, in fact, I even provided you a picture of my lead-off witness in the case against the leadership of the Revolutionary United Front. He has "AFRC RUF" carved into his chest.

You bring in the victims, you bring in the individuals who were victims of being recruited. So it is victim testimony. Of course, certainly they can be cross-examined. I mean, obviously, the rules of procedure and evidence that were created by the statute of the court certainly allow a complete, common law due process.

In fact, it was a very familiar feeling to me when I was wearing the robes of a chief prosecutor in a tribunal as you would in practicing before the judge here. I mean, it is common law. But the bottom line is it is just good lawyering and getting your victims.

I was impressed. We had 395 witnesses lined up to testify in all sorts of crimes, one of which was crimes against children; 394 showed up. And, as was alluded to, they proudly come forward and want to tell their testimony. They want to give—they do this for the families that aren't there and for the people who have been murdered in front of their eyes.

Mr. SCOTT. Mr. Malinowski, do you see any due process or evidentiary challenges that we need to address?

Mr. MALINOWSKI. Well, yeah, the due process standards are the same, defendants' rights are the same, and the evidentiary standards are the same.

If the evidence is overseas, it is harder, which is why—you know, if it happens in the United States, the Justice Department is likely to choose cases where the evidence is fairly clear, where witnesses are available, where they feel like they have a good chance of obtaining a conviction.

And, you know, we mentioned the case of Chuckie Taylor, Charles Taylor's son. And that is a good example of a case where the Justice Department feels it can overcome those inherent challenges and set a precedent that will be very valuable. And I imagine that would be the same for any case that they take under the child soldier statute, as well.

Mr. SCOTT. The statute of limitations in the bill is 10 years. Is that too long or too short or just right?

Mr. CRANE. My feeling is it is—I think it is about right. I think it is about right. Ten years is sufficient. I think that kind of evidence will come out earlier than later. But, again, it remains to be seen. I'm speculating, frankly, Mr. Chairman. But 10 years seems to be right to me.

Mr. SCOTT. And the penalty, 20 years to life if death occurs, how does that compare to other crimes? In context, is that an appropriate sentence?

Mr. CRANE. Yes, it is, Mr. Chairman. The standard at the international level is if you're charged with the unlawful recruitment of child soldiers under the age of 15, it can carry up to as much as what would be equivalent to a life sentence. There is no death penalty at the international level.

So, on balance, this bill is right down the middle as far as statute of limitations, penalties, and even the standard of under the age of 15, in my opinion.

Mr. SCOTT. Thank you.

Mr. Gohmert?

Mr. GOHMERT. Just one clarification question, Mr. Malinowski. You mentioned if this were purely symbolic, that you wouldn't be here. And I'm curious, because, to me, since it appears it will not be used a great deal, so far not at all—as the occasion arisen, but there may be facts arising now—but is the symbolism to other countries of this Nation passing a law like this of any significance?

Mr. MALINOWSKI. Absolutely. And I would see that as a practical, rather than symbolic, benefit.

Mr. GOHMERT. I wasn't sure if you were saying——

Mr. MALINOWSKI. Yeah, I mean, ideally we would want to create a web of laws around the world, so that it is not just an issue of no safe haven in the United States, but no safe haven anywhere.

The United States is a leader. If the Congress passes this law——

Mr. GOHMERT. We agree on that, because it looked like to me that the potential message to the rest of the world may be the most important aspect if this becomes law.

Mr. MALINOWSKI. It is a very important aspect, yes.

Mr. GOHMERT. Okay. I just wasn't sure if you felt that was important, from your comment. Thank you.

Mr. SCOTT. Let me ask one final question.

This says the prohibition is against someone doing the recruiting and whatnot. If we passed the bill, would it apply to anyone who

has done this in the last 10 years or anyone who violates the provisions of the bill prospectively?

That came up in some of our other bills. And it was felt that, since it is already illegal, that we would be intending a retroactive application. How does that fit in our little constitutional framework?

Mr. CRANE. Well, certainly, ex post facto laws and those types of things are problematic, and I take your point.

The unlawful recruitment of children under the age of 15 into an armed force, as our appellate court ruled, crystalized as customary international law as of 1996. So it is an international crime, certainly as of that date. In other words, all who have done it are on notice that it is unlawful to recruit.

So, certainly, my argument would be, if we were doing this in a court of law, is that we are just enforcing what is already an international crime and using this as the mechanism by which we would do that.

Mr. SCOTT. Do you have a different analysis, Mr. Malinowski?

Mr. MALINOWSKI. No, I would agree.

Mr. SCOTT. I'd like to thank our witnesses for their testimony today, particularly Ms. Akallo, for your very moving testimony, and responses to questions.

Members may have additional written questions for witnesses which will be forwarded to you, and we ask that if you're sent questions, that you answer them as promptly as you can so they may be made part of the record.

And, without objection, the hearing record will remain open for 1 week for submission of additional materials.

Without objection, this Subcommittee stands adjourned.

[Whereupon, at 5:14 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL – 03 – I

THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR also known as

CHARLES GHANKAY MACARTHUR DAPKPANA TAYLOR

INDICTMENT

The Prosecutor, Special Court for Sierra Leone, under Article 15 of the Statute of the Special Court for Sierra Leone (the Statute) charges:

CHARLES GHANKAY TAYLOR also known as
(aka) CHARLES GHANKAY MACARTHUR DAPKPANA TAYLOR

with **CRIMES AGAINST HUMANITY, VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II and OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW, in violation of Articles 2, 3 and 4 of the Statute** as set forth below:

THE ACCUSED

1. **CHARLES GHANKAY TAYLOR aka CHARLES GHANKAY MACARTHUR DAPKPANA TAYLOR** (the **ACCUSED**) was born on or about 28 January 1948 at Arthington in the Republic of Liberia.

GENERAL ALLEGATIONS

2. At all times relevant to this Indictment, a state of armed conflict existed within Sierra Leone. For the purposes of this Indictment, organized armed factions involved in this conflict included the Revolutionary United Front (RUF), the Civil Defence Forces (CDF) and the Armed Forces Revolutionary Council (AFRC).

3. A nexus existed between the armed conflict and all acts or omissions charged herein as Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and as Other Serious Violations of International Humanitarian Law.

4. The organized armed group that became known as the RUF, led by FODAY SAYBANA SANKOH aka POPAY aka PAPA aka PA, was founded about 1988 or 1989 in Libya. The RUF, under the leadership of FODAY SAYBANA SANKOH, began

organized armed operations in Sierra Leone in March 1991. During the ensuing armed conflict, the RUF forces were also referred to as "RUF", "rebels" and "People's Army".

5. The CDF was comprised of Sierra Leonean traditional hunters, including the Kamajors, Gbethis, Kapras, Tamaboros and Donsos. The CDF fought against the RUF and AFRC.

6. On 30 November 1996, in Abidjan, Ivory Coast, FODAY SAYBANA SANKOH and Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, signed a peace agreement which brought a temporary cessation to active hostilities. Thereafter, the active hostilities recommenced.

7. The AFRC was founded by members of the Armed Forces of Sierra Leone who seized power from the elected government of the Republic of Sierra Leone via a coup d'état on 25 May 1997. Soldiers of the Sierra Leone Army (SLA) comprised the majority of the AFRC membership. On that date JOHNNY PAUL KOROMA aka JPK became the leader and Chairman of the AFRC. The AFRC forces were also referred to as "Junta", "soldiers", "SLA", and "ex-SLA".

8. Shortly after the AFRC seized power, at the invitation of JOHNNY PAUL KOROMA, and upon the order of FODAY SAYBANA SANKOH, leader of the RUF, the RUF joined with the AFRC. The AFRC and RUF acted jointly thereafter. The AFRC/RUF Junta forces (Junta) were also referred to as "Junta", "rebels", "soldiers", "SLA", "ex-SLA" and "People's Army".

9. After the 25 May 1997 coup d'état, a governing body, the Supreme Council, was created within the Junta. The governing body included leaders of both the AFRC and RUF.

10. The Junta was forced from power by forces acting on behalf of the ousted government of President Kabbah about 14 February 1998. President Kabbah's government returned in March 1998. After the Junta was removed from power the AFRC/RUF alliance continued.

11. On 7 July 1999, in Lomé, Togo, FODAY SAYBANA SANKOH and Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, signed a peace agreement. However, active hostilities continued.

12. The **ACCUSED** and all members of the organized armed factions engaged in fighting within Sierra Leone were required to abide by International Humanitarian Law and the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 12 August 1949, and Additional Protocol II to the Geneva Conventions, to which the Republic of Sierra Leone acceded on 21 October 1986.

13. All offences alleged herein were committed within the territory of Sierra Leone after 30 November 1996.

14. All acts and omissions charged herein as Crimes Against Humanity were committed as part of a widespread or systematic attack directed against the civilian population of Sierra Leone.

15. The words civilian or civilian population used in this Indictment refer to persons who took no active part in the hostilities, or who were no longer taking an active part in the hostilities.

INDIVIDUAL CRIMINAL RESPONSIBILITY

16. Paragraphs 1 through 15 are incorporated by reference.

17. In the late 1980's **CHARLES GHANKAY TAYLOR** received military training in Libya from representatives of the Government of MU'AMMAR AL-QADHAFI. While in Libya the **ACCUSED** met and made common cause with FODAY SAYBANA SANKOH.

18. While in Libya, the **ACCUSED** formed or joined the National Patriotic Front of Liberia (NPFL). At all times relevant to this Indictment the **ACCUSED** was the leader of the NPFL and/or the President of the Republic of Liberia.

19. In December 1989 the NPFL, led by the **ACCUSED**, began conducting organized armed attacks in Liberia. The **ACCUSED** and the NPFL were assisted in these attacks by FODAY SAYBANA SANKOH and his followers.

20. To obtain access to the mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth of Sierra Leone, and to destabilize the State, the **ACCUSED** provided financial support, military training, personnel, arms, ammunition and other support and encouragement to the RUF, led by FODAY SAYBANA SANKOH, in preparation for RUF armed action in the Republic of Sierra Leone, and during the subsequent armed conflict in Sierra Leone.

21. Throughout the course of the armed conflict in Sierra Leone, the RUF and the AFRC/RUF alliance, under the authority, command and control of FODAY SAYBANA SANKOH, JOHNNY PAUL KOROMA and other leaders of the RUF, AFRC and AFRC/RUF alliance, engaged in notorious, widespread or systematic attacks against the civilian population of Sierra Leone.

22. At all times relevant to this Indictment, **CHARLES GHANKAY TAYLOR** supported and encouraged all actions of the RUF and AFRC/RUF alliance, and acted in concert with FODAY SAYBANA SANKOH and other leaders of the RUF and AFRC/RUF alliance. FODAY SAYBANA SANKOH was incarcerated in Nigeria and Sierra Leone and subjected to restricted movement in Sierra Leone from about March 1997 until about April 1999. During this time the **ACCUSED**, in concert with FODAY SAYBANA SANKOH, provided guidance and direction to the RUF, including SAM BOCKARIE aka MOSQUITO aka MASKITA.

23. The RUF and the AFRC shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.

24. The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.

25. The **ACCUSED** participated in this joint criminal enterprise as part of his continuing efforts to gain access to the mineral wealth of Sierra Leone and to destabilize the Government of Sierra Leone.

26. **CHARLES GHANKAY TAYLOR**, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Indictment, which crimes the **ACCUSED** planned, instigated, ordered, committed or in whose planning, preparation or execution the **ACCUSED** otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which the **ACCUSED** participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which the **ACCUSED** participated.

27. In addition, or alternatively, pursuant to Article 6.3. of the Statute, **CHARLES GHANKAY TAYLOR**, while holding positions of superior responsibility and exercising command and control over his subordinates, is individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute. The **ACCUSED** is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and the **ACCUSED** failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

CHARGES

28. Paragraphs 16 through 27 are incorporated by reference.

29. At all times relevant to this Indictment, members of the RUF, AFRC, Junta and/or AFRC/RUF forces (AFRC/RUF), supported and encouraged by, acting in concert with and/or subordinate to **CHARLES GHANKAY TAYLOR**, conducted armed attacks throughout the territory of the Republic of Sierra Leone, including, but not limited, to Bo, Kono, Kenema, Bombali and Kailahun Districts and Freetown. Targets of the armed

attacks included civilians and humanitarian assistance personnel and peacekeepers assigned to the United Nations Mission in Sierra Leone (UNAMSIL), which had been created by United Nations Security Council Resolution 1270 (1999).

30. These attacks were carried out primarily to terrorize the civilian population, but also were used to punish the population for failing to provide sufficient support to the AFRC/RUF, or for allegedly providing support to the Kabbah government or to pro-government forces. The attacks included unlawful killings, physical and sexual violence against civilian men, women and children, abductions and looting and destruction of civilian property. Many civilians saw these crimes committed; others returned to their homes or places of refuge to find the results of these crimes - dead bodies, mutilated victims and looted and burnt property.

31. As part of the campaign of terror and punishment the AFRC/RUF routinely captured and abducted members of the civilian population. Captured women and girls were raped; many of them were abducted and used as sex slaves and as forced labour. Some of these women and girls were held captive for years. Men and boys who were abducted were also used as forced labour; some of them were also held captive for years. Many abducted boys and girls were given combat training and used in active fighting. AFRC/RUF also physically mutilated men, women and children, including amputating their hands or feet and carving "AFRC" and "RUF" on their bodies.

COUNTS 1 - 2: TERRORIZING THE CIVILIAN POPULATION AND COLLECTIVE PUNISHMENTS

32. Members of the AFRC/RUF supported and encouraged by, acting in concert with and/or subordinate to CHARLES GHANKAY TAYLOR committed the crimes set forth below in paragraphs 33 through 58 and charged in Counts 3 through 13, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone, and did terrorize that population. The AFRC/RUF also committed the crimes to punish the civilian population for allegedly supporting the elected government of President Ahmed Tejan Kabbah and factions aligned with that government, or for failing to provide sufficient support to the AFRC/RUF.
By his acts or omissions in relation, but not limited to these events, **CHARLES GHANKAY TAYLOR**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, is individually criminally responsible for the crimes alleged below:

Count 1: Acts of Terrorism, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.d. of the Statute;

And:

Count 2: Collective Punishments, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.b. of the Statute.

COUNTS 3 - 5: UNLAWFUL KILLINGS

33. Victims were routinely shot, hacked to death and burned to death. Unlawful killings included, but were not limited to, the following:

Bo District

34. Between 1 June 1997 and 30 June 1997, AFRC/RUF attacked Tikonko, Telu, Sembehun, Gerihun and Mamboma, unlawfully killing an unknown number of civilians;

Kenema District

35. Between about 25 May 1997 and about 19 February 1998, in locations including Kenema town, members of AFRC/RUF unlawfully killed an unknown number of civilians;

Kono District

36. About mid February 1998, AFRC/RUF fleeing from Freetown arrived in Kono District. Between about 14 February 1998 and 30 June 1998, members of AFRC/RUF unlawfully killed several hundred civilians in various locations in Kono District, including Koidu, Tombodu, Foindu, Willifeh, Mortema and Biaya;

Bombali District

37. Between about 1 May 1998 and 31 July 1998, in locations including Karina, members of AFRC/RUF unlawfully killed an unknown number of civilians;

Freetown

38. Between 6 January 1999 and 31 January 1999, AFRC/RUF conducted armed attacks throughout the city of Freetown. These attacks included large scale unlawful killings of civilian men, women and children at locations throughout the city, including the State House, Parliament building, Connaught Hospital, and the Kissy, Fourah Bay, Upgun, Calaba Town and Tower Hill areas of the city.

By his acts or omissions in relation, but not limited to these events, **CHARLES GHANKAY TAYLOR**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, is individually criminally responsible for the crimes alleged below:

Count 3: Extermination, a **CRIME AGAINST HUMANITY**, punishable under Article 2.b. of the Statute;

In addition, or in the alternative:

Count 4: Murder, a **CRIME AGAINST HUMANITY**, punishable under Article 2.a. of the Statute;

In addition, or in the alternative:

Count 5: Violence to life, health and physical or mental well-being of persons, in particular murder, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a. of the Statute.

COUNTS 6 - 8: SEXUAL VIOLENCE

39. Widespread sexual violence committed against civilian women and girls included brutal rapes, often by multiple rapists. Acts of sexual violence included, but were not limited to, the following:

Kono District

40. Between about 14 February 1998 and 30 June 1998, members of AFRC/RUF raped hundreds of women and girls at various locations throughout the District, including Koidu, Tombodu, Kissi-town (or Kissi Town), Foendor (or Foendu), Tomendeh, Fokoiya, Wondedu and AFRC/RUF camps such as "Superman camp" and Kissi-town (or Kissi Town) camp. An unknown number of women and girls were abducted from various locations within the District and used as sex slaves;

Bombali District

41. Between about 1 May 1998 and 31 July 1998, members of AFRC/RUF raped an unknown number of women and girls in locations such as Mandaha. In addition, an unknown number of abducted women and girls were used as sex slaves;

Kailahun District

42. At all times relevant to this Indictment, an unknown number of women and girls in various locations in the District were subjected to sexual violence. Many of these victims were captured in other areas of the Republic of Sierra Leone, brought to AFRC/RUF camps in the District, and used as sex slaves;

Freetown

43. Between 6 January 1999 and 31 January 1999, members of AFRC/RUF raped hundreds of women and girls throughout the Freetown area, and abducted hundreds of women and girls and used them as sex slaves.

By his acts or omissions in relation, but not limited to these events, **CHARLES GHANKAY TAYLOR**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, is individually criminally responsible for the crimes alleged below:

Count 6: Rape, a **CRIME AGAINST HUMANITY**, punishable under Article 2.g. of the Statute;

And:

Count 7: Sexual slavery and any other form of sexual violence, a **CRIME AGAINST HUMANITY**, punishable under Article 2.g. of the Statute;

In addition, or in the alternative:

Count 8: Outrages upon personal dignity, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.e. of the Statute.

COUNTS 9 - 10: PHYSICAL VIOLENCE

44. Widespread physical violence, including mutilations, was committed against civilians. Victims were often brought to a central location where mutilations were carried out. These acts of physical violence included, but were not limited to, the following:

Kono District

45. Between about 14 February 1998 and 30 June 1998, AFRC/RUF mutilated an unknown number of civilians in various locations in the District, including Tombodu, Kaima (or Kayima) and Wondedu. The mutilations included cutting off limbs and carving "AFRC" and "RUF" on the bodies of the civilians;

Freetown

46. Between 6 January 1999 and 31 January 1999, AFRC/RUF mutilated an unknown number of civilian men, women and children in various areas of Freetown, including the northern and eastern areas of the city, and the Kissy area, including the Kissy mental hospital. The mutilations included cutting off limbs.

By his acts or omissions in relation, but not limited to these events, **CHARLES GHANKAY TAYLOR**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, is individually criminally responsible for the crimes alleged below:

Count 9: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a. of the Statute;

In addition, or in the alternative:

Count 10: Other inhumane acts, a **CRIME AGAINST HUMANITY**, punishable under Article 2.i. of the Statute.

COUNT 11: USE OF CHILD SOLDIERS

47. At all times relevant to this Indictment, throughout the Republic of Sierra Leone, AFRC/RUF routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities. Many of these children were first abducted, then trained in AFRC/RUF camps in various locations throughout the country, and thereafter used as fighters.

By his acts or omissions in relation, but not limited to these events, **CHARLES GHANKAY TAYLOR**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, is individually criminally responsible for the crimes alleged below:

Count 11: Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an OTHER SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW, punishable under Article 4.c. of the Statute.

COUNT 12: ABDUCTIONS AND FORCED LABOUR

48. At all times relevant to this Indictment, AFRC/RUF engaged in widespread and large scale abductions of civilians and use of civilians as forced labour. Forced labour included domestic labour and use as diamond miners. The abductions and forced labour included, but were not limited to, the following:

Kenema District

49. Between about 1 August 1997 and about 31 January 1998, AFRC/RUF forced an unknown number of civilians living in the District to mine for diamonds at Cyborg Pit in Tongo Field;

Kono District

50. Between about 14 February 1998 and 30 June 1998, AFRC/RUF forces abducted hundreds of civilian men, women and children, and took them to various locations outside the District, or to locations within the District such as AFRC/RUF camps, Tombodu, Koidu, Wondedu, Tomendeh. At these locations the civilians were used as forced labour, including domestic labour and as diamond miners in the Tombodu area;

Bombali District

51. Between about 1 May 1998 and 31 July 1998, in Bombali District, AFRC/RUF abducted an unknown number of civilians and used them as forced labour;

Kailahun District

52. At all times relevant to this Indictment, captured civilian men, women and children were brought to various locations within the District and used as forced labour;

Freetown

53. Between 6 January 1999 and 31 January 1999, in particular as the AFRC/RUF were being driven out of Freetown, the AFRC/RUF abducted hundreds of civilians, including a large number of children, from various areas within Freetown, including Peacock Farm and Calaba Town. These abducted civilians were used as forced labour.

By his acts or omissions in relation, but not limited to these events, **CHARLES GHANKAY TAYLOR**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, is individually criminally responsible for the crimes alleged below:

Count 12: Enslavement, a **CRIME AGAINST HUMANITY**, punishable under Article 2.c. of the Statute.

COUNT 13: LOOTING AND BURNING

54. At all times relevant to this Indictment, AFRC/RUF engaged in widespread unlawful taking and destruction by burning of civilian property. This looting and burning included, but was not limited to, the following:

Bo District

55. Between 1 June 1997 and 30 June 1997, AFRC/RUF forces looted and burned an unknown number of civilian houses in Telu, Sembehun, Mamboma and Tikonko;

Kono District

56. Between about 14 February 1998 and 30 June 1998, AFRC/RUF engaged in widespread looting and burning in various locations in the District, including Tombodu, Foindu and Yardu Sando, where virtually every home in the village was looted and burned;

Bombali District

57. Between 1 March 1998 and 30 June 1998, AFRC/RUF forces burned an unknown number of civilian buildings in locations such as Karina;

Freetown

58. Between 6 January 1999 and 31 January 1999, AFRC/RUF forces engaged in widespread looting and burning throughout Freetown. The majority of houses that were destroyed were in the areas of Kissy and eastern Freetown; other locations included the Fourah Bay, Upgun, State House and Pademba Road areas of the city.

By his acts or omissions in relation, but not limited to these events, **CHARLES GHANKAY TAYLOR**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, is individually criminally responsible for the crimes alleged below:

Count 13: Pillage, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.f. of the Statute.

COUNTS 14 - 17: ATTACKS ON UNAMSIL PERSONNEL

59. Between about 15 April 2000 and about 15 September 2000, AFRC/RUF engaged in widespread attacks against UNAMSIL peacekeepers and humanitarian assistance workers within the Republic of Sierra Leone, including, but not limited to locations within Bombali, Kailahun, Kambia, Port Loko, and Kono Districts. These attacks included unlawful killing of UNAMSIL peacekeepers, and abducting hundreds of peacekeepers and humanitarian assistance workers who were then held hostage.

By his acts or omissions in relation, but not limited to these events, **CHARLES GHANKAY TAYLOR**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, is individually criminally responsible for the crimes alleged below:

Count 14: Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission, an **OTHER SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW**, punishable under Article 4.b. of the Statute;

In addition, or in the alternative:

Count 15: For the unlawful killings, Murder, a **CRIME AGAINST HUMANITY**, punishable under Article 2.a. of the Statute;

In addition, or in the alternative:

Count 16: Violence to life, health and physical or mental well-being of persons, in particular murder, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a. of the Statute;

In addition, or in the alternative:

Count 17: For the abductions and holding as hostage, Taking of hostages, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.c. of the Statute.

Dated this 3rd day of March 2003
Freetown, Sierra Leone

_____
David M. Crane
The Prosecutor

Statement Of Senator Patrick Leahy On
The Indictment Of Charles Taylor
June 4, 2003

Mr. President, I rise today to voice my strong support for the decision of the Special Court for Sierra Leone to indict Charles Taylor for "bearing the greatest responsibility for war crimes, crimes against humanity, and serious violations of international humanitarian law in Sierra Leone." I commend the Court's prosecutor, David Crane, for taking this decisive action.

Since its inception, the Special Court has moved swiftly to indict key figures allegedly involved in some of the worst atrocities that occurred during the brutal civil war in Sierra Leone during the late 1990's. The Court has also made it a priority to emphasize outreach programs to further the reconciliation process and promote the rule of law throughout the country.

Despite important progress, we all know that the Court's work would be grossly deficient if those most responsible for these crimes were not brought to justice because they were too hard to catch, were high officials of a foreign government, or no longer resided inside of Sierra Leone. It would be like the United States deciding against pursuing the perpetrator of an act of terrorism on American soil, that killed or maimed thousands of individuals, because he left the country or was a high-ranking official in a foreign government. That would be unacceptable.

That is precisely why Congress expressed its clear intent that the Special Court for Sierra Leone should pursue those most responsible, irrespective of where they currently reside.

In the report that accompanied the Senate version of the Fiscal Year 2002 Foreign Operations bill (Report 107-58), Congress stated in unambiguous terms: "To build a lasting peace, the Committee believes that it is imperative for the international community to support a tribunal in order to bring to justice those responsible for war crimes and other atrocities in Sierra Leone, irrespective of where they currently reside."

This statement was later endorsed by the Conference Report to the Fiscal Year 2002 Foreign Operations bill (Report 107-345), which put the House of Representatives on record on this issue as well.

Even before these reports were issued, Senators Feingold, Frist, McConnell and I wrote a letter to Secretary Powell, dated June 20, 2001, which stated: "Because some of the individuals most responsible for the atrocities in Sierra Leone are no longer in the country, we believe it is imperative that the tribunal has the authority to prosecute culpable individuals -- including senior Liberian officials -- regardless of where they reside. This will prevent such persons from escaping justice simply by leaving the country."

I can safely say that we had one individual especially in mind when we drafted that text: Charles Taylor. I was the principal author of the letter and two Congressional reports referenced above.

The involvement of Charles Taylor in the conflict in Sierra Leone is well documented and I will not go into great detail here. I will simply say that there is no doubt in my mind that he deserves to be brought to justice before the Special Court.

To its credit, the State Department took the advice of Congress. The State Department successfully negotiated an

agreement that established the Special Court for Sierra Leone and which did not contain geographic restrictions on the Prosecutor, allowing him to go after Charles Taylor.

Perhaps the Prosecutor for the Court, David Crane, best described the Special Court's mandate: "My office was given an international mandate by the United Nations and the Republic of Sierra Leone to follow the evidence impartially wherever it leads."

Today, acting on information that Charles Taylor was traveling to Ghana, the Special Court unsealed an indictment for Charles Taylor, originally approved March 7, 2003, and served the outstanding warrant for his arrest on Ghanaian authorities and transmitted the arrest warrant to INTERPOL.

Again, I commend the prosecutor for taking this step. While I understand there some, including in the Administration, who are concerned about the impact that this may have on the peace process now underway in West Africa, I agree with Mr. Crane's comments on this sensitive issue:

"To ensure the legitimacy of these negotiations, it is imperative that the attendees know they are dealing with an indicted war criminal. These negotiations can still move forward, but they must do so without the involvement of this indictee. The evidence upon which this indictment was approved raises serious questions about Taylor's suitability to be a guarantor of any deal, let alone a peace agreement."

Mr. President, the Ghanaian Government needs to act immediately. It needs to uphold the basic tenants of international law, apprehend Charles Taylor and hold him until arrangements can be made to transfer him to the Court. In addition, the State Department needs to send an unequivocal message to Accra that action on this issue is urgently needed.

This may be the only chance that we get for years to bring Charles Taylor to justice. It is imperative that, in its most important moment thus far, the United States and Ghana do everything in their power to apprehend Charles Taylor. If this does not occur, the world will have missed a golden opportunity bring to justice one of the world's most heinous war criminals and advance the cause of international justice.

In closing, I would like to read into the record Mr. Crane's statement issued today that describes the situation concerning Charles Taylor:

"Today, on behalf of the people of Sierra Leone and the international community, I announce the indictment of Charles Ghankay Taylor, also known as Charles Ghankay Macarthur Dapkpana Taylor.

"The indictment accuses Taylor of "bearing the greatest responsibility" for war crimes, crimes against humanity, and serious violations of international humanitarian law within the territory of Sierra Leone since 30 November 1996. The indictment was judicially approved on March 7th and until today, was sealed on my request to the Court.

"My office was given an international mandate by the United Nations and the Republic of Sierra Leone to follow the evidence impartially wherever it leads. It has led us unequivocally to Taylor.

"Upon learning that Taylor was travelling to Ghana, the Registrar of the Special Court served the outstanding warrant for his arrest on Ghanaian authorities and transmitted the arrest warrant to INTERPOL. This is the first

time that his presence outside of Liberia has been publicly confirmed. The Registrar was doing his duty by carrying out the order of the Court.

"Furthermore, the timing of this announcement was carefully considered in light of the important peace process begun this week. To ensure the legitimacy of these negotiations, it is imperative that the attendees know they are dealing with an indicted war criminal. These negotiations can still move forward, but they must do so without the involvement of this indictee. The evidence upon which this indictment was approved raises serious questions about Taylor's suitability to be a guarantor of any deal, let alone a peace agreement.

"I am aware that many members of the international community have invested a great deal of energy in the current peace talks. I want to make it clear that in reaching my decision to make the indictment public, I have not consulted with any state. I am acting as an independent prosecutor and this decision was based solely on the law.

"I also want to send a clear message to all factions fighting in Liberia that they must respect international humanitarian law. Commanders are under international legal obligation to prevent their members from violating the laws of war and committing crimes against humanity.

"In accordance with Security Council resolutions 1315, 1470, and 1478, now is the time for all nations to reinforce their commitments to international peace and security. West Africa will not know true peace until those behind the violence answer for their actions. This office now calls upon the international community to take decisive action to ensure that Taylor is brought to justice."

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West Africa: Taylor Indictment Advances Justice

Liberian President Must Be Arrested

(New York, June 4, 2003) Liberian President Charles Taylor should be arrested by the government of any country he travels to, now that his indictment has been announced by the Sierra Leone Special Court, Human Rights Watch said today. The Liberian president was attending peace talks in Ghana when the indictment was "unsealed."

"Charles Taylor is one of the single greatest causes of spreading wars in West Africa. His indictment is a tremendous step forward, but his arrest would be even better."

Peter Takirambudde
Executive director of the Africa division of Human Rights Watch

The indictment charges Taylor with "bearing the greatest responsibility" for war crimes (murder, taking hostages); crimes against humanity (extermination, rape, murder, sexual slavery); and other serious violations of international humanitarian law (use of child soldiers) in Sierra Leone.

"Charles Taylor is one of the single greatest causes of spreading wars in West Africa," said Peter Takirambudde, executive director of the Africa division of Human Rights Watch. "His indictment is a tremendous step forward, but his arrest would be even better."

Related Material

"WE'LL KILL YOU IF YOU CRY": Sexual Violence in the Sierra Leone Conflict
HRW Report, January 2003

The Sierra Leone Special Court approved the indictment on March 7, but it has been sealed since then, and only made public today. A warrant for Taylor's arrest has been served on the Ghanaian authorities and sent to Interpol.

Human Rights Watch called on the United Nations Security Council to address the security situation in Monrovia, which is likely to decline in the wake of the indictment.

The indictment alleges that Taylor provided training and helped finance the Revolutionary United Front (RUF), led by Foday Sankoh, in preparation for RUF armed action in Sierra Leone and during the subsequent armed conflict in Sierra Leone. It also alleges that Taylor acted in concert with members of the RUF/Armed Forces Revolutionary Council (AFRC) rebel alliance who are accused of horrific crimes.

Rebel leaders who have been supported by Taylor, including RUF leader Sam "Mosquito" Bockarie, have also been linked to recent abuses against civilians in western Côte d'Ivoire. Bockarie was reportedly killed by Taylor last month. The last indicted individual who remains at large, Johnny Paul Koroma, is believed to be still in Liberia despite calls for Taylor to turn him over to the Special Court.

"The indictment against Taylor sends a strong message that no one is above the law when it comes to accountability for war crimes, crimes against humanity, and serious violations of international humanitarian law," said Takirambudde. "Charles Taylor should not be immune from prosecution for these crimes simply because he is the president of Liberia."

The Special Court's Statute and implementing legislation specifically provide that official capacity is no defense to arrest or prosecution. The statutes for the Rwanda and Yugoslav Tribunals and the International Criminal Court similarly bar immunity based on official position, reflecting the increasing trend by international courts to bring officials to justice for war crimes, crimes against

humanity and violations of international humanitarian law, even while they are still in office.

The Special Court was established by agreement between the United Nations and Sierra Leone and is designed to function for three years. The Special Court has power to prosecute those "who bear the greatest responsibility" for serious violations of international humanitarian law and certain violations of Sierra Leone law committed in Sierra Leone since November 30, 1996.

For Human Rights Watch's reports on the widespread and systematic use of rape and sexual violence and other crimes committed in Sierra Leone, see "We'll Kill You If You Cry: Sexual Violence in the Sierra Leone Conflict," http://hrw.org/reports/2003/sierraleone/sierleon0103.pdf, "Sowing Terror: Atrocities Against Civilians in Sierra Leone," http://www.hrw.org/reports98/sierra/ and "Sierra Leone: Getting Away with Murder, Mutilation, and Rape," http://www.hrw.org/reports/1999/sierra/.

U.S. Lawmakers Call for Action on Liberia's Charles Taylor

House, Senate members say Taylor should face war crimes tribunal

Washington – A bipartisan group of five U.S. senators and eight members of the House of Representatives is demanding that former Liberian President Charles Taylor be called to account for his actions in war-torn Sierra Leone.

The bipartisan group was led by Representative Ed Royce (Republican of California), a member of the House Committee on International Relations and former chairman, now vice chairman, of the House Africa Subcommittee.

According to a December 14 House Committee on International Relations press release, the group said it would feel "considerably more optimistic about Liberia's future if former Liberian President Charles Taylor faced his war crimes indictment at the Special Court for Sierra Leone."

Taylor, who served as Liberia's president from 1997 to 2003, was charged with funding and arming Sierra Leone's notorious rebel group, the Revolutionary United Front (RUF), which is accused of a range of atrocities, including looting and burning, brutal rapes, abductions, forced labor, mutilations, amputations and the use of child soldiers. This allowed Taylor to destabilize the state and gain access to its mineral wealth, particularly its diamonds.

In June 2003, Taylor's indictment for these crimes (approved in March 2003) was made public by the U.N.-backed Special Court for Sierra Leone. The activities of the former Liberian president threaten the stability of Liberia and the entire West African region.

In a December 13 letter to Secretary of State Condoleezza Rice on December 13, the lawmakers suggested that the secretary make the issue a priority. The group made its announcement the day before Rice planned to meet with Liberian President-elect Ellen Johnson-Sirleaf.

Taylor currently is living in Nigeria, where President Olusegun Obasanjo has "committed to consider an extradition request made by a democratically elected Liberian government," the press release said.

Royce said, "It is my hope that Secretary Rice will strongly recommend to President-Elect Johnson-Sirleaf that she call upon the government of Nigeria to transfer Charles Taylor to the custody of the Special Court for Sierra Leone, which has indicted him for war crimes and crimes against humanity."

The California legislator added: "The present situation provides a unique window of opportunity. Delay only works to Mr. Taylor's advantage. The time for action is now. For if we fail to act, and Mr. Taylor is allowed to escape justice, history will look poorly upon the international community, and the future of millions of West Africans will be needlessly imperiled."

Other lawmakers signing the letter were Representatives Henry Hyde (Republican-Illinois), Frank Wolf (Republican-Virginia), Chris Smith (Republican-New Jersey), Sue Kelly (Republican-New York), Betty McCollum (Democrat-Minnesota), Vic Snyder (Democrat-Arkansas) and Dianne Watson (Democrat-California) and Senators Lincoln Chafee (Republican-Rhode Island), Patrick Leahy (Democrat-Vermont), Barack Obama (Democrat-Illinois), Jack Reed (Democrat-Rhode Island) and Russ Feingold (Democrat-Wisconsin).

Following is the text of the letter to Rice:

(begin text)

December 13, 2005

Dear Madame Secretary:

On the occasion of Liberian President-Elect Ellen Johnson-Sirleaf's visit to Washington, we write to respectfully request that you make the status of former Liberian President Charles Taylor a paramount concern of the United States in your conversations with the President-Elect. It is our hope that you will strongly recommend to President-Elect Johnson-Sirleaf that she call upon the government of Nigeria to transfer Charles Taylor to the custody of the Special Court for Sierra Leone, which has indicted him for war crimes and crimes against humanity. The treatment of Taylor is a matter of security and justice for the West African people.

The election of Ellen Johnson-Sirleaf in November promises a new beginning for Liberia. Liberians enthusiastically demonstrated their faith in the democratic process, marking the freest and fairest election in their country's history. In 2003, Congress, on a bipartisan basis, played a leadership role in appropriating $200 million for relief and reconstruction efforts in Liberia. Since that time, Congress has worked to ensure strong funding for Liberia during the appropriations process to see that the basic needs of the Liberian people are met. Many in Congress look forward to continued work with you and the new Liberian government to confront the country's many political, development, and other challenges.

We would be considerably more optimistic about Liberia's future, however, if Mr. Taylor faced the 17 counts of war crimes and crimes against humanity charges that

the Special Court has lodged against him. In our view, progress in Liberia, and the international community's considerable investment in the region, is in jeopardy so long as Mr. Taylor is permitted to elude justice and meddle in Liberian politics. Of equal importance, justice must be pursued for the people of West Africa, who were brutalized in the war Taylor is accused of fueling. The United States and other governments have strongly supported the Special Court and its mandate, both financially and politically. This investment risks producing little return, however, if Mr. Taylor remains outside of its reach.

Unfortunately, Nigerian President Olusegun Obasanjo has resisted numerous calls, including by the United States Congress, to transfer Mr. Taylor to the custody of the Special Court. However, President Obasanjo has committed to consider an extradition request made by a democratically-elected Liberian government. That is why we are asking you to request that President-Elect Johnson-Sirleaf now call for the Nigerian government to deliver Mr. Taylor to the Special Court.

Last month, we were encouraged to see the United Nations Security Council unanimously adopt a resolution, cosponsored by the United States, mandating that the U.N. peacekeeping force in Liberia arrest and transfer Mr. Taylor to the Special Court for Sierra Leone to stand trial if he were to return to Liberia. This resolution -- which emphasized that Taylor's stay in Nigeria is temporary and recognized him as a threat to the region -- is further indication of the international community's strong desire to see Mr. Taylor face the Special Court. Additionally, the European Union, days after President-Elect Johnson-Sirleaf's election, issued a statement that the new Liberian government "must cooperate fully with the international community to ensure that former President Charles Taylor is brought to court." Should Mr. Taylor continue to evade justice, the international community may show reluctance to continue with its strong support for the reconstruction of Liberia and Sierra Leone.

President-Elect Johnson-Sirleaf has a strong democratic mandate to call for Mr. Taylor to be placed in the custody of the Special Court. Such a call by the Liberian President-Elect would send a powerful message that the use of violence to achieve political ends is no longer acceptable in West Africa, and would help usher in a new era for the rule of law in the region.

Madame Secretary, Mr. Taylor must be held accountable. Achieving this end will require decisive and quick action by President-Elect Johnson-Sirleaf, backed by the United States. While some will argue that the "timing is not right," we believe that the present situation provides a unique window of opportunity. Delay only works to Mr. Taylor's advantage. The time for action is now.

Thank you for considering our views.

Committee on International Relations
U.S. House of Representatives
Henry J. Hyde, Chairman
CONTACT: Sam Stratman, (202) 226-7875, June 13, 2003

For IMMEDIATE Release

Hyde, Lantos Urge Powell to Release Funds for Sierra Leone Court Facing Security Threats

(WASHINGTON) -- A bipartisan group of House members led by U.S. Rep. Henry J. Hyde (R-IL), are urging the Bush Administration today to release additional funds earmarked for the Special Court for Sierra Leone, which is facing increasing security threats in the wake of its indictment of Liberian President Charles Taylor.

In their letter to U.S. Secretary of State Colin Powell, Hyde and U.S. Reps. Tom Lantos (D-CA), the ranking Democrat on the committee, Edward R. Royce (R-CA), chairman of the Africa Subcommittee, and Christopher H. Smith (R-NJ), the committee's vice chair, also ask for assurances that the Department of State "does not equate a 'soft landing' for the people of Liberia with a 'soft landing' for Charles Taylor."

Taylor's indictment by the Court was unsealed last week during his visit to Ghana to participate in a regional peace conference organized to end years of bloodshed in Liberia.

"Charles Taylor has actively supported the Revolutionary United Front (RUF) of Sierra Leone, a rebel group notorious for hacking off the limbs of innocent civilians, including women and children. He is alleged to be cooperating with international terrorist organizations. He is linked to the proliferation of small arms throughout west Africa and the illicit trade in diamonds in violation of UN sanctions. He has terrorized the population of Liberia and suppressed the media and political opposition. Taylor has fomented conflict not only in his own country, but also in neighboring Sierra Leone, Guinea, and most recently, Cote d'Ivoire. He has destabilized the entire sub-region of west Africa, leaving thousands dead and millions displaced in his wake," the Members write in the letter to Powell.

"There can be no peace in Liberia, or in west Africa, as long as Charles Taylor is allowed to maintain influence and act as a menace to his neighbors. To regard

Mr. Taylor as an honest broker who is capable of contributing to a peace process for Liberia, or to acquiesce to conditions for his voluntary retreat into exile, would be a mistake. Mr. Taylor has proven time and time again that he will say or do whatever is necessary to seize and maintain power. There is no reason to believe that his willingness and ability to foment conflict and destabilize his neighbors will be any less virulent if he is sent to Tripoli, Lome, Abuja, Paris, or elsewhere. If the United States truly seeks to support the peace process in Liberia and to foster stability in west Africa, there can be no deals. Exile for Mr. Taylor is not a sound option," the letter states.

In addition to endorsing the work of the Special Court for Sierra Leone which they suggest "is integral to facilitating reconciliation and restoring peace in the region," the Members suggest that its work is in danger of physical attack if additional funds - already appropriated by Congress - to enhance the court's security are not released by the Department.
The Members urge the Administration to obligate and release $10 million in FY 2003 Economic Support Funds, bringing the total U.S. contribution to the Special Court to $20 million, as provided by the Consolidated Appropriations Act of 2003. "Threats (to the Court) posed by non-state actors have multiplied exponentially following the indictment of Taylor. Now more than ever, the Special Court needs the full backing of the U.S. Government. Public statements of support for the work of the Court should be issued, and additional funds to enhance the security posture of the Court should be provided. Too many lives have been lost, too many peacekeepers have been deployed, and too much has been invested by the United States, both politically and financially, to allow this Court to fail and instability reign," the Members state.

##30##

June 13, 2003

The Honorable Colin Powell
Secretary
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Secretary Powell:

We are writing to urge you to help foster peace and security in west Africa by supporting the work of the Special Court for Sierra Leone and resisting efforts to negotiate with President Charles Taylor of Liberia, indicted by the Special Court for war crimes and crimes against humanity. Further, we urge the Administration to obligate and release to the Special Court, without delay, $10 million in Fiscal Year 2003 Economic Support Funds, bringing the total U.S. contribution to the

Special Court to $20 million, as called for in the Consolidated Appropriations Act of 2003.

As you know, following a decade of conflict characterized by mass mutilation, murder, rape, sexual slavery and forced conscription of child soldiers, the international community empowered the Special Court to prosecute those "who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law . . . including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone." The Special Court, headed by Chief Prosecutor David Crane, has since worked tirelessly and courageously toward this end. Within just nine months, ten individuals have been indicted, including rebel leaders and commanders, a senior member of the government of Sierra Leone and, most recently, President Charles Taylor of Liberia.

Charles Taylor has actively supported the Revolutionary United Front (RUF) of Sierra Leone, a rebel group notorious for hacking off the limbs of innocent civilians, including women and children. He is alleged to be cooperating with international terrorist organizations. He is linked to the proliferation of small arms throughout west Africa and the illicit trade in diamonds in violation of UN sanctions. He has terrorized the population of Liberia and suppressed the media and political opposition. Taylor has fomented conflict not only in his own country, but also in neighboring Sierra Leone, Guinea and, most recently, Cote d'Ivoire. He has destabilized the entire sub-region of west Africa, leaving thousands dead and millions displaced in his wake. To this end, we seek assurances that the U.S. Department of State does not equate a "soft landing" for the people of Liberia with a "soft landing" for Charles Taylor. There can be no peace in Liberia, or in west Africa, as long as Charles Taylor is allowed to maintain influence and act as a menace to his neighbors. To regard Mr. Taylor as an honest broker who is capable of contributing to a peace process for Liberia, or to acquiesce to conditions for his voluntary retreat into exile, would be a mistake. Mr. Taylor has proven time and time again that he will say or do whatever is necessary to seize and maintain power. There is no reason to believe that his willingness and ability to foment conflict and destabilize his neighbors will be any less virulent if he is sent to Tripoli, Lome, Abuja, Paris, or elsewhere.

If the United States truly seeks to support the peace process in Liberia and to foster stability in west Africa, there can be no deals. Exile for Mr. Taylor is not a sound option.

We believe that the Special Court for Sierra Leone is integral to facilitating reconciliation and restoring peace in the region. Given the profile of the characters involved, the nature of the crimes committed, and the volatile security situation in the region, the Special Court is at risk of attack. Threats posed by non-state actors have multiplied exponentially following the indictment of Taylor. Now more than ever, the Special Court needs the full backing of the U.S.

Government. Public statements of support for the work of the Court should be issued, and additional funds to enhance the security posture of the Court should be provided. Too many lives have been lost, too many peacekeepers have been deployed, and too much has been invested by the United States, both politically and financially, to allow this Court to fail and instability reign.

Mr. Secretary, we have seen your administration make valuable and visionary commitments to the people of Africa. Let us now extend that commitment to the people of west Africa by supporting the Special Court's efforts to end the era of impunity and lawlessness in Sierra Leone, by denying Mr. Taylor a soft landing, and by urging other states to deny Mr. Taylor asylum.

Sincerely,

/s/	/s/
HENRY J. HYDE	EDWARD R. ROYCE
Chairman	Chairman, Subcommittee on Africa
/s/	/s/
CHRISTOPHER SMITH	TOM LANTOS
Vice-Chairman	Ranking Democratic Member

OP-ED CONTRIBUTOR

Bring Charles Taylor to Justice

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By ED ROYCE
Published: May 5, 2005

Washington

NEARLY two years after Charles Taylor fled Monrovia under pressure from advancing rebels and a force of Marines on ships off Liberia, he sits exiled in Nigeria, plotting to undermine an international effort to rebuild the country he did so much to destroy. Although Mr. Taylor has been indicted on charges of fueling a brutal war in neighboring Sierra Leone, a deal brokered by Nigeria and the United States has kept him beyond the reach of justice.

Readers' Opinions

Forum: Op-Ed Contributors

But when President Bush meets with President Olusegun Obasanjo of Nigeria today, he has the chance to press him to bring Mr. Taylor before the body that indicted him, the Special Court for Sierra Leone. In so doing, Mr. Bush will not only help safeguard West Africa's fragile stability but strengthen the rule of law and the role of a court that the United States has done so much to create and support.

After he terrorized his way to power in Liberia, Charles Taylor backed the brutal Revolutionary United Front, a rebel group that murdered, raped and mutilated tens of thousands in Sierra Leone in the 1990's. But in return for agreeing to go into exile and to stay out of politics, Mr. Taylor was able to escape a 17-count Special Court indictment for war crimes and crimes against humanity handed down against him in 2003; instead, he landed softly in Nigeria. The State Department said this was a temporary step intended to stop the killing in Liberia. This deal, bad then, is worse today.

What's more, Mr. Taylor constantly violates the terms of the agreement. He is in regular telephone contact with former aides and is working with parties set to contest and, most likely, disrupt the Liberian elections scheduled for October. Last month, Jacques Klein, the United Nations special representative in Liberia, reported that Mr. Taylor was intruding in Liberian politics. When he left Liberia, he told followers, "God willing, I will be back." He reaffirmed his intention on Nigerian television in spring of 2004.

Sierra Leone and Liberia, though stabilized, remain fragile. The United States has spent nearly $750 million rebuilding Liberia since Mr. Taylor left. Leaving him at large threatens to knock down what the United States has built up. Moreover, the United States has spent $22 million to create the Special Court, which will chip away at West Africa's culture of impunity, foster the regional rule of law and, more broadly, provide a model for international justice besides the International Criminal Court. While the court has tried some of those responsible for Sierra Leone's mayhem, its legacy will be determined by whether it tries Charles Taylor.

Given Nigeria's own unhappy recent past as a dictatorship and its current role as a force for peace and stability in Africa, Mr. Obasanjo's harboring of Mr. Taylor is perplexing. Many Nigerians understand this, including the Nigerian Union of Journalists and the Nigerian Bar Association, which have criticized Mr. Obasanjo's policy.

But so far the United States has yet to press President Obasanjo for rendition. Why the United States continues to coddle Charles Taylor is something of a mystery. On Wednesday the House of Representatives passed a resolution calling on Nigeria to send Mr. Taylor to the Special Court. The European Parliament passed a similar resolution in February. Last week, a bipartisan group of senators asked Secretary of State Condoleezza Rice to request that Nigeria transfer Mr. Taylor to the Special Court. But according to one published report, a senior administration official recently assured Mr. Obasanjo that Mr. Bush would not raise the matter during his visit.

Sending Mr. Taylor to the Special Court is right and sensible. Mr. Bush, who has spoken so purposefully on other occasions about the need for freedom, justice and accountability, can make those same points about one of Africa's worst warlords in his conversation with Mr. Obasanjo today.

Ed Royce, Republican of California, is vice chairman of the House subcommittee on Africa.

FOR IMMEDIATE RELEASE
AUGUST 11, 2005
9:26 AM

CONTACT: Human Rights Watch
(212) 290-4700
hrwnyc@hrw.org

Nigeria: Surrender Taylor to War Crimes Court

On Two-Year Anniversary of Charles Taylor's Exile, Justice Should Be Done

NEW YORK - August 11 - Two years after former Liberian President Charles Taylor fled Liberia for exile in Nigeria, Nigerian President Olusegun Obasanjo should no longer allow Taylor to escape prosecution for crimes against humanity and war crimes committed during Sierra Leone's civil war, the Campaign Against Impunity said today. Nigeria should immediately surrender Taylor to face trial at the Special Court for Sierra Leone.

The Campaign Against Impunity, a coalition made up of some 300 African and international civil society groups was formed to ensure Nigeria's surrender of Charles Taylor to the Special Court for Sierra Leone. Taylor has been accused of 17 counts of war crimes and crimes against humanity against the people of Sierra Leone by the Special Court. The crimes include killings, mutilations, rape and other forms of sexual violence, sexual slavery, the recruitment and use of child soldiers, abduction, and the use of forced labor by Sierra Leonean armed opposition groups.

Despite mounting international pressure from African countries, the United Nations, the European Union and the United States, Nigeria continues to resist surrendering indicted war criminal Charles Taylor to the Special Court for Sierra Leone. Most recently on July 28, the Mano River Union, which consists of Sierra Leone, Liberia and Guinea, issued a communiqué, which agreed to call for a review of Taylor's temporary stay in Nigeria.

"Nigeria is swimming against the tide of international justice," said Shina Loremikan, director of the Committee for Defence of Human Rights (CDHR), a Nigerian organization that is part of the Campaign Against Impunity. "The international community is in agreement that Taylor must be surrendered to the Special Court for trial. It is high time that President Obasanjo did the right thing by turning Taylor over to be tried for his alleged crimes."

The campaign stressed that Taylor's trial must take place in accordance with international law and standards for fair trial, including the right to be presumed innocent until proven guilty beyond a reasonable doubt.

Surrendering Taylor to the Special Court is crucial not only to ensure justice is done for crimes committed during the Sierra Leone conflict, but also to ensure stability in West Africa, the Campaign Against Impunity said. There are consistent reports of Taylor's interference in Liberian politics, despite the terms of the agreement granting him asylum, which prohibits any such meddling.

U.N. Secretary-General Kofi Annan and, more recently, the Mano River Union have expressed concern over Taylor's potential for fomenting instability in the region. The July 28 communiqué issued by the Mano River Union cited allegations of Taylor's involvement in an attack on the Guinean president, gathering armed people in the forests of Liberia, and making telephone calls to Liberian officials. In his June 7 report on Liberia, the U.N. secretary-general stated that Taylor is reportedly in regular contact with former business, military and political associates in Liberia and is suspected of supporting candidates in Liberia's October presidential election.

"On the second anniversary of Charles Taylor's flight to Nigeria, his continued impunity is undermining the rule of law in West Africa and putting civilians in the region at risk," said Richard

Dicker, director of the International Justice program at Human Rights Watch, which is part of the campaign.

"African leaders owe it to their people to work vigorously with President Obasanjo to see that Taylor faces trial expeditiously," Kolawole Olaniyan, Africa program director at Amnesty International, which is also part of the campaign.

The first public call for Nigeria to surrender Taylor to face trial came from the European Parliament in February of this year in the form of a resolution. Later in May, the U.S. House of Representatives and Senate passed similar resolutions. During a visit to West Africa last month, the U.N. High Commissioner for Human Rights Louise Arbour called for Taylor to appear for trial at the Special Court for Sierra Leone and for African leaders to urge President Obasanjo to hand over Taylor.

The campaign called on members of the Southern African Development Community (SADC) to follow the example of the Mano River Union and speak out on the need for Taylor's surrender to the Special Court. SADC is holding its annual summit in Gaborone, Botswana in the coming days.

"The moment for Taylor's surrender to the Special Court is now," said James Paul Allen, a Sierra Leonean human rights activist involved in the campaign. "The indictment for Charles Taylor on war crimes and crimes against humanity must be honored. The victims in Sierra Leone who suffered grave crimes under international law should not be forced to wait any longer."

Partners in the Campaign Against Impunity in Nigeria and elsewhere in Africa held events today, including interfaith services in Lagos and Calabar (the city where Taylor now resides), to mark the second anniversary of Taylor's arrival in Nigeria with a call for his surrender.

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ChristianityToday magazine
A MAGAZINE OF EVANGELICAL CONVICTION
April 2, 2008

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The following article is located at: http://www.christianitytoday.com/ct/2007/march/17.38.html

The Devil's Yoke

A young woman describes her former life as a slave of rebel soldiers.

Interview by Sheryl Henderson Blunt | posted 2/26/2007 08:33AM

The Lord's Resistance Army, a violent rebel group, attacked the dormitories of St. Mary's College in Aboke, northern Uganda, on October 10, 1996. They were in search of child soldiers and "wives" for terrorist Joseph Kony's army commanders. Fifteen-year-old Grace Akallo and 139 of her classmates were kidnapped.

A school nun negotiated the release of many girls. But soldiers kept Akallo and 29 others. After seven horror-filled months, Akallo escaped. Today, she is an undergraduate student at Gordon College near Boston.

Last October, she met with CT senior writer Sheryl Henderson Blunt on the tenth anniversary of her abduction. Akallo spoke softly as she told of her captivity and new mission. Thirty minutes later, she addressed the Peace Within Reach gathering in Washington, D.C., calling for open U.S. support of Uganda's fragile peace agreement—after which 700 people gave her a thunderous standing ovation.

You witnessed many horrors carried out by the LRA.

The killings, the abductions, the lootings—I saw it. I spent one month in Uganda, then walked to Sudan. We had to march in a line. If you diverted from the line, you were dead. They killed so many children who tried to escape. The youngest was seven. He cried for his mother, then they killed him. Either they would kill them by beating them with big sticks, or by bayonet. Other times—it's very hard to say—they would cut the head with an axe.

There was one commander who, if he was not killing someone, was not happy. When he was killing someone, he was happy. People would start crying that they wanted to kill someone. One 18-year-old boy came out of the line crying that he wanted to kill someone. This boy—they would give him 10 children. He'd say he was taking them for a bath. He'd kill five, and only five would come back.

How would you describe Kony's ritualistic religious practices?

He pretends that he has power. After we were abducted, all of the children were smeared with Shea nut butter. It was to clean the "evil"—to make us members. Later, they had us sit in a circle for a ceremony. They used ash mixed with water and dipped an egg in it and drew the sign of a heart on our chests and backs and crosses on our hands and foreheads for "protection." People in the camp would also wear small bottles of water around their necks with a small stone in it. Kony had a shrine in his camp where he would go to "pray"—he called it prayer. When he was praying, he'd change voices or lose consciousness. One person would go with him to record the messages he would receive. They would be random messages. Once it was, "Thirty people should be killed." Then they would do it.

Describe your relationship with the other girls from your boarding school who were kidnapped.

Before the kidnapping, we would pray together every day. We felt like sisters from one mother. After the abduction took place, we were even more bonded. Then we were split up and told not to talk. Some of us were beaten and killed.

How did you escape?

I escaped after seven months in captivity, when Ugandan soldiers went to Sudan. The SPLA [a southern Sudanese rebel group] and the Ugandan Army joined together to fight the LRA. I ran away from the fight with eight other girls. I was taken to the Ugandan army soldier barracks.

Later, Sister Rachele [from St. Mary's] came for me with my dad. They were crying, but I was not. My survival is all from God. From the very day I was abducted to the very day I escaped, it was only God who helped me. My family tried, but God succeeded.

Is it difficult to talk about your experiences?

Talking has never killed anybody. My friends who remain in captivity cannot talk. If they could, they would scream. They would cry. But they cannot. I have a chance. I have a life. God gave me this. I'm not better than my friends to be here. If God had not taken me to see what was happening, I would not be speaking about it. Maybe I would just be saying, "I can't do anything." But that is not what I say.

What message do you have for the U.S. government?

I want them to support the peace talks, but they've left it to the Ugandan government and to Sudan's government. I don't hear the international community trying to oversee it and become involved in the peace talks. How can we trust there will be progress without the international community holding them responsible?

Have you been able to forgive your captors?

I have forgiven them if they have come back [and surrendered]. But if they are still hurting my friends, that would be very hard. I've forgiven one man who had one of my friends as a wife. He surrendered. I need the others to come back, too, so I can forgive them.

How do you feel about the amnesty that has been extended to rebel leaders as an incentive to end the conflict?

[Under the amnesty agreement] those who have left the rebel army are being treated like small gods. Some of the LRA commanders who were close with Kony, including his chief mastermind, are living free in a nice hotel. Meanwhile, the children are dying. We want peace to come, but at some point we also want justice, because there are so many broken-hearted people.

What challenges will the freed Ugandan children face after peace is established?

People are saying if the peace talks are signed, the children can go home. But it will be far from over. The people in the camps, their whole life is gone. What about these people? How will they get back to their normal lives? How do they know how they are supposed to live? In a house? With a family? Some have been born in the camps. Many do not have a family. How will we be sure it really is over? It is far from over. But I do have hope. I have hope that peace will come to my country once again.

Related Elsewhere:

Christianity Today's special section on the Lord's Resistance Army and Uganda are available online.

The Los Angeles Times has a narrated slideshow about the 'Horror in Uganda' (warning: disturbing content.)

Grace Akallo testified before Congress as a spokesperson for World Vision.

The Washington Post reported on Grace Akallo and the situation of children—both those who have been abducted by the LRA and those who are trying to avoid abduction.

March's Inside CT talks about what ordinary people can do to end slavery.

Other articles on slavery in the March issue of *Christianity Today* include 'Free at Last,' 'Amazing Abolitionist,' 'CVP: On a Justice Mission,' and 'What Would Wilberforce Do?.'

The Amazing Change campaign includes a petition to end slavery.

Christianity Today's other articles on slavery and human trafficking include:

Red-Light Rescue | The 'business' of helping prostituted women help themselves. (December 29, 2006)

Child Sex Tours | The average victim is 14, and Americans make up 25 percent of the customers. (December 29, 2006)

Sex Isn't a Spectator Sport | Germany's World Cup pimping will fuel sex trafficking. (July 1, 2006)

Asia: Christian Women Combat Sex Trafficking | Christian women lead girls out of sexual bondage. (October 4, 1999)

Back From the Brothel | Thanks to brave ministries, prostitutes are still entering the kingdom. (January 2005)

Churches Rescue Thailand's Sex Tourism Workers | Protestants and Catholics work against $2.2 billion industry (November 1, 1999)

Fighting the other slave trade | Women against sexual trafficking. (*Christian History & Biography*, April 1, 2006)

We're Still Supporting Slavery | New efforts to stop U.S. troops from visiting prostitutes abroad are a good step, but let's not whitewash what's happening. (September 1, 2004)

The Dick Staub Interview: Francis Bok Is Proof that Slavery Still Exists | "After spending 10 years in slavery, the young Sudanese man is telling his story to the world" (October 1, 2003)

Finding the 'Real God' | An interview with a sex trafficking survivor (November 11, 2003)

Redeeming Sudan's Slaves | Americans are becoming instant abolitionists. But is the movement backfiring? (August 9, 1999)

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KEY INTERNATIONAL LAW AND STANDARDS
Regarding the Recruitment and Use of Child Soldiers:

Additional Protocols to the four Geneva Conventions of 1949 (1977) sets fifteen as the minimum age for recruitment or use in armed conflict. This minimum standard applies to all parties, both governmental and non-governmental, in both international and internal armed conflict.

Convention on the Rights of the Child (1989): Although the Convention on the Rights of the Child generally defines a child as any person under the age of eighteen, it sets the age of fifteen as the minimum age for recruitment or participation in armed conflict. The Convention is the most widely ratified convention in the world, with 192 states parties.

African Charter on the Rights and Welfare of the Child (1990) is the only regional treaty in the world that addresses the issue of child soldiers. It states that no one under the age of 18 should take a direct part in hostilities and that states should refrain from recruiting any child.

ILO Worst Forms of Child Labor Convention 182 (1999) states parties to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency." The term "child" applies to all persons under the age of 18 years and the worst forms of child labour include the forced or compulsory recruitment of children for use in armed conflict. The United States ratified in 1999.

Rome Statute of the International Criminal Court (1998) establishes a permanent court to try persons charged with committing war crimes, crimes against humanity, and genocide. In its definition of war crimes, the statute includes "conscripting or enlisting children under the age of fifteen year into armed forces or groups or using them to participate actively in hostilities."

Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict (2000) sets 18 as the minimum age for direct participation in hostilities, for recruitment into armed groups, and for compulsory recruitment by governments. States may accept volunteers from the age of 16, but must deposit a binding declaration at the time of ratification or accession, setting out their minimum voluntary recruitment age and outlining certain safeguards for such recruitment. It has been ratified by over 120 states. The United States ratified in 2002.

Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (2007): These principles do not have the status of international law, but were developed by UNICEF with broad input by international and regional experts. The document gives guidance for protecting children from recruitment and providing assistance to those who have already been involved with armed forces or groups. They were launched at a Paris conference in February 2007 that was hosted by the French government and attended by representatives from 58 countries.

UN Security Council resolutions on children and armed conflict: These are resolutions 1261 (1999), 1314 (2000) 1379 (2001), 1460 (2003), 1539 (2004) and 1612 (2005) on children and armed conflict.

HUMAN
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Children as Weapons of War

In at least 18 countries around the world, children are direct participants in war. The United Nations estimates that up to 250,000 children are serving as soldiers for both rebel groups and government forces in current armed conflicts.

Child soldiers are denied a childhood and often subjected to horrific violence. Because they are physically vulnerable and easily intimidated, children often make obedient soldiers. Many are abducted or recruited by force, and often compelled to follow orders under threat of death. Others join armed groups out of desperation.

As society breaks down during conflict, leaving children no access to school, driving them from their homes, or separating them from family members, many children perceive armed groups as their best chance for survival. Others seek escape from poverty or join military forces to avenge family members who have been killed.

Once recruited, these young combatants participate in all aspects of contemporary warfare. They wield AK-47s and M-16s on the front lines of combat, serve as human mine detectors, participate in suicide missions, carry supplies, and act as spies, messengers or lookouts.

Facts about child soldiers:

- Today, children are actively recruited and used as soldiers in Afghanistan, Burma (Myanmar), Burundi, Central African Republic, Chad, Colombia, the Democratic Republic of Congo, India, Iraq, Israel/Occupied Palestinian Territories, Nepal, Philippines, Somalia, Sri Lanka, Sudan, Thailand, and Uganda.
- Although most child soldiers are adolescents, some are as young as 8 years old;
- In many conflicts, girls make up more than 30 percent of child soldiers. In some conflicts, they may be raped or given to military commanders as "wives."
- Children are sometimes forced to commit atrocities against their own family or neighbors. Such practices help ensure that the child is "stigmatized" and unable to return to his or her home community.
- In some countries, former child soldiers have access to rehabilitation programs to help them locate their families, get back into school, receive vocational training, and re-enter civilian life. However, many children have no access to such programs. They may have no way to support themselves and are at risk of re-recruitment

Relevant International Law:

- **Additional Protocols to the four Geneva Conventions of 1949** (1977): The protocols set 15 as the minimum age for recruitment or use in armed conflict. This minimum standard applies to all parties, both governmental and non-governmental, in both international and internal armed conflict.

- **Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict** (2000): The protocol prohibits the forced recruitment of children under the age of 18 or their use in hostilities. To date, it has been ratified by more than 120 countries, including the United States.
- **ILO Convention on the Worst Forms of Child Labor** (ILO 182): Prohibits the forced or compulsory recruitment of children under the age of 18 for use in armed conflict. It has been ratified by over 150 countries, including the United States.

Criminal Responsibility and the Use of Child Soldiers:

Significant advances have been made in the last decade in establishing individual criminal responsibility for the recruitment and use of child soldiers:

- In 1998, governments agreed that the prohibition on the recruitment and participation in hostilities of children under the age of 15 had achieved the status of customary international law and should be considered a war crime under the jurisdiction of the International Criminal Court.
- In 2004, the Appeals Chamber of the Special Court of Sierra Leone ruled that the prohibition on the recruitment and use of children below age 15 had crystallized as customary international law by 1996, and found that individuals responsible bear criminal responsibility for their acts.
- In 2007, the Special Court for Sierra Leone convicted five commanders from the Sierra Leone war for recruiting and using child soldiers. Former Liberian President Charles Taylor is also charged with this crime.
- In 2008, the International Criminal Court will begin its first trial against Thoms Lubanga of the Democratic Republic of Congo. The charge against him is the recruitment and use of child soldiers.

Voices of Former Child Soldiers

I had a friend, Juanita, who got into trouble for sleeping around. We had been friends in civilian life and we shared a tent together. The commander said that it didn't matter that she was my friend. She had committed an error and had to be killed. I closed my eyes and fired the gun, but I didn't hit her. So I shot again. The grave was right nearby. I had to bury her and put dirt on top of her. The commander said, "You did very well. Even though you started to cry, you did well. You'll have to do this again many more times, and you'll have to learn not to cry."

- Angela, joined the FARC-EP in Colombia at age twelve

The section leader ordered us to take cover and open fire. There were seven of us, and seven or ten of the enemy. I was too afraid to look, so I put my face in the ground and shot my gun up at the sky. I was afraid their bullets would hit my head. I fired two magazines, about forty rounds. I was afraid that if I didn't fire the section leader would punish me.

- Khin Maung Than, recruited by Burma's national army at age eleven

I was captured in Lofa County by government forces. The forces beat me, they held me and kept me in the bush. I was tied with my arms kept still and was raped there. I was fourteen years old. . . . After the rape, I was taken to a military base. . . I was used in the fighting to carry medicine. During the fighting I would carry medicine on my head and was not allowed to talk. I had to stand very still. I had to do a lot of work for the soldiers, sweeping, washing, cleaning. During this time, I felt really bad. I was afraid. I wanted to go home, but was made to stay with the soldiers.

- Evelyn, recruited in Liberia by government forces at age fourteen

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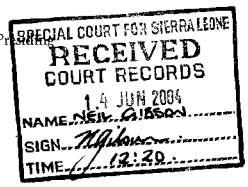
IN THE APPEALS CHAMBER



Before:	Justice Emmanuel Ayoola, Presiding Justice George Gelaga King Justice Renate Winter Justice Geoffrey Robertson	
Registrar:	Robin Vincent	
Date:	31 May 2004	
PROSECUTOR	Against	SAM HINGA NORMAN (Case No.SCSL-2004-14-AR72(E))

DECISION ON PRELIMINARY MOTION BASED ON LACK OF JURISDICTION (CHILD RECRUITMENT)

Office of the Prosecutor:

Desmond de Silva
Luc Côté
Christopher Staker
Walter Marcus-Jones
Abdul Tejan-Cole

Defence Counsel:

James Blyden Jenkins-Johnson
Sulaiman Banja Tejan-Sie
Timothy Owen
Quincy Whitaker

Amici Curiae:
University of Toronto
International Human Rights Clinic
UNICEF

Intervener:
Michiel Pestman for *Moinina Fofana*

THE APPEALS CHAMBER of the Special Court for Sierra Leone ("the Special Court");

SEIZED of the Defence Preliminary Motion Based on Lack of Jurisdiction: Child Recruitment, filed on 26 June 2003 ("Preliminary Motion") on behalf of Sam Hinga Norman ("Accused");

NOTING that the Prosecution Response was filed on 7 July 2003[1] and the Defence Reply was filed on 14 July 2003[2];

NOTING that the Preliminary Motion was referred to the Appeals Chamber on 17 September 2003 pursuant to Rule 72 (E) of the Rules of Procedure and Evidence of the Special Court ("the Rules")[3];

NOTING that the Appeals Chamber granted an application by the University of Toronto International Human Rights Clinic and interested Human Rights Organisations to submit an amicus curiae brief on 1 November 2003[4] and that the amicus curiae brief was filed on 3 November 2003[5];

NOTING that an oral hearing was held on 6 November 2003;

NOTING that Additional Post-Hearing Submissions of the Prosecution were filed on 24 November 2003[6];

NOTING that the Appeals Chamber invited UNICEF to submit an amicus curiae brief[7] and

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[1] Prosecution Response to Fourth Defence Preliminary Motion on Lack of Jurisdiction (Child Recruitment), 7 July 2003 ("Prosecution Response").
[2] Reply - Preliminary Motion based on Lack of Jurisdiction: Child Recruitment, 14 July 2003 ("Defence Reply").
[3] Order pursuant to Rule 72(E): Preliminary Motion on Lack of Jurisdiction: Child Recruitment, 17 September 2003.
[4] Decision on Application by the University of Toronto International Human Rights Clinic for Leave to File Amicus Curiae Brief, 1 November 2003.
[5] Fourth Defence Preliminary Motion based on Lack of Jurisdiction (Child Recruitment): Amicus Curiae Brief of University of Toronto International Human Rights Clinic and Interested International Human Rights Organisations, 3 November 2003 ("Toronto Amicus Curiae Brief").
[6] Additional Written Submissions of the Prosecution - Recruitment and Use of Child Soldiers, 24 November 2003.
[7] Order on the Appointment of Amicus Curiae, 12 December 2003.

that the amicus curiae brief was filed on 21 January 2003[8];

NOTING that Counsel for Moinina Fofana filed written submissions on 3 November 2003[9] and was granted leave to intervene at the oral hearing;

CONSIDERING THE ORAL AND WRITTEN SUBMISSIONS OF THE PARTIES AND AMICI CURIAE:

I. SUBMISSIONS OF THE PARTIES

A. Defence Preliminary Motion

1. The Defence raises the following points in its submissions:

   a) The Special Court has no jurisdiction to try the Accused for crimes under Article 4(c) of the Statute (as charged in Count 8 of the Indictment) prohibiting the recruitment of children under 15 "into armed forces or groups or using them to participate actively in hostilities" since the crime of child recruitment was not part of customary international law at the times relevant to the Indictment.

   b) Consequently, Article 4(c) of the Special Court Statute violates the principle of *nullum crimen sine lege*.

   c) While Protocol II Additional to the Geneva Conventions of 1977 and the Convention of the Rights of the Child of 1990 may have created an obligation on the part of States to refrain from recruiting child soldiers, these instruments did not criminalise such activity.

   d) The 1998 Rome Statute of the International Criminal Court criminalises child recruitment but it does not codify customary international law.

   The Defence applies for a declaration that the Court lacks jurisdiction to try the Accused on Count 8 of the Indictment against him.

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[8] Fourth Defence Preliminary Motion based on Lack of Jurisdiction (Child Recruitment): Amicus Curiae Brief of the United Nations Children's Fund (UNICEF), 21 January 2003 ("UNICEF Amicus Brief").
[9] Reply to the Prosecution Response to the Motion on Behalf of Moinina Fofana for Leave to Intervene as an Interested Party in the Preliminary Motion filed by Mr. Norman on Lack of Jurisdiction: Child Recruitment and Substantive Submissions, 3 November 2003 ("Fofana – Reply to the Prosecution Response to the Motion").

B. Prosecution Response

2. The Prosecution submits as follows:

   a) The crime of child recruitment was part of customary international law at the relevant time. The Geneva Conventions established the protection of children under 15 as an undisputed norm of international humanitarian law. The number of states that made the practice of child recruitment illegal under their domestic law and the subsequent international conventions addressing child recruitment demonstrate the existence of this customary international norm.

   b) The ICC Statute codified existing customary international law.

   c) In any case, individual criminal responsibility can exist notwithstanding lack of treaty provisions specifically referring to criminal liability in accordance with the *Tadić* case.[10]

   d) The principle of *nullum crimen sine lege* should not be rigidly applied to an act universally regarded as abhorrent. The question is whether it was foreseeable and accessible to a possible perpetrator that the conduct was punishable.

C. Defence Reply

3. The Defence submits in its Reply that if the Special Court accepts the Prosecution proposition that the prohibition on the recruitment of child soldiers has acquired the status of a crime under international law, the Court must pinpoint the moment at which this recruitment became a crime in order to determine over which acts the Court has jurisdiction. Furthermore, the Defence argues, a prohibition under international law does not necessarily entail criminal responsibility.

D. Prosecution Additional Submissions

4. The Prosecution argues further that:

   a) In international law, unlike in a national legal system, there is no Parliament with legislative power with respect to the world as a whole. Thus, there will never be a statute declaring conduct to be criminal under customary law as from

[10] Prosecution Response, para.11.

a specified date. Criminal liability for child recruitment is a culmination of numerous factors which must all be considered together.

b) As regards the principle of *nullum crimen sine lege*, the fact that an Accused could not foresee the creation of an international criminal tribunal is of no consequence, as long as it was foreseeable to them that the underlying acts were punishable. The possible perpetrator did not need to know the specific description of the offence. The dictates of the public conscience are important in determining what constitutes a criminal act, and this will evolve over time.

c) Alternatively, individual criminal responsibility for child recruitment had become established by 30 April 1997, the date on which the "Capetown Principles" were adopted by the Symposium on the Prevention of Children into Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in Africa, which provides that "those responsible for illegally recruiting children should be brought to justice".[11]

d) Alternatively, individual criminal responsibility for child recruitment had become established by 29 June 1998, the date on which the President of the Security Council condemned the use of child soldiers and called on parties to comply with their obligations under international law and prosecute those responsible for grave breaches of international humanitarian law.

e) Alternatively, individual criminal responsibility for child recruitment had become established by 17 July 1998 when the ICC Statute was adopted.

E. Submissions of the Intervener

5. Defence Counsel for Fofana submits that child recruitment was not a crime under customary international law, and that there was no sufficient state practice indicating an intention to criminalise it.

F. Submissions of the Amici Curiae

University of Toronto International Human Rights Clinic and interested Human Rights

[11] *Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa*, Symposium of the NGO working group on the Convention of the Rights of the Child and UNICEF, 30 April 1997, para.4.

Organisations

6. The University of Toronto International Human Rights Law Clinic sets out its arguments as follows:

a) In invoking the principle *nullum crimen sine lege*, the Defence assumes a clear distinction between war crimes and violations of international humanitarian law, and that only the former may be prosecuted without violating this principle. This premise is false and the jurisprudence supports the ability to prosecute serious violations of international humanitarian law.

b) Both conventional and customary international law supports the contention that the recruitment of child soldiers under the age of 15 was prohibited at the time in question. State practice provides evidence of this custom, in that almost all states with military forces prohibit child recruitment under 15.

c) Since child recruitment can attract prosecution by violating laws against, for example, kidnapping, it is overly formalistic to characterise regulation of military recruitment as merely restricting recruitment rather than prohibiting or criminalising it.

d) International resolutions and instruments expressing outrage at the practice of child recruitment since 1996 demonstrate acceptance of the prohibition as binding.

e) International humanitarian law permits the prosecution of individuals for the commission of serious violations of the laws of war, irrespective of whether or not they are expressly criminalised, and this is confirmed in international jurisprudence, state practice, and academic opinion.

f) The prohibition on recruitment of children is contained in the "Fundamental Guarantees" of Additional Protocol II and the judgments of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") provide compelling evidence that the violation was a pre-existing crime under customary international law.

g) The principle of *nullum crimen sine lege* is meant to protect the innocent who in

good faith believed their acts were lawful. The Accused could not reasonably have believed that his acts were lawful at the time they were committed and so cannot rely on *nullum crimen sine lege* in his defence.

UNICEF

7. UNICEF presents its submissions along the following lines:

a) By 30 November 1996, customary international law had established the recruitment or use in hostilities of children under 15 as a criminal offence and this was the view of the Security Council when the language of Article 4(c) of the Statute was proposed. While the first draft of the Special Court Statute referred to "abduction and forced recruitment of children under the age of fifteen", the language in the final version was found by the members of the Security Council to conform to the statement of the law existing in 1996 and as currently accepted by the international community.

b) This finding by the Security Council is supported by conventional law, state practice, the judgments of the ICTY and ICTR, and also declarations and resolutions by States, even though the recruitment of children under 15 is first referred to expressly as a crime in the Rome Statute of the ICC of 17 July 1998.

c) Children under 15 are a protected group under the Geneva Convention IV. Both Additional Protocols extend a specific protection to this group and contain explicit references to the recruitment and participation of children in hostilities. Article 4 of Additional Protocol II specifically includes the (absolute) prohibition on the recruitment and use of children in hostilities and this prohibition is well established.

d) The Convention on the Rights of the Child ("CRC") is the most widely ratified human rights treaty and prohibits, in its Article 38, the recruitment and use of children under 15 in hostilities. States parties are required to take appropriate steps at national level in order to ensure that children under 15 do not take part in hostilities. This obligation was stressed in the drafting process of the Optional Protocol to the CRC, which came into force on 12 February 2002, Article 4 of which states that "States Parties shall take all feasible measures to

prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalise such practices."

e) The prohibition on recruitment and use of child soldiers below 15 has been universally recognised in the practice of states.

f) Upon signature and ratification of the CRC, some states lodged declarations or reservations concerning Article 38 advocating for a higher age limit with regard to child recruitment.

g) Most states have enacted legislation for the implementation of their minimum age for recruitment and some have explicitly criminalised child recruitment, for example Columbia, Argentina, Spain, Ireland and Norway.

h) The prohibition of child recruitment which was included in the two Additional Protocols and the CRC has developed into a criminal offence. The ICTY Statute provides, and its jurisprudence confirms, that breaches of Additional Protocol I lead to criminal sanctions and the ICTR Statute recognises that criminal liability attaches to serious violations of Additional Protocol II. The Trial Chamber in the ICTR case of *Akayesu* confirmed the view that in 1994 'serious violations' of the fundamental guarantees contained within Additional Protocol II to the Geneva Conventions were subject to criminal liability and child recruitment shares the same character as the violations listed therein.

i) The expert Report by Graça Machel to the General Assembly on the impact of armed conflict on children, the resolutions of the Organisation for African Unity, and the Security Council debate on the situation in Liberia, all of 1996, provide further evidence of state practice and opinio juris within multilateral fora.

j) By August 1996 there was universal acceptance that child recruitment was a criminal offence. It was therefore an expression of existing customary international law when the war crime of child recruitment was included in the Rome Statute.

k) In 2000, the Optional Protocol to the CRC was adopted, its main purpose being to raise the age for the participation in hostilities and recruitment beyond the

established standards of the Additional Protocols and the CRC. It also reaffirmed the obligation of all states to criminalise the recruitment and use of child soldiers.

HEREBY DECIDES:

II. DISCUSSION

8. Under Article 4 of its Statute, the Special Court has the power to prosecute persons who committed serious violations of international humanitarian law including:

> c. Conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities ("child recruitment").

The original proposal put forward in the Secretary-General's Report on the establishment of the Special Court referred to the crime of "abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities"[12], reflecting some uncertainty as to the customary international law nature of the crime of conscripting or enlisting children as defined in the Rome Statute of the International Criminal Court[13] and mirrored in the Special Court Statute. The wording was modified following a proposal by the President of the Security Council to ensure that Article 4(c) conformed "to the statement of the law existing in 1996 and as currently accepted by the international community".[14] The question raised by the Preliminary Motion is whether the crime as defined in Article 4(c) of the Statute was recognised as a crime entailing individual criminal responsibility under customary international law at the time of the acts alleged in the indictments against the accused.

9. To answer the question before this Court, the first two sources of international law under Article 38(1) of the Statute of the International Court of Justice ("ICJ") have to be scrutinized:

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[12] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, paras 17-18 and Enclosure, Article 4(c).
[13] UN Doc. A/CONF.183/9, 17 July 1998, in force 17 July 2002.
[14] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, S/2000/1234, 22 December 2000, para.3.

1) international conventions, whether general or particular, establishing rules especially recognized by the contesting states

2) international custom, as evidence of a general practice accepted as law [...]

A. International Conventions

10. Given that the Defence does not dispute the fact that international humanitarian law is violated by the recruitment of children[15], it is not necessary to elaborate on this point in great detail. Nevertheless, the key words of the relevant international documents will be highlighted in order to set the stage for the analysis required by the issues raised in the Preliminary Motion. It should, in particular, be noted that Sierra Leone was already a State Party to the 1949 Geneva Conventions and the two Additional Protocols of 1977 prior to 1996.

1) Fourth Geneva Convention of 1949[16]

11. This Convention was ratified by Sierra Leone in 1965. As of 30 November 1996, 187 States were parties to the Geneva Conventions.[17] The pertinent provisions of the Conventions are as follows:

> Art. 14. In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, **children under fifteen**, expectant mothers and mothers of children under seven.
>
> Art.24. The Parties to the conflict shall take the necessary measures **to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war**, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

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[15] Fofana – Reply to the Prosecution Response to the Motion, para.13. See Transcript of 5-6 November 2003, para.95.
[16] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 75 UNTS (1950).
[17] UNICEF Amicus Brief, para.22.

Art. 51. The Occupying Power **may not compel protected persons to serve in its armed or auxiliary forces.** No pressure or propaganda which aims at securing voluntary enlistment is permitted.

2) Additional Protocols I and II of 1977[18]

12. Both Additional Protocols were ratified by Sierra Leone in 1986. Attention should be drawn to the following provisions of Additional Protocol I:

Article 77.-Protection of children

2. The Parties to the conflict shall take all **feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.** In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.

3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

13. 137 States were parties to Additional Protocol II as of 30 November 1996.[19] Sierra Leone ratified Additional Protocol II on 21 October 1986.[20] The key provision is Article 4 entitled "fundamental guarantees" which provides in relevant part:

[18] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 609 (entered into force 7 December 1978) ("Additional Protocol I"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 3 (entered into force 7 December 1977) ("Additional Protocol II").
[19] UNICEF Amicus Brief, para. 22.
[20] Available at www.child-soldiers.org and annexed to the UNICEF Amicus Brief.

Article 4.-**Fundamental guarantees**

3. Children shall be provided with the care and aid they require, and in particular:

(c) Children **who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities**

3) Convention on the Rights of the Child of 1989[21]

14. The Convention entered into force on 2 September 1990 and was on the same day ratified by the Government of Sierra Leone. In 1996, all but six states existing at the time had ratified the Convention.[22] The CRC recognizes the protection of children in international humanitarian law and also requires States Parties to ensure respect for these rules by taking appropriate and feasible measures.

15. On feasible measures:

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take **all feasible measures** to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. **States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.** In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take **all feasible measures to ensure protection** and care of children who are affected by an armed conflict.

16. On general obligations of states:

[21] Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.
[22] Available at www.child-soldiers.org and annexed to the UNICEF Amicus Brief.

Article 4

States Parties shall undertake **all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.** With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

B. Customary International law

17. Prior to November 1996, the prohibition on child recruitment had also crystallised as customary international law. The formation of custom requires both state practice and a sense of pre-existing obligation (opinio iuris). "An articulated sense of obligation, without implementing usage, is nothing more than rhetoric. Conversely, state practice, without opinio iuris, is just habit."[23]

18. As regards state practice, the list of states having legislation[24] concerning recruitment or voluntary enlistment clearly shows that almost all states prohibit (and have done so for a long time) the recruitment of children under the age of 15. Since 185 states, including Sierra Leone, were parties to the Geneva Conventions prior to 1996, it follows that the provisions of those conventions were widely recognised as customary international law. Similarly, 133 states, including Sierra Leone, ratified Additional Protocol II before 1995. Due to the high number of States Parties one can conclude that many of the provisions of Additional Protocol II, including the fundamental guarantees, were widely accepted as customary international law by 1996. Even though Additional Protocol II addresses internal conflicts, the ICTY Appeals Chamber held in *Prosecutor v Tadić* that "it does not matter whether the 'serious violation' has occurred within the context of an international or an internal armed conflict".[25] This means that children are protected by the fundamental guarantees, regardless of whether there is an international or internal conflict taking place.

19. Furthermore, as already mentioned, all but six states had ratified the Convention on the Rights of the Child by 1996. This huge acceptance, the highest acceptance of all international conventions, clearly shows that the provisions of the CRC became

[23] Edward T. Swaine, *Rational Custom*, Duke Law Journal, 559, 567-68 (December 2002).
[24] Available at www.child-soldiers.org and annexed to the UNICEF Amicus Brief.
[25] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, ("*Tadić* Jurisdiction Decision"), para.94.

international customary law almost at the time of the entry into force of the Convention.

20. The widespread recognition and acceptance of the norm prohibiting child recruitment in Additional Protocol II and the CRC provides compelling evidence that the conventional norm entered customary international law well before 1996. The fact that there was not a single reservation to lower the legal obligation under Article 38 of the CRC underlines this, especially if one takes into consideration the fact that Article 38 is one of the very few conventional provisions which can claim universal acceptance.

21. The **African Charter on the Rights and Welfare of the Child**[26], adopted the same year as the CRC came into force, reiterates with almost the same wording the prohibition of child recruitment:

> Article 22(2): Armed Conflicts
>
> 2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child.

22. As stated in the Toronto Amicus Brief, and indicated in the 1996 Machel Report, it is well-settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties.[27] Customary international law represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws.[28] It has also been pointed out that non-state entities are bound by necessity by the rules embodied in international humanitarian law instruments, that they are "responsible for the conduct of their members"[29] and may be "held so responsible by opposing parties or by the outside world".[30] Therefore all parties to the conflict in Sierra Leone were bound by the

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[26] *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), adopted 11 July 1990, entered into force 29 November 1999.
[27] Toronto Amicus Brief, para.13.
[28] Jean-Marie Henckaerts, *Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law* in Relevance of International Humanitarian Law to Non-state Actors, Proceedings of the Brugge Colloquium, 25-26 October 2002.
[29] See F. Kalsoven and L. Zegveld, *Constraints on the Waging of War, An Introduction to International Humanitarian Law*, (International Committee of the Red Cross, March 2001), p. 75.
[30] Ibid.

prohibition of child recruitment that exists in international humanitarian law.[31]

23. Furthermore, it should be mentioned that since the mid-1980s, states as well as non-state entities started to commit themselves to preventing the use of child soldiers and to ending the use of already recruited soldiers.[32]

24. The central question which must now be considered is whether the prohibition on child recruitment also entailed individual criminal responsibility at the time of the crimes alleged in the indictments.

C. Nullum Crimen Sine Lege, Nullum Crimen Sine Poena

25. It is the duty of this Chamber to ensure that the principle of non-retroactivity is not breached. As essential elements of all legal systems, the fundamental principle *nullum crimen sine lege* and the ancient principle *nullum crimen sine poena*, need to be considered. In the ICTY case of *Prosecutor v Hadžihasanović*, it was observed that "In interpreting the principle *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance."[33] In other words it must be "foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable".[34] As has been shown in the previous sections, child recruitment was a violation of conventional and customary international humanitarian law by 1996. But can it also be stated that the prohibited act was criminalised and punishable under international or national law to an extent which would show customary practice?

26. In the ICTY case of *Prosecutor v. Tadić*, the test for determining whether a violation of humanitarian law is subject to prosecution and punishment is set out thus:

> The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3 [of the ICTY Statute]:
>
> (i) the violation must constitute an infringement of a rule of international

[31] Toronto Amicus Brief, para.13.
[32] UNICEF Amicus Brief, para.49.
[33] *Prosecutor v Hadžihasanović, Alagić and Kubura*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002, para.62.
[34] Ibid.

humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;

(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim [...];

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[35]

1. International Humanitarian Law

27. With respect to points i) and ii), it follows from the discussion above, where the requirements have been addressed exhaustively, that in this regard the test is satisfied.

2. Rule Protecting Important Values

28. Regarding point iii), all the conventions listed above deal with the protection of children and it has been shown that this is one of the fundamental guarantees articulated in Additional Protocol II. The Special Court Statute, just like the ICTR Statute before it, draws on Part II of Additional Protocol II entitled "Humane Treatment" and its fundamental guarantees, as well as Common Article 3 to the Geneva Conventions in specifying the crimes falling within its jurisdiction.[36] "All the fundamental guarantees share a similar character. In recognising them as fundamental, the international community set a benchmark for the minimum standards for the conduct of armed conflict."[37] Common Article 3 requires humane treatment and specifically addresses humiliating and degrading treatment. This includes the treatment of child soldiers in the course of their recruitment. Article 3(2) specifies further that the parties "should further endeavour to bring into force [...] all or part of the other provisions of the present convention", thus including the specific protection for children under the Geneva Conventions as stated above.[38]

29. Furthermore, the UN Security Council condemned as early as 1996 the "inhumane and

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[35] *Tadić* Jurisdiction Decision, para.94.

[36] UNICEF Amicus Brief, para.64.

[37] UNICEF Amicus Brief, para.65.

[38] Toronto Amicus Brief, paras 20 and 21.

abhorrent practice"[39] of recruiting, training and deploying children for combat. It follows that the protection of children is regarded as an important value. As can be verified in numerous reports of various human rights organizations, the practice of child recruitment bears the most atrocious consequences for the children.[40]

3. Individual Criminal Responsibility

30. Regarding point iv), the Defence refers to the Secretary-General's statement that "while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognised as a war crime entailing the individual criminal responsibility of the accused."[41] The ICTY Appeals Chamber upheld the legality of prosecuting violations of the laws and customs of war, including violations of Common Article 3 and the Additional Protocols in the *Tadić* case in 1995.[42] In creating the ICTR Statute, the Security Council explicitly recognized for the first time that serious violations of fundamental guarantees lead to individual criminal liability[43] and this was confirmed later on by decisions and judgments of the ICTR. In its Judgment in the *Akayesu* case, the ICTR Trial Chamber, relying on the *Tadić* test, confirmed that a breach of a rule protecting important values was a "serious violation" entailing criminal responsibility.[44] The Trial Chamber noted that Article 4 of the ICTR Statute was derived from Common Article 3 (containing fundamental prohibitions as a humanitarian minimum of protection for war victims) and Additional Protocol II, "which equally outlines 'Fundamental Guarantees'".[45] The Chamber concluded that "it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds".[46] Similarly, under the ICTY Statute adopted in 1993, a person acting in breach of Additional Protocol I to the Geneva Conventions may face criminal sanctions, and this has been confirmed in ICTY jurisprudence.[47]

31. The Committee on the Rights of the Child, the international monitoring body for the

[39] Security Council Resolution S/RES/1071 (1996), 30 August 1996 para. 9.
[40] This is true both at the stage of recruitment and at the time of release, and also for the remainder of the child's life.
[41] Fofana – Reply to the Prosecution Response to the Motion, para.19, referring to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915, para.17.
[42] *Tadić* Jurisdiction Decision, paras 86-93.
[43] Statute of the International Criminal Tribunal for Rwanda, S/RES/935 (1994), 1 July 1994 (as amended), Article 4.
[44] *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, paras 616-17.
[45] Ibid, para.616.
[46] Ibid.
[47] See *Tadić* Jurisdiction Decision.

implementation of the CRC, showed exactly this understanding while issuing its recommendations to Uganda in 1997.[48] The Committee recommended that: "awareness of the duty to fully respect the rules of international humanitarian law, in the spirit of article 38 of the Convention, *inter alia* with regard to children, should be made known to the parties to the armed conflict in the northern part of the State Party's territory, and that **violations of the rules of international humanitarian law entail responsibility being attributed to the perpetrators.**"[49]

32. In 1998 the Rome Statute for the International Criminal Court was adopted. It entered into force on 1 July 2002. Article 8 includes the crime of child recruitment in international armed conflict[50] and internal armed conflict[51], the elements of which are elaborated in the Elements of Crimes adopted in 2000[52]:

> Article 8
>
> War crimes
>
> 1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
>
> 2. For the purpose of this Statute, "war crimes" means:
>
> [...]
>
> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: [...]
>
> xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

33. The Defence, noting the concerns of the United States, argues that the Rome Statute

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[48] See UNICEF Amicus Brief, para. 34.

[49] Concluding observations of the Committee on the Rights of the Child: Uganda, 21 October 1997 upon submission of the Report in 1996, CRC/C/15/Add.80.

[50] Article 8(2)(b)(xxvi).

[51] Article 8(2)(e)(vii).

[52] UN Doc. PCNICC/2000/1/Add.2(2000). Elements of Article 8(2)(e)(vii) War crime of using, conscripting and enlisting children:

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group 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.

created new legislation.[53] This argument fails for the following reasons: first, the first draft of the Rome Statute was produced as early as 1994 referring generally to war crimes;[54] second, in the first session of the Preparatory Committee it was proposed that the ICC should have the power to prosecute serious violations of Common Article 3 and Additional Protocol II;[55] third, discussion continued during 1996 and 1997 when Germany proposed the inclusion of child recruitment under the age of fifteen as a crime "within the established framework of international law";[56] and finally, it was the German proposal to include "conscripting or enlisting children under the age of fifteen years [...]" that was accepted in the final draft of the Statute. With regard to the United States, an authoritative report of the proceedings of the Rome Conference states "the United States in particular took the view that [child recruitment] did not reflect international customary law, and was more a human rights provision than a criminal law provision. However, the majority felt strongly that the inclusion was justified by the near-universal acceptance of the norm, the violation of which warranted the most fundamental disapprobation."[57] The question whether or not the United States could be said to have persistently objected to the formation of the customary norm is irrelevant to its status as such a norm.[58] The discussion during the preparation of the Rome Statute focused on the codification and effective implementation of the existing customary norm rather than the formation of a new one.

34. Building on the principles set out in the earlier Conventions, the 1999 ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, provided:

> Article 1
>
> Each Member which ratifies this Convention shall take **immediate and effective measures** to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

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[53] Preliminary Motion, para.9.

[54] Report of the International Law Commission on the work of its forty-sixth session, UN General Assembly Doc. A/49/355, 1 September 1994. Summary of the Proceedings of the Preparatory Committee during the period 25 March-12 April 1996, Annex I: Definition of Crimes.

[55] UNICEF Amicus Brief, para.86.

[56] Working Group on Definitions and elements of Crimes, *Reference Paper on War Crimes submitted by Germany*, 12 December 1997.

[57] Herman Von Hebel and Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in R. Lee (ed), *The International Criminal Court: The Making of the Rome Statute*, chapter 2, pp. 117-18.

[58] Notably, the United States, despite not having ratified the CRC, has recognized the Convention as a codification of customary international law. See Toronto Amicus Brief para.24 and note 41.

> Article 2
>
> For the purposes of this Convention, **the term "child" shall apply to all persons under the age of 18.**
>
> Article 3
>
> For the purposes of this Convention, the term "the worst forms of child labour" comprises:
>
> (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, **including forced or compulsory recruitment of children for use in armed conflict.**

It is clear that by the time Article 2 of this Convention was formulated, the debate had moved on from the question whether the recruitment of children under the age of 15 was prohibited or indeed criminalized, and the focus had shifted to the next step in the development of international law, namely the raising of the standard to include all children under the age of 18. This led finally to the wording of Article 4 of the Optional Protocol II to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.[59]

35. The CRC Optional Protocol II was signed on 25 May 2000 and came into force on 12 February 2002. It has 115 signatories and has been ratified by 70 states. The relevant Article for our purposes is Article 4 which states:

> 1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons **under the age** of 18 **years.**
>
> 2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to **prohibit and criminalize such practices.**

36. The Defence argues that the first mention of the criminalization of child recruitment occurs in Article 4(2) of the CRC Optional Protocol II.[60] Contrary to this argument, the Article in fact demonstrates that the aim at this stage was to raise the standard of the

[59] UN Doc. A/54/RES/263, 25 May 2000, entered into force 12 February 2002 ("CRC Optional Protocol II").
[60] Preliminary Motion, para.7.

prohibition of child recruitment from age 15 to 18, proceeding from the assumption that the conduct was already criminalized at the time in question.

37. The Appeals Chamber in *Prosecutor v. Dusko Tadić*, making reference to the Nuremberg Tribunal, outlined the following factors establishing individual criminal responsibility under international law:

> the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals.[61]

The Appeals Chamber in *Tadić* went on to state that where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

> [c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[62]

38. A norm need not be expressly stated in an international convention for it to crystallize as a crime under customary international law. What, indeed, would be the meaning of a customary rule if it only became applicable upon its incorporation into an international instrument such as the Rome Treaty? Furthermore, it is not necessary for the *individual criminal responsibility* of the accused to be explicitly stated in a convention for the provisions of the convention to entail individual criminal responsbility under customary international law.[63] As Judge Meron in his capacity as professor has pointed out, "it has not been seriously questioned that some acts of individuals that are prohibited by international law constitute criminal offences, even when there is no accompanying provision for the establishment of the jurisdiction of particular courts or scale of penalties".[64]

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[61] *Tadić* Jurisdiction Decision, para.128.
[62] The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, (1950) at 447.
[63] See Prosecutor v. Tadić, Case No IT-94-1, Decision on Defence Motion on Jurisdiction, 10 August 1995, para. 70.
[64] Theodor Meron, *International Criminalization of Internal Atrocities*, (1995) 89 AJIL 554, p. 562.

39. The prohibition of child recruitment constitutes a fundamental guarantee and although it is not enumerated in the ICTR and ICTY Statutes, it shares the same character and is of the same gravity as the violations that are explicitly listed in those Statutes. The fact that the ICTY and ICTR have prosecuted violations of Additional Protocol II provides further evidence of the criminality of child recruitment before 1996.

40. The criminal law principle of specificity provides that criminal rules must detail specifically both the objective elements of the crime and the requisite *mens rea* with the aim of ensuring that all those who may fall under the prohibitions of the law know in advance precisely which behaviour is allowed and which conduct is instead proscribed.[65] Both the Elements of Crimes[66] formulated in connection with the Rome Statute and the legislation of a large proportion of the world community specified the elements of the crime.

41. Article 38 of the CRC states that States Parties have to take "all feasible measures" to ensure that children under 15 do not take part in hostilities and Article 4 urges them to "undertake all appropriate legislative [...] measures" for the implementation of the CRC. As all "feasible measures" and "appropriate legislation" are at the disposal of states to prevent child recruitment, it would seem that these also include criminal sanctions as measures of enforcement. As it has aptly been stated: "Words on paper cannot save children in peril."[67]

42. In the instant case, further support for the finding that the *nullum crimen* principle has not been breached is found in the national legislation of states which includes criminal sanctions as a measure of enforcement.

43. The Defence submitted during the oral hearing that there is not a single country in the world that has criminalized the practice of recruiting child soldiers and that child recruitment was not only not a war crime but it was doubtful whether the provisions of

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[65] Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003), p. 145.

[66] UN Doc. PCNICC/2000/1/Add.2(2000).

[67] During the 57th session of the Commission of Human Rights, The Special Representative of the Secretary General, Mr. Olara A. Otunnu addressed the Assembly with regard to the Graça Machel Report. He said: "Over the past 50 years, the nations of the world have developed and ratified an impressive series of international human rights and humanitarian instruments. [...] However, the value of these provisions is limited to the extent to which they are applied." *Rights of the Child, Children in Armed Conflict*, Interim Report of the Special Representative of the Secretary-General, Mr. Olara A. Otunnu, submitted to the Economic and Social Council pursuant to General Assembly Resolution 52/107, E/CN.4/1998/119, 12 March 1998, paras 14-15.

the CRC protected child soldiers.[68] A simple reading of Article 38 of the CRC disposes of the latter argument. Concerning the former argument, it is clearly wrong. An abundance of states criminalized child recruitment in the aftermath of the Rome Statute, as for example Australia. In response to its ratification of the Rome Statute, Australia passed the *International Criminal Court (Consequential Amendments) Act*[69]. Its purpose was to make the offences in the Rome Statute offences under Commonwealth law. Section 268.68(1) creates the offence of using, conscripting and enlisting children in the course of an international armed conflict and sets out the elements of the crime and the applicable terms of imprisonment. Section 268.88 contains similar provisions relating to conflict that is not an international armed conflict.

44. By 2001, and in most cases prior to the Rome Statute, 108 states explicitly prohibited child recruitment, one example dating back to 1902,[70] and a further 15 states that do not have specific legislation did not show any indication of using child soldiers.[71] The list of states in the 2001 Child Soldiers Global Report[72] clearly shows that states with quite different legal systems - civil law, common law, Islamic law – share the same view on the topic.

45. It is sufficient to mention a few examples of national legislation criminalizing child recruitment prior to 1996 in order to further demonstrate that the *nullum crimen* principle is upheld. As set out in the UNICEF Amicus Brief[73], Ireland's Geneva Convention Act provides that any "minor breach" of the Geneva conventions [...], as well as any "contravention" of Additional Protocol II, are punishable offences.[74] The operative Code of Military justice of Argentina states that breaches of treaty provisions providing for special protection of children are war crimes.[75] Norway's Military Penal Code states that [...] anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in [...] the Geneva

[68] The Defence asserted that "the offence does not appear in the criminal calendar of any national state, there is not a single country in the world that makes this a crime". See Transcript of 5-6 November 2003, paras 284 and 338 (referring to G. Goodwin-Gill and I. Cohen, *Child Soldiers* (Oxford University Press, 1994).

[69] *International Criminal Court (Consequential Amendments) Act*, 2002 No. 42 (Cth).

[70] Norway, Military Penal Code as amended (1902), para.108.

[71] See Child Soldiers Global Report 2001, published by the coalition to stop the Use of Child Soldiers. Available at www.child-soldiers.org and annexed to the UNICEF Amicus Brief.

[72] Ibid.

[73] UNICEF Amicus Brief, para.47.

[74] Ireland,*Geneva Conventions Act* as amended (1962), Section 4(1) and (4).

[75] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new article 876(4) in *the Code of Military Justice*, as amended (1951).

Conventions [...] [and in] the two additional protocols to these Conventions [...] is liable to imprisonment.[76]

46. More specifically in relation to the principle *nullum crimen sine poena*, before 1996 three different approaches by states to the issue of punishment of child recruitment under national law can be distinguished.

47. First, as already described, certain states from various legal systems have criminalized the recruitment of children under 15 in their national legislation. Second, the vast majority of states lay down the prohibition of child recruitment in military law. However, sanctions can be found in the provisions of criminal law as for example in Austria[77] and Germany[78] or in administrative legislation, criminalizing any breaches of law by civil servants. Examples of the latter include Afghanistan[79] and Turkey.[80] Legislation of the third group of states simply makes it impossible for an individual to recruit children, as the military administration imposes strict controls through an obligatory cadet schooling, as for example in England,[81] Mauritania[82] and Switzerland[83]. In these states, provisions for punishment are unnecessary as it is impossible for the crime to be committed.

48. Even though a punishment is not prescribed, individual criminal responsibility may

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[76] Norway, *Military Penal code* as amended (1902), para.108.

[77] Austrian legislation sets the minimum age for recruitment at 18 in *Wehrgesetz 2001*, BGBl. I Nr. 146/2001 as amended in BGBl. I Nr. 137/2003 and provides for criminal sanctions in *Strafgesetzbuch*, BGBl. Nr. 60/1974 in Articles 27 and 302.

[78] German legislation sets the minimum age for compulsory recruitment at 18 in *Wehrpflichtgesetz*, 15 December 1995 (as amended), para.1 and provides for a sanction in *Wehrstrafgesetz*, 24 May 1974, para. 32.

[79] *Decree S. No*[79] 20, Article 1, states that "The Afghan citizen volunteer to join the National Army should [...] be aged between 22-28 years." Art. 110 *Penal Law for Crimes of Civil Servants and Crimes against Public Welfare and Security*, 1976 states that "An official :who deliberately registers a minor as an adult or vice-versa on his nationality card, court records or similar documents shall be punishable [...]"

[80] Article 2 of the *The Military Service Law* (Amended 20 November 1935 – 2248/Article 1) states that "The military age shall be according to the age of every male as recorded in his main civil registration [...] starting on the first day of January in the year in which he becomes twenty [...]. The *Turkish Penal Code* (Amended 12 June 1979 – 2248/Article19) states in Article 240 that "a civil servant who has abused his/her office for any reason whatsoever other than the circumstances specified in the law shall be imprisoned for one year to three years [...] He/she shall also be disqualified from the civil service temporarily or permanently."

[81] According to the *Education (School Leaving Date) Order* 1997, made under the *Education Act 1996*, section 8(4), a child may not legally leave school until the last Friday in June of the school year during which they reach the age 16. According to *HM Armed forces Enquiry Questionnaire*, AFCO Form 2, January 2000, Armed forces do not recruit those under the age of 16 and the recruitment process, including selection, medical examination and obtaining parental consent may only begin at 15 years and nine months. Rachel Harvey, *Child soldiers in the UK: Analysis of recruitment and deployment practices of under18s and the CRC* (June 2002), p13, note 73.

[82] *Loi No. 62 132 sur le recrutement de l'armée*. Articles 7 and 9, 29 June 1962.

[83] Loi fédérale sur l'armée et l'administration militaire, Article 131, 3 February 1995.

follow.[84] Professor Cassese has stated that:

> It is common knowledge that in many States, particularly in those of civil law tradition, it is considered necessary to lay down in law a tariff relating to sentences for each crime [...] This principle is not applicable at the international level, where these tariffs do not exist. Indeed States have not yet agreed upon a scale of penalties, due to widely differing views about the gravity of the various crimes, the seriousness of guilt for each criminal offence and the consequent harshness of punishment. It follows that courts enjoy much greater judicial discretion in punishing persons found guilty of international crimes.[85]

However, Article 24 of the ICTY Statute provides some guidance in the matter as it refers to the general practice regarding prison sentences. The point of reference is thus not a concrete tariff but quite generally the practice of prison sentences.[86] The penalities foreseen in national legislation specify prison sentences for breaching the prohibition on the recruitment of children under the age of fifteen.

49. When considering the formation of customary international law, "the number of states taking part in a practice is a more important criterion [...] than the duration of the practice."[87] It should further be noted that "the number of states needed to create a rule of customary law varies according to the amount of practice which conflicts with the rule and that [even] a practice followed by a very small number of states can create a rule of customary law if there is no practice which conflicts with the rule."[88]

50. Customary law, as its name indicates, derives from custom. Custom takes time to develop. It is thus impossible and even contrary to the concept of customary law to determine a given event, day or date upon which it can be stated with certainty that a norm has crystallised.[89] One can nevertheless say that during a certain period the conscience of leaders and populations started to note a given problem. In the case of recruiting child soldiers this happened during the mid-1980s. One can further

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[84] *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on Defence Motion on Jurisdiction, 10 August 1995, para. 70.
[85] Antonio Cassese, *International Criminal Law*, (Oxford University Press, 2003), p. 157.
[86] Daniel Augenstein, Ethnische Saüberungen in ehemaligen Jugoslawien - Rechtliche Aspekte, Seminar "Zwangsumsiedlungen, Deportationen und "ethische Saüberungen" im 20. Jahrhundert", Sommersemester 1997, p.18.
[87] Michael Akehurst, *Custom As a Source of International Law*, The British Year Book of International Law 1974-1975 (Oxford at the Clarendon Press, 1977), p.16.
[88] Ibid, p.18.
[89] Contrary to the Defence Reply, para.13.

determine a period where customary law begins to develop, which in the current case began with the acceptance of key international instruments between 1990 and 1994. Finally, one can determine the period during which the majority of states criminalized the prohibited behaviour, which in this case, as demonstrated, was the period between 1994 and 1996. It took a further six years for the recruitment of children between the ages of 15 and 18 to be included in treaty law as individually punishable behaviour. The development process concerning the recruitment of child soldiers, taking into account the definition of children as persons under the age of 18, culminated in the codification of the matter in the CRC Optional Protocol II.

51. The overwhelming majority of states, as shown above, did not practise recruitment of children under 15 according to their national laws and many had, whether through criminal or administrative law, criminalized such behaviour prior to 1996. The fact that child recruitment still occurs and is thus illegally practised does not detract from the validity of the customary norm. It cannot be said that there is a contrary practice with a corresponding opinio iuris as states clearly consider themselves to be under a legal obligation not to practise child recruitment.

4. Good Faith

52. The rejection of the use of child soldiers by the international community was widespread by 1994. In addition, by the time of the 1996 Graça Machel Report, it was no longer possible to claim to be acting in good faith while recruiting child soldiers (contrary to the suggestion of the Defence during the oral hearing).[90] Specifically concerning Sierra Leone, the Government acknowledged in its 1996 Report to the Committee of the Rights of the Child that there was no minimum age for conscripting into armed forces "except the provision in the Geneva Convention that children below the age of 15 years should not be conscripted into the army."[91] This shows that the Government of Sierra Leone was well aware already in 1996 that children below the age of 15 should not be recruited. Citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law.[92]

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[90] Counsel stated: "I would not say please do, but you can do it, it is not a crime under international law. As long as they [are] not members of warring factions you can do it...". See Transcript of 5-6 November 2003, para.384.
[91] The Initial Report of States Parties: Sierra Leone 1996 CRC/C/3/Add.43 para.28.
[92] Toronto Amicus Brief, para.69.

53. Child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictments. As set out above, the principle of legality and the principle of specificity are both upheld.

III. DISPOSITION

54. For all the above-mentioned reasons the Preliminary Motion is dismissed.

Done at Freetown this thirty-first day of May 2004

Justice Ayoola
Presiding

Justice King

Justice Winter

[Seal of the Special Court for Sierra Leone]

Justice King appends a Separate Opinion to this Decision.

Justice Robertson appends a Dissenting Opinion to this Decision.

Hybrid International Courts...

The Special Court for Sierra Leone

Whose Justice Is It?

Professor David M. Crane
Syracuse University
College of Law

Hybrid International Courts

What we will cover today…

A New and Bold Experiment in International Criminal Justice!

--The Conflict
--The Request
--The Response

The Special Court Itself

--The Mandate
--Organization

Lessons Learned

--Narrow Mandate
--Location
--Outreach is the key to success
--"Of the UN not in the UN"
--A reconciliation commission and a tribunal can exist together!
--Challenges…indifference…state support

Are we delivering the justice the victims seek?

Hybrid International Courts

Concluding thoughts…

Hybrids work.

Their mandates can be shaped and molded to meet the political, cultural, and legal needs of the region.

They are efficient and effective if they have a proper mandate, are not in the UN system, and have international support.

They are flexible and are perfect compliments to the ICC.

TRUTH +JUSTICE=SUSTAINABLE PEACE!

Hybrid International Courts

A Bold New Experiment in International Criminal Justice…

A response to a horrific conflict…

Caused by a joint criminal enterprise backed by warlords, politicians, and international criminals for their own personal criminal gain.
Main causation—A ten year geopolitical plan to control all of West Africa.
Cornerstone—Natural resources…diamonds, gold, timber
Main backers—Libya, Burkina Faso, Liberia
Main combatants—The RUF, CDF, AFRC
The results—Two nations destroyed—Sierra Leone, Liberia
1.2 million West Africans murdered, raped, maimed and mutilated!!!

The Request… A letter from the President of Sierra Leone to the UN SG—2000

The Response—International mandate (UNSC Res 1315 Aug 2000) and a bilateral treaty between the United Nations and Sierra Leone creating the world's first hybrid international war crimes tribunal.

Hybrid International Courts

The Special Court

Mandate—Prosecute those who bore ***the greatest responsibility*** for war crimes and crimes against humanity…

Organization…

The Chambers—Hybrid

The Registry

The Prosecutor

The Principle Defender

Hybrid International Courts

Lessons Learned…

A narrow mandate is a key to success!

Focused, efficient, effective, realistic and politically acceptable time frame to accomplish the mandate.

A hybrid international tribunal is inherently flexible!

Place the tribunal at the scene of the crimes if possible.

Justice must be seen taking place for it to be understood!

Outreach is a key to success.

A tribunal is for and about the victims, their families, the region!

The UN is important only to a limited degree.

Truth (a TRC) plus Justice (a Tribunal) equals a sustainable peace!

Challenges: Indifference and state support

Hybrid International Courts

Key question…

Is the justice we seek the justice they want?

The space ship phenomenon

Balancing international norms with cultural perspectives

Hybrid International Courts

Concluding thoughts…

Hybrids work.

Their mandates can be shaped and molded to meet the political, cultural, and legal needs of the region.

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They are flexible and are perfect compliments to the ICC.

TRUTH +JUSTICE=SUSTAINABLE PEACE!

SEPARATE OPINION OF JUSTICE GELAGA KING

1. I have had the privilege of reading the Decisions of both Justice Winter and Justice Robertson. While I agree with the reasoning of Justice Winter I would like to add a few words of my own.

2. The Defence in requesting this Court to declare that it has no jurisdiction to try the accused on Count 8 on the indictment submits that "the crime of child recruitment was not part of customary international law at the times relevant to the indictment."[1] Nowhere in the Motion has the Defence explained what it means by the phrase "at the times relevant to the indictment." The phrase itself is vague, imprecise and clearly lacks specificity. The obligation is on the applicant i.e. the Defence, who seeks the declaration, to detail and particularise in precise, unequivocal and unambiguous terms what exactly the Defence is requesting the Court to declare.

3. That obligation, in my judgement, must be discharged by the Defence if it is to have the relief sought, the more so as in this case where there is a serious controversy between the parties as to when the recruitment of children under the age of 15 years was criminalised. The Defence has failed to discharge that fundamental and unavoidable duty and obligation. Because of this failure and for this reason alone I am unable to grant the declaration requested. In coming to this conclusion I am not oblivious of the provision in Article 1 of the Statute of the Special Court that the Court shall "have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leone law committed in the territory of Sierra Leone since 30 November 1996."

4. Let me take this opportunity to refer to the regional treaty of the African Charter on the Rights And Welfare of the Child promulgated in 1990.[2] Sierra Leone is a State Party to that treaty. It is most instructive to refer to two Articles of that treaty which I find pre-eminently relevant in

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[1] Defence Preliminary Motion, para. 3.
[2] OAU DOC.Cab/Leg/24.9/49 (1990).

the instant application. Their provisions speak clearly for themselves and need no construction or interpretation.

5. I refer first to Article 22: Armed Conflicts:

> 1. States Parties to this Charter shall undertake to respect and ensure respect of international humanitarian law applicable in armed conflicts which affect the child.
>
> 2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.
>
> 3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

6. It is perhaps, even more instructive to refer to the other Article, Article 2 which deals with the definition of a child. It states:

> Article 2: Definition of a child for the purposes of this charter, a child means every human being below the age of 18 years.

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

> the baggage train, as Shakespeare's *Henry V* reminds us, is not always a place of safety for children, and the Little Drummer Boy may be as much at risk as the 'powder monkey' on the *Les Miserables* barricades.[3]

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

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[3] Para 8 of Justice Robertson's Dissenting Opinion.

7412

Done at Freetown this thirty-first day of May 2004

Justice George Gelaga King

[Seal of the Special Court for Sierra Leone]

DISSENTING OPINION OF JUSTICE ROBERTSON

1. The Applicant, Samuel Hinga Norman, is charged together with Moinina Fofana and Allieu Kondewa on an Indictment[1] containing eight counts, the last of which alleges his command responsibility for a serious violation of international humanitarian law, namely,

> At all times relevant to this indictment... Enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

He had been initially charged with "conscripting or enlisting" children[2], but the conscription allegation – which implies some use of force – has been abandoned. The temporal jurisdiction of this court to prosecute international crimes begins on 30th November 1996. The charge does not specify, as it should, the actual period after that at which the enlistment offence or its more serious alternative (*using* children in combat) is alleged to have been committed, other than by reference to "times relevant to this indictment". The duty to provide particulars of the charge rests on the prosecution, and the defence cannot be criticized for seeking a declaration that "the crime of child recruitment was not part of customary international law at the time relevant to the indictment".

2. The crime of "enlisting children under the age of fifteen years into armed forces or groups", which I shall call for short "child enlistment" has never been prosecuted before in an international court nor, so far as I am aware, has it been the subject of prosecution under municipal law, although many states now have legislation which would permit such a charge. The Applicant argues that "child enlistment" is not a

[1] *Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-2004-14-I, Indictment, 4 February 2004.
[2] *Prosecutor v Samuel Hinga Norman*, Case No. SCSL-2004-08-I, Indictment, 7 March 2003.

war crime; alternatively, that it became such only on the entry into force in mid-2002 of two important treaties - the *Rome Statute* which established the International Criminal Court ("ICC") and the *Optional Protocol to the Convention on the Rights of Child*. The Prosecution declines to pinpoint a date on which the offence crystallized in international criminal law: it argues that such point was in all events prior to 30th November 1996, and upon the correctness of that contention the fate of this application turns.

The Statute of the Special Court

3 That this Preliminary Motion raises a substantial and difficult issue is plain from our starting point, which must be the Statute of this Court as explicated by the Report of the UN Secretary-General[3] when laying it before the Security Council. Article 2 endows the Special Court with jurisdiction to punish crimes against humanity and Article 3 permits prosecution of those alleged to have committed or ordered serious violations of Common Article 3 of the Geneva Conventions and the Additional Protocol II (i.e. breaches of rules that restrain both internal and international conflicts). Article 4 reads:

> OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW
>
> 4. The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law: ...
>
> c. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

[3] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, paras 15-18 and Enclosure.

This formula is in almost identical language to the prohibition in Article 8 of the Rome Treaty establishing the International Criminal Court. This Treaty was signed by 122 nations on 17th July 1998, and it came into force, after 60 of them ratified it, in July 2002. Article 8 makes it an offence, *inter alia*, to commit acts of

> Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.[4]

4. The first point to note is that Article 4(c) as eventually adopted by the Security Council is not the Article 4(c) offence proposed by the Secretary-General. His original draft, in his Report presented to the Security Council in October 2000, would have endowed the court with jurisdiction over:

> c. Abduction and forced recruitment of children under the age of fifteen years into armed forces or groups for the purpose of using them to participate actively in hostilities.[5]

This is a much more precise and certain definition of a narrower offence. It made the *actus reus* turn on the use of physical force or threats in order to recruit children and the *mens rea* element required an intention to involve them in potentially lethal operations. This was in my view a war crime by November 1996: indeed, it would have amounted to a most serious breach of Common Article 3 of the Geneva Convention. Why did the Secretary-General prefer this formulation to the wider definition in the Rome Statute? For the very good reason that he was unsure as to whether the Rome Statute formulation reflected the definition of a war crime

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[4] Rome Statute, UN Doc. A/CONF.183/9, 17 July 1998, in force 17 July 2002., Articles 8(b)(xxvi) and 8(e)(vii).

[5] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, para. 17.

either by 1996 or even by the time of his Report (October 2000). As that Report explains,[6]

> 17. [...] in 1998 the Statute of the International Criminal Court criminalized the prohibition and qualified it as a war crime. But while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognised as a war crime entailing the individual responsibility of the accused.
>
> 18. Owing to the doubtful customary nature of the ICC's statutory crime which criminalizes the conscription or enlistment of children under the age of fifteen, whether forced or "voluntary", the crime which is included in Article 4(c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of the crime as "conscripting" or "enlisting" connotes and administrative act of putting ones name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are:
>
> a. Abduction, which in the case of the children of Sierra Leone was the original crime and is in itself a crime under Article 3 of the Geneva Conventions;
>
> b. Forced recruitment in the most general sense - administrative formalities, obviously, notwithstanding; and
>
> c. Transformation of the child into, and its use as, among other degrading uses, a "child combatant".

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[6] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, paras 17-18.

5. The Secretary-General's Report accurately identifies the conduct which by November 1996 had become the war crime of forcibly recruiting children under fifteen for use in combat. But notwithstanding the Secretary-General's reasoned position, the offence defined in 4(c) was quite crucially changed, to the different crime of *conscripting* or *enlisting* children, or *using them in hostilities*. This crime of child recruitment, as it was finally formulated in 4(c) of the Statute, may be committed in three quite different ways:

a. by *conscripting* children (which implies compulsion, albeit in some cases through force of law),

b. by *enlisting* them (which merely means accepting and enrolling them when they volunteer), or

c. by *using* them to participate actively in hostilities (i.e. taking the more serious step, having conscripted or enlisted them, of putting their lives directly at risk in combat).

These are, in effect, three different crimes, and are treated as such by some states which have implemented the Rome Treaty in their domestic law (see the example of Australia, paragraph 41 below). Since b) makes it a crime merely to enroll a child who volunteers for military service, it extends liability in a considerable and unprecedented way. The Prosecution would need only to prove that the defendant knew that the person or persons he enlisted in an armed force was under 15 at the time. The change came as a result of an intervention by the President of the Security Council, Mr Sergey Lavrov, in December 2000. He "modified" Article 4(c) "so as to conform to the statement of the law existing in 1996 and as currently accepted by the international community".[7] He provided no actual "statement of

[7] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, S/2000/1234, 22 December 2000, para. 3.

the law existing in 1996", nor any authority for the proposition that the law in 1996 criminalised individuals who enlisted child volunteers, as distinct from forcibly conscripting them or using them to participate actively in hostilities – i.e. directing them to engage in combat.

6. It might strike some as odd that the state of international law in 1996 in respect to criminalisation of child enlistment was doubtful to the UN Secretary-General in October 2000 but was very clear to the President of the Security Council only two months later. If it was not clear to the Secretary-General and his legal advisers that international law had by 1996 criminalized the enlistment of child soldiers, could it really have been any clearer to Chief Hinga Norman or any other defendant at that time, embattled in Sierra Leone? If international criminal law shares the basic principle of common law crime, namely that punishment must not be inflicted for conduct that was not clearly criminal at the time it was committed, then the Prosecution has an obvious difficulty in proceeding with an "enlistment" charge that does not specifically allege the use of some kind of force or pressure. If international criminal law adopts the common law principle that in cases of real doubt as to the existence or definition of a criminal offence, the benefit of that doubt must be given to the defendant, then this would appear to be such a case.

"Child Soldiers"

7. It should go without saying that the question of whether and when particular conduct becomes criminal must be carefully separated from the question of whether it *should* be or have been criminalized. This Court has been made aware of literature detailing the appalling impact of war on children in Africa, and especially in Sierra Leone where more than 10,000 children under the age of fifteen are said to have served in the armies of the main warring factions. Many were killed or wounded and others were forced or induced to kill and maim - their victims including members of their own community and even their own families. The

consequences for these children are reportedly traumatic - they continue to suffer reprisals from communities they were ordered to attack, and exhibit behavioural problems and psychological difficulties related to the horrors in which they have been involved by the direction of adults in positions of command responsibility.[8] Adults in such positions could be charged with crimes of abduction or conscription, or using children in combat, but that does not exhaust the ways in which children may be induced to risk their lives in war. As Graça Machel points out, "Children become soldiers in a variety of ways. Some are conscripted, others press-ganged or kidnapped, still others join armed groups because they are convinced it is a way to protect their families... Children have been dragooned into government-aligned paramilitary groups, militia or civil defence forces".[9]

8. I accept that "voluntary" enlistment is not as benign as it sounds. Children who "volunteer" may do so from poverty (so as to obtain army pay) or out of fear - to obtain some protection in a raging conflict. They may do so as the result of psychological or ideological inducement or indoctrination to fight for a particular cult or cause, or to achieve posthumous glory as a "martyr". Any organization which affords the opportunity to wield an AK47 will have a certain allure to the young. The result will be to put at serious risk a life that has scarcely begun to be lived. It follows that although *forcible* recruitment of children for actual fighting remains among the worst of war crimes, the lesser "enlistment" offence of accepting child volunteers into armies nonetheless can have equally serious consequences for them, if they are put at risk in combat.

9. There may be a distinction in this respect: forcible recruitment is always wrong, but enlistment of child volunteers might be excused if they are accepted into the force only for non-combatant tasks, behind the front-lines. Indeed, at the preparatory

[8] See e.g. Human Rights Watch, *Getting Away with Murder, Mutilation, Rape: New Testimony from Sierra Leone*, July 1999; US Department of State, *Country Reports on Human Rights Practices*, 1999: Sierra Leone, 25 February 2000; Amnesty International, *Sierra Leone: Childhood - A Casualty of Conflict*, 31 August 2000.
[9] Graça Machel: *The Impact of War on Children*, (UNICEF, 2001), pp. 8-9.

conference before the Rome Treaty, it was agreed that the crime of using children in hostilities would "not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use as domestic staff" [10]. This distinction is somewhat dubious - the baggage train, as Shakespeare's *Henry V* reminds us, is not always a place of safety for children[11]. Besides which, children enlisted for duties "unrelated to hostilities" may be all too willing to help on the front-line, dying on the barricades like the "powder monkey" Gavroche in Victor Hugo's *Les Misérables*. The enlistment of children of fourteen years and below to kill and risk being killed in conflicts not of their making was abhorrent to all reasonable persons in 1996 and is abhorrent to them today. But abhorrence alone does not make that conduct a crime in international law.

10. So when did child enlistment - as distinct from forcible recruitment of children or subsequently using them in combat - become a war crime? That depends, as we shall see, first on identifying a stage - or at least a process - by which prohibition of child enlistment became a rule of international law binding only on states (i.e. on their governments) and with which they were meant to comply (although nothing could be done if they declined). Then, at the second stage, on further identifying a subsequent turning point at which that rule - a so-called "norm" of international law - metamorphosed into a *criminal* law for the breach of which individuals might be punished, if convicted by international courts. Before identifying and applying the appropriate tests - and the second stage test is contentious - let me explain why this second-stage process is necessary, even - indeed, especially - in relation to conduct which is generally viewed as abhorrent.

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[10] Report of ICC Preparatory Committee, A/CONF/183/2/ Add.1, 14 April 1998.

[11] In Act 4, Scene 7, the French attack on the boys in the baggage train was "expressly against the law of arms", according to Captain Fluellan. See Theodor Meron, "Shakespeare's Henry V and the Law of War", in *War Crimes Law Comes of Age*, (Oxford 1998), p52.

No Punishment Without Law

11. In a democracy it is easy to tell when certain conduct becomes a crime: parliament passes a law against it and that law comes into force on a date identified in the Statute itself. In semi or non-democratic states, the ruler or ruling body will usually issue a decree with such a date, or time that date from the promulgation or gazettal of the new crime. As well, in common law countries, there is usually a customary body of judge-made criminal law, capable of development and refinement in later times but not of creation anew. What restrains the judges from creating new crimes is the overriding principle of legality, expressed invariably in Latin, *nullem crimen sine lege* - conduct, however awful, is not unlawful unless there is a criminal law against it in force at the time it was committed. As Article 15 of the International Covenant on Civil and Political Rights[12] puts it,

> No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

12. It must be acknowledged that like most absolute principles, *nullem crimen* can be highly inconvenient - especially in relation to conduct which is abhorrent or grotesque, but which parliament has not thought to legislate against. Every law student can point to cases where judges have been tempted to circumvent the *nullem crimen* principle to criminalise conduct which they regard as seriously anti-social or immoral, but which had not been outlawed by legislation or by established categories of common-law crimes. This temptation must be firmly resisted by international law judges, with no legislature to correct or improve upon them and with a subject - international criminal law - which came into effective operation as

[12] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6546 (1966) (entered into force 23 March 1976).

recently as the judgement at Nuremberg in 1946. Here, the Prosecution asserts with some insouciance that

> the principle of nullem crimen sine lege is not in any case applied rigidly, particularly where the acts in question are universally regarded as abhorrent and deeply shock the conscience of humanity.[13]

On the contrary, it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime. *Nullem crimen* may not be a household phrase, but it serves as some protection against the lynch mob.

13. The principle of legality, sometimes expressed as the rule against retroactivity, requires that the defendant must at the time of committing the acts alleged to amount to a crime have been in a position to know, or at least readily to establish, that those acts may entail penal consequences. Ignorance of the law is no defence, so long as that law is capable of reasonable ascertainment. The fact that his conduct would shock or even appall decent people is not enough to make it unlawful in the absence of a prohibition. The requisite clarity will not necessarily be found in there having been previous successful prosecutions in respect of similar conduct, since there has to be a first prosecution for every crime and we are in the early stages of international criminal law enforcement. Nor is it necessary, at the time of commission, for there to be in existence an international court with the power to punish it, or any foresight that such a court will necessarily be established. In every case, the question is whether the defendant, at the time of conduct which was not clearly outlawed by national law in the place of its commission, could have ascertained through competent legal advice that it was contrary to international criminal law. That could certainly be said on 1 July 2002, the date of ratification of

[13] Prosecution Response, para. 17.

the ICC Statute, which in terms makes it an offence to commit acts of "*conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities*". That is too late for any indictment in this court, and the applicant puts the Prosecution to proof that the offence thus defined came into existence in or by 1996.

14. The Prosecution relies on some academic commentaries which unacceptably weaken the *nulla crimen* principle, for example by suggesting that it does not apply with full force to abhorrent conduct. On the contrary, as I have sought to explain in paragraphs 10-11 above, it is a fundamental principle of criminal law. There are some European Court of Human Rights decisions which suggest that the rule is primarily a safe-guard against arbitrary conduct by government.[14] But it is much more than that. It is the very basis of the rule of law, because it impels governments (in the case of national law) and the international community (in the case of international criminal law) to take positive action against abhorrent behaviour, or else that behaviour will go unpunished. It thus provides the rationale for legislation and for treaties and Conventions – i.e. for a system of justice rather than an administrative elimination of wrongdoers by command of those in power. It is the reason why we are ruled by law and not by police.

15. Professor Cassese explains in his textbook on *International Criminal Law* how the *nulla crimen* doctrine of strict legality, originating in Article 39 of Magna Carta has replaced the "substantive justice" doctrine initially adopted by international law.[15] He poses the question:

> A logical and necessary corollary of the doctrine of strict legality is that criminal rules may not cover acts or conduct undertaken prior to the adoption of such rules. Otherwise the executive power, or the judiciary,

[14] E.g. *SW v UK*, ECHR, Series A, vol. 335-B, 22 November 1995.
[15] A. Cassese, *International Criminal Law*, (Oxford, 2003), pp. 142-43.

> could arbitrarily punish persons for actions that were legally allowed when they were carried out. By contrast, the ineluctable corollary of the doctrine of substantive justice is that, for the purpose of defending society against new and unexpected forms of criminality, one may go so far as to prosecute and punish conduct that was legal when taken. These two approaches lead to contrary conclusion. The question is: which approach has been adopted in international law?[16]

The question must be answered firmly in favour of the doctrine of strict legality. A general rule prohibiting the retroactive application of criminal law has evolved after being laid down repeatedly in human rights treaties: see for example Article 7 of the European Convention of Human Rights;[17] Article 15 of the UN Covenant on Civil and Political Rights;[18] Article 9 of the Inter-American Convention on Human Rights[19] and Article 7(2) of the African Charter of Human and People's Rights.[20] It is to be found in the Geneva Conventions (see Article 99 of Convention III[21], Article 67 of Convention IV[22] and Article 75(4)(c) of the first Protocol,[23] all relating to criminal trials. It is set out in Article 22(1) of the Statute of the ICC.[24] In the case of the Special Court for Sierra Leone, it was spelled out very plainly in paragraph 12 of the Secretary-General's Report:

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[16] Ibid, p.147.

[17] *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222.

[18] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6546 (1966) (entered into force 23 March 1976).

[19] *Inter-American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System 25, Doc. No. OEA/Ser.L.V./II.82 doc. 6 rev. 1 (1992).

[20] *African Charter on Human and Peoples' Rights*, adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5.

[21] Geneva Convention (III) Relative to the Treatment of the Prisoners of War, 12 August 1949, 75 U.N.T.S. 135 (1950).

[22] *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS (1950).

[23] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 1125 U.N.T.S. 609 (entered into force 7 December 1978) ("Additional Protocol I").

[24] *Rome Statute of the International Criminal Court*, July 17, 1998, UN Doc. A/CONF.183/9* (1998).

> In recognition of the principle of legality, in particular nullem crimen sine lege, and the prohibition on retroactive criminal legislation, the international crimes enumerated are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.

16. Professor Cassese concludes that "the principle of non-retroactivity of criminal rules is now solidly embodied in international law. It follows that courts may only apply substantive criminal rules that existed at the time of commission of the alleged crime".[25] There is room for judicial development, but he lays down three rules for such development:

    1. It must be in keeping with the rules of criminal liability defining the essence of the offence.

    2. It must conform with the fundamental principles of international criminal law.

    3. The particular development must be reasonably foreseeable by the defendant.[26]

17. This tripartite test is designed define the limits of judicial "development" of existing legal rules. It is relevant to, but not the same process as, the second stage identified at paragraph 9 above, namely of determining whether and when a rule of customary international law binding on states has developed or changed so as to entail criminal consequences for individuals - as the Secretary-General puts it (see paragraph 4 above), "Whether it is customarily recognised as a war crime entailing

[25] A. Cassese, *International Criminal Law*, (Oxford, 2003) p. 149.
[26] Ibid, p. 152.

the individual responsibility of the accused."[27] In this context, for an international court to recognise the creation of a new criminal offence without infringing the *nullum crimen* principle, I would formulate the test as follows:

i. The elements of the offence must be clear and in accordance with fundamental principles of criminal liability;

ii. That the conduct could amount to an offence in international criminal law must have been capable of reasonable ascertainment at the time of commission;

iii. There must be evidence (or at least inference) of general agreement by the international community that breach of the customary law rule would or would now, entail international criminal liability for individual perpetrators, in addition to the normative obligation on States to prohibit the conduct in question under their domestic law.

Customary International Law

18. International law is not found in statutes passed by parliament and its rules do not date from any official gazettes. It is a set of principles binding on states, pulling itself up by its own bootstraps mainly through an accretion of state practice. The point at which a rule becomes part of customary international law depends upon creative interplay between a number of factors. Everyone agrees upon the identification of those factors: they are authoritatively enumerated in Article 38(1) of the Statute of the International Court of Justice, which enjoins court to apply, in deciding interstate disputes,

[27] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, para. 17.

a. International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

b. International custom, as evidence of a general practice accepted as law;

c. The general principles of law recognised by civilized nations;

d. Subsidiary means for determining rules of law, judicial decisions and the teaching of the most highly qualified publicists of the various nations.

19. The classic example of the interplay of these factors is the decision in the *Paquete Habana*[28]. This Cuban fishing boat had been destroyed by the US Navy and its exemption from capture as a prize of war was described as "an ancient usage among civilized nations, beginning centuries ago, and *gradually ripening into* a [settled] rule of law"[29]. This "ripening" process was assisted by treaties, decisions of prize courts and the opinions of text-book writers. But what mattered most was the exemption that had been made over the centuries by most states (originally as a matter of mercy rather than law) and was now the invariable practice of law-abiding states. I prefer to avoid the "ripening" metaphor (given that rotting follows ripeness) but there will for all rules of customary international law have been a process of evolution (which may be comparatively short) before that rule may be said to be generally recognised by states as a "norm" to which their conduct should conform.

20. That process crystallizes the international law rules that are binding on states. But they do not bind individuals, unless the state legislates or adopts them by decree or ratification into municipal criminal law. In order to become a criminal prohibition, enforceable in that sphere of international law which is served by international criminal courts, the "norm" must satisfy the further, second-stage test, identified at paragraph 17 above. It must have the requisite qualities for a serious criminal prohibition: the elements of the offence must be tolerably clear and must

[28] *The Paquete Habana* (1900), 175 US 677.
[29] Ibid, p. 686 (emphasis added).

include the mental element of a guilty intention. Its existence, as an international law crime, must be capable of reasonable ascertainment, which means (as an alternative formulation) that prosecution for the conduct must have been foreseeable as a realistic possibility. Most significantly, it must be clear that the overwhelming preponderance of states, courts, conventions, jurists and so forth relied upon to crystallize the international law "norm" intended - or now intend - this rule to have penal consequences for individuals brought before international courts, whether or not such a court presently exists with jurisdiction over them. In this case we must be satisfied, after an examination of the sources claimed for the customary norm prohibiting child enlistment, that by 1996 it was intended by the international community to be a criminal law prohibition for the breach of which individuals should be arrested and punished.

21. The Prosecution has relied on a passage from *Prosecutor v Tadic*[30] to define the test for the stage at which an existing norm of international law, i.e. a rule binding on states, takes on the additional power of a criminal prohibition, by which individuals may be prosecuted. But this passage does not seek to address the *nullum crimen* position: it was advanced in a different context, namely to identify the conditions which had to be fulfilled before a prosecution could be brought under Article 3 of the ICTY Statute, which provided jurisdiction to prosecute persons "violating the laws or customs of war". Article 3 has no equivalent in the Statute of this Court. Nevertheless, since the majority decision in this case adopts the passage, I set it out below:

> The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3 (of the ICTY Statute):

[30] *Prosecutor v Dusko Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, passage no. .

> i. The violation must constitute an infringement of a rule of international humanitarian law;
>
> ii. The rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
>
> iii. The violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim...
>
> iv. The violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[31]

Requirement iv) begs the very question that we have to decide in this case. It may be accepted that the alleged offence of child enlistment infringes a rule of international humanitarian law (i) and that the violation would be "serious" (iii). Let us assume that by 1996 it had accreted sufficient state practice to be regarded as "customary in nature" (iii). The final question reflected in iv), namely how do we tell whether rule violation entails individual criminal responsibility, becomes the crucial question - and the passage from *Tadic* provides in my opinion no assistance in answering it.

22. Where *Tadic* does assist is later in the Appeals Chamber decision[32], where it is noted that

> The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to

[31] Ibid, para.94.
[32] Ibid, para 128.

> criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals (id., at 445 to 447, 467). Where these conditions are met, individuals must be held criminally responsible...

I do not find these criteria fulfilled as of 1996 in relation to the prohibition on child enlistment. The *Tadic* decision draws attention to factors such as Security Council resolutions stating that individuals will be held criminally responsible; to the existence of specific criminal laws and the decisions of criminal courts; to statements by warring parties accepting the prohibition; to "the behaviour of belligerent states and governments and insurgents", and to General Assembly and European Union statements assuming criminality; to legal interpretations published by the international committee of the Red Cross and so forth. Such a corpus of authority in relation to the crime of child enlistment was notably lacking in 1996. Unlike the majority opinion, I cannot find in the material supplied by UNICEF satisfactory evidence that the majority of States had *explicitly* criminalised child enlistment prior to this time and certainly there has been no suggestion of any prosecution for such an offence under the national law of any State.

23. It is instructive to compare the somewhat prescient example provided by the Appeals Chamber in *Tadic*[33] of the evolution of the international crime of domestic deployment of chemical weapons against the civilian population, i.e. the criminalisation for the purposes of internal conflicts of conduct which had hitherto been criminal only in international conflicts. It was from the universally outraged reaction of States in 1988 to allegations that chemical weapons had been used by Iraq at Halebja and the denial by Iraq itself of those allegations that "there undisputedly emerged a general consensus in the international community on the

[33] Ibid, paras 120-124.

principle that the use of those weapons is also prohibited in internal armed conflicts."[34]

24. There may be similar flash points at which it can be said that a new crime emerges in international law through general acceptance by States. Such a point was in my view reached in relation to child enlistment in July 1998 with general acceptance of the offence as defined in Article 8 of the Rome Treaty. I do not find any such consensus at any earlier point.

The Child at War

24. Attention to the problem of child soldiers - of whom there are estimated to be 300,000 currently in Africa[35] - has been relatively recent. The use of children in conflict situations (e.g. to load naval cannons) was ended (like their use to sweep chimneys and to go down mines) as much by new technologies as by humanitarian sentiment. Children are a very recent subject of human rights law, omitted from the 18th Century declarations on the Rights of Man because they were then regarded as the property of their parents. The League of Nations, moved by the numbers of children orphaned in the First World War, issued a declaration in 1924 about the duties of governments to provide food, shelter and medical attention for poor children. The Universal Declaration of Human Rights says no more than that "motherhood and childhood are entitled to special care and assistance"[36]. The International Covenant on Civil and Political Rights vaguely gives protection to children as part of "the family" and affords them just one right - to acquire a nationality. In the course of the 1980s, national jurisdictions became aware of the case for "children's rights": there were powerful challenges to the approach that saw children as subject entirely to parental governance until their "age of majority". In *Gillick*, for example, the House of Lords accepted that

[34] Ibid, para. 124.
[35] Graça Machel: *The Impact of War on Children*, (UNICEF, 2001), p. 7.
[36] *Universal Declaration of Human Rights*, G.A. Res. 217A (III), 3 U.N. GAOR at 17, U.N. Doc. A/810 at 71 (1948), Article 25.

parental rights "dwindled" as teenage years advanced.[37] Eventually, in 1990, the Convention on the Rights of the Child[38] put these developments into a coherent code, requiring states to protect the interests of children and acknowledge age-appropriate rights. The developments in the rules for protecting children in war were at first treaty-based, as follows:

Geneva Convention IV, 1949

24. Children featured at the Nuremberg and Tokyo trials as victims - especially in the death camps - rather than as forcible recruits. Geneva Convention IV set out in Article 24 the generally agreed protective principle:

> Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion, and their education are facilitated in all circumstances.

This duty to protect children under fifteen from the effects of war was placed on parties to the conflict, and it is impossible to extrapolate from this general duty on states to protect vulnerable classes of civilians an international law crime against recruiting children for military purposes. Nonetheless, Article 24 set the scene for the development of a customary international law rule.

25. What can be said is that Geneva Convention IV identified "children under fifteen" as a class which required a special protection in war, along with other vulnerable categories identified by Article 14 - the sick and wounded, the aged, expectant mothers and mothers of children under seven. They were to be accommodated, if

[37] *Gillick v West Norfolk and Wisbech Area Health Authority*, [1986] AC 112, HL.
[38] *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3.

possible, in "safety zones". Article 24, properly interpreted, applies only to those children who are orphaned or separated from parents, and not to all children under fifteen: the Article relates only to providing them with education, religion and shelter. Article 51, however, provides:

> The occupying power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

This is a duty on the occupying power, and not on any other state or non-state actor: it is not enforceable and is not part of the "grave breaches" regime of the Geneva Convention. It relates to an abuse of power by a victorious army. Nonetheless, it can in retrospect be identified as the beginning of international concern about "voluntary" enlistment, which it accepts may be induced by "pressure and propaganda".

The Additional Protocols (1977)

26. In 1977 the two protocols to the Geneva Convention were promulgated.[39] Article 77(2) of Protocol 1 which relates to international conflicts requires

> The parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and in particular, they shall refrain from recruiting them into the armed forces.

[39] Additional Protocol I; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 U.N.T.S. 3 (entered into force 7 December 1977).

It is notable that this Protocol is directed only to parties to the conflict and relates to involving children in front-line hostilities ("taking a direct part"). Indeed, Article 77(3) accepts that there will be "exceptional cases" where children *will* take a direct part, and requires them to be treated, when captured, as protected civilians and not as prisoners of war. The duty to "take all feasible measures" means to do what is practicable in the circumstances - it does not imply a duty to legislate for a new crime.

27. Geneva Protocol II sets out rules that should apply in *internal* conflict. Article 4(3) required states to avoid both recruitment of children and their deployment in fighting, but recognised that they might be so deployed - in which event they deserve special treatment when captured:

> Article 4(3) Children should be provided with the care and aid they require, and in particular:
>
> > c. Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
> >
> > d. The special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured.

Article 4(3) spells out the duty to protect the welfare of children in the course of internecine conflict and civil war - they must be educated, stay with their families wherever possible, and those under fifteen must not be recruited for armed groups or front-line fighting. "Recruitment" is a term which implies some active soliciting of "recruits", i.e. to pressure or induce them to enlist: it is not synonymous with "enlistment".

Convention on Rights of Child - 1990

28. The Convention on the Rights of the Child was adopted in 1989 and entered into force in 1990. Article 38(2) places the duty on "*States Parties*" to take "all feasible measures", but limited to ensuring that children under fifteen "do not take a direct part in hostilities". Article 38(3) requires States Parties "to refrain from recruiting" any person under fifteen into the armed forces: this amounts to a negative obligation on governments to avoid such recruitment in their national armies, but is a far cry from imposing an international law obligation to prosecute and punish those who enlist child indictees into civil defence forces or militias. The duty does not apply by this Convention to armed groups and non-state actors, and states are left with a discretion as to whether to legislate so as to prohibit child recruitment. Although this Convention has attracted almost universal support, it has no enforcement mechanism and does not cast the duty in the form of a criminal prohibition.

African Charter, 1992

29. In 1990 the Organization of African Unity promulgated the African Charter on the Rights and Welfare of the Child.[40] Many commentators have overlooked this important Treaty, but not Judge Bankole Thompson, who (writing extra-judicially) hailed it as "a radical departure from African cultural traditionalism."[41] He said that it would ensure that "the 1990s will go down in history as a revolutionary decade for the human rights movement in Africa".[42] Article 22 of the Charter deals with armed conflicts insofar as they affect children. It first imposes on

[40] *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), adopted 11 July 1990, entered into force 29 November 1999.
[41] Bankole Thompson, *Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism*, 41 INT'L. & COMP. L.Q. (April 1992) 432, 433.
[42] Ibid, p. 432.

member states an obligation to "undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflict which affects the child". It then enjoins them to "ensure that no child takes a direct part in hostilities and refrain in particular from recruiting any child".

30. Judge Thompson is right to identify the African Charter as a significant step for this continent, but he accepts that it imposes an obligation only on member states of the OAU and he concludes with "a note of caution as to the Charter's ability to achieve its goals and aspirations".[43]

Developments until November 1996

31. I do not find any significant addition to these Conventions before November 1996. In 1996, ironically, the Government of Sierra Leone acknowledged in its report to the Committee on the Rights of the Child that there was no minimum age for recruitment of persons into the armed forces "except provision in the Geneva Convention that children below the age of fifteen years should not be *conscripted*[44] into the army"[45]. The Committee did not get around to answering Sierra Leone until five years later, when it suggested that the country should pass and enforce a law to prohibit the recruitment of children. This rather makes the point that, so far as local legislation was concerned, the applicant could not, back in 1996, have understood there to be any criminal law against enlisting children who volunteered to serve in militias. That is because Articles 24 and 51 of the Geneva Convention did not prohibit child enlistment other than by an "occupying power" and Additional Protocol II called upon States "to take all feasible measures" to stop child recruitment. It was the view of the Committee in 2000 that Sierra Leone had not taken any measures, feasible or not. The information supplied to us by

[43] Ibid, pp 433, 443-44.
[44] Emphasis added.
[45] The Initial Report of States Parties: Sierra Leone 1996 CRC/C/3/Add.43 para. 28.

UNICEF from a global report published in 2001[46] actually states that the Sierra Leone position is that children can be recruited at "any age with consent" – apparently of parents and guardians – and refers to Section 16(2) of the Royal Sierra Leone Military Forces Act, 1961.

32. At any event, and notwithstanding all the valuable help from UNICEF and the other *amicus*, The University of Toronto International Human Rights Clinic, I cannot find that by 1996 the rule against enlistment of child soldiers had passed beyond a general rule of international humanitarian law. There was undoubtedly an obligation on states and on belligerent parties to avoid the enlistment of children, but if they did enlist children they were enjoined to keep them out of the firing line and if captured to treat them as "protected persons" rather than as prisoners of war. It does not seem to me to matter at all that the Rome Treaty was drafted in 1994: it did not obtain approval until July 1998, and in any event the final formulation of the "child enlistment" crime does not appear to have been suggested by Germany until December 1997. Professor William Schabas, one of the leading experts on the Rome Treaty, has no doubt that the "enlistment" crime in Article 8 was "new law". He explains that "The term "recruiting" appeared in an earlier draft, but was replaced by "conscripting or enlisting" to suggest something more passive, such as putting the name of a person on a list."[47] The learned authors of "*The Rome Statute of the International Criminal Court - A Commentary*", Messrs Cassese, Gaeta and Jones, point out that the crime was not contained in the original draft statute and goes beyond the 1977 Additional Protocols of the Geneva Convention.[48]

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[46] By The Coalition to Stop the Use of Child Soldiers see UNICEF Appendix, p11.
[47] W. Schabas, *An Introduction to the International Criminal Court*, (Cambridge, 2001), p. 50.
[48] A. Cassese, P. Gaeta, J. Jones, *The Rome Statute of the International Criminal Court – A Commentary*, (Oxford, 2002), p. 416.

Discussion

33. So what had emerged, in customary international law, by the end of 1996 was an humanitarian rule that obliged states, and armed factions within states, to avoid enlisting under fifteens or involving them in hostilities, whether arising from international or internal conflict. What had not, however, evolved was an offence cognizable by international criminal law which permitted the trial and punishment of individuals accused of enlisting (i.e. accepting for military service) volunteers under the age of fifteen. It may be that in some states this would have constituted an offence against national law, but this fact cannot be determinative of the existence of an international law crime: theft, for example, is unlawful in every state of the world, but does not for that reason exist as a crime in international law. It is worth emphasizing that we are here concerned with a jurisdiction which is very special, by virtue of its power to override the sovereign rights of states to decide whether to prosecute their own nationals. Elevation of an offence to the category of an international crime means that individuals credibly accused of that crime will lose the protection of their national law and it may as well lose them such protections as international law would normally afford, such as diplomatic or head of state immunity. For that reason, international criminal law is reserved for the very worst abuses of power - for crimes which are "against humanity" because the very fact that fellow human beings conceive and commit them diminishes all members of the human race and not merely the nationals of the state where they are directed or permitted. That is why not all, or even most, breaches of international humanitarian law, i.e. offences committed in the course of armed conflict, are offences at international *criminal* law. Such crimes are limited to the breaches of the Geneva Convention which violate Common Article 3, and to other specified conduct which has been comprehensively and clearly identified as an international law crime: treaties or State practice or other methods of demonstrating the consensus of the international community that they are so

destructive of the dignity of humankind that individuals accused of committing them must be put on trial, if necessary in international courts.

34. For a specific offence - here, the non-forcible enlistment for military service of under fifteen volunteers - to be exhibited in the chamber of horrors that displays international law crimes, there must, as I have argued above, be proof of general agreement among states to impose individual responsibility, at least for those bearing the greatest responsibility for such recruitment. There must be general agreement to a formulation of the offence which satisfies the basic standards for any serious crime, namely a clear statement of the conduct which is prohibited and a satisfactory requirement for the proof of *mens rea* - i.e. a guilty intent to commit the crime. The existence of the crime must be a fact that is reasonably accessible. I do not find these conditions satisfied, as at November 1996, in the source material provided by the Prosecutor or the *amici*. Geneva Convention IV, the 1977 Protocols, the Convention on the Rights of the Child and the African Charter are, even when taken together, insufficient. What they demonstrate is a growing predisposition in the international community to support a new offence of non-forcible recruitment of children, at least for front-line fighting. What they do not prove is that there was a universal or at least general consensus that individual responsibility had already been imposed in international law. It follows that the Secretary-General was correct to doubt whether a crime of "conscripting or enlisting" child soldiers had come into existence by 30th November 1996.

35. Indeed, it was from about this time that the work of Graça Machel (who first reported on this subject to the United Nations in 1996) and the notable campaigning by NGOs led by UNICEF, Amnesty International, Human Rights Watch and No Peace Without Justice, took wing. What they were campaigning for, of course, was the introduction into international criminal law of a crime of child enlistment - and their campaign would not have been necessary in the years

that followed 1996 if that crime had already crystallized in the arsenal of international criminal law.

35. The first point at which that can be said to have happened was 17th July 1998, the conclusion of the five week diplomatic conference in Rome which established the Statute of the International Criminal Court. On that day the delegates from 122 nations affirmed by their signature

> That the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.[49]

37. Article 8 of the Rome Treaty defined the "war crimes" which fell within this category: they were defined to include

> 8(2)(a): Grave breaches of the Geneva Conventions of 1949.
> 8(2)(b): Other serious violations of the laws and customs applicable in international armed conflict, including
> (xxvi) Conscripting or enlisting children under the age of fifteen years under the national armed forces or using them to participate actively in hostilities
> 8(c): In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 1949.
> 8(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely...

[49] Preamble to the *Rome Statute of the International Criminal Court*, July 17, 1998, UN Doc. A/CONF.183/9* (1998).

vii. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

38. The Rome Statute was a landmark in international criminal law - so far as children are concerned, participation in hostilities was for the first time spelled out as an international crime in every kind of serious armed conflict. The Statute as a whole was approved by 122 states. True, 27 states abstained and 7 voted against it, but the conference records do not reveal that any abstention or opposition was based on or even referred to this particular provision relating to child recruitment. In the course of discussions, a few states - the US in particular - took the position that "it did not reflect customary international law and was more a human rights provision than a criminal law provision."[50] That, in my view, was correct - until the Rome Treaty itself, the rule against child recruitment *was* a human rights principle and an obligation upon states, but did not entail individual criminal liability in international law. It did so for the first time when the Treaty was concluded and approved on 17th July 1998.

39. It is to diminish the achievement of the Rome Treaty and its preparatory work to argue that Article 8 was merely a consolidation of existing customary law. The prohibition of child recruitment was one article in respect of which the Treaty produced a new offence, or perhaps more accurately, elevated what had hitherto been a "non grave" rule of international humanitarian law into a war crime punishable, like grave breaches, by international criminal courts. July 17th, 1998 deserves to be remembered as a red-letter day in the development of international legal protection for children against being embroiled, or embroiling themselves, in warfare.

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[50] "Crimes Within the Jurisdiction of the Court", Herman von Hebel and Darrel Robinson in *The International Criminal Court: Making of the Rome Statute*, ed. Roy Lee; Chapter II at pp. 117-18.

40. I do not think, for all the above reasons, that it is possible to fix the crystallization point of the crime of child enlistment at any earlier stage, although I do recognise the force of the argument that July 1998 was the beginning and not the end of this process, which concluded four years later when sufficient ratifications (that of sixty states) were received to bring the Rome Treaty into force. Nonetheless, state practice immediately after July 1998 demonstrates that the Rome Treaty was accepted by states as a turning point in the criminalisation of child recruitment. For example, UNICEF could only cite five states which had a specific criminal law against child recruitment prior to July 1998.[51] However,

> In the wake of the adoption of the Rome Statute of the ICC, many more states have criminalized the recruitment of children under the age of fifteen by ratification of the Statute, and in many cases by altering their own legislation accordingly through implementing legislation of the ICC Statute.[52]

41. In other words, there was no common state practice of explicitly criminalizing child recruitment prior to the Rome Treaty, and it was in the process of ratification of that Treaty that many states introduced municipal laws to reflect it. A good example is provided by Australia, which in response to its ratification passed the International Criminal Court (Consequential Amendments) Act 2002 Number 42 (Cth). This Consequential Amendments Act operated to amend the Criminal Code Act 1995 (Cth) to make the offences in the Rome Statute, for the first time, offences under Australian Commonwealth law. It is interesting to note that Section 268.68 of the Criminal Code Act creates (as, I think, does Article 4(c) of the SCSL Statute) three separate offences: 1) of *using*; 2) of *conscripting* and 3) of *enlisting* children in the course of armed conflict. The crime of *using* children for active participation in hostilities carries the heaviest sentence (of seventeen years),

[51] Columbia, Argentina, Spain, Ireland and Norway, see UNICEF Amicus Brief, para. 47.
[52] UNICEF Amicus Brief, para. 48.

the crime of *conscripting* children into an armed force carries fifteen years whilst the crime of *enlisting* children carries a maximum sentence of only ten years. In my view, international crimes should be confined to offences so serious that they should carry a maximum penalty of at least fifteen years imprisonment: if states like Australia regard the offence of non-forcible enlistment of children as worth at most ten years imprisonment, I am surprised that they support it as an offence in international law at all. Should it be charged against a defendant who persuaded young children of the virtue of becoming suicide-bombers, a maximum penalty of ten years would seem inadequate.

42. The material helpfully provided to the Court by UNICEF shows that a major contribution to the campaign for incrimination was the ground-breaking study on "The Impact of Armed Conflict on Children" prepared by Ms Graça Machel for the United Nations. Ms Machel was not appointed by the Secretary-General until September 1994 and did not present her study until October 1996. It was indeed "a driving force in consolidating strong political will among states to take appropriate action"[53] but that action was not taken in 1996, it was taken in July 1998. In August 1996 there was a debate in the UN Security Council over the situation in Liberia. The delegate from Italy stated that "words alone do not suffice to condemn this heinous behaviour. This behaviour must be stopped immediately, by every means the international community has available, including that of writing some provision, the framework of what will soon become the International Criminal Court, in order to bring to justice the perpetrators of such intolerable acts."[54] These sentiments were supported by a number of other states including the United States whose delegate stated:

> Who can forget the photographs of child soldiers brandishing assault weapons? Who can imagine the psychological scars that will be left with

[53] UNICEF Amicus Brief, para. 69.
[54] Italy, Statement before the UN Security Council, UN Doc S/PV.3694, 30 August 1996, p. 6.

these children for years to come? The Council is determined that this abhorrent practice shall not continue.[55]

The Security Council duly condemned the practice of "recruiting, training and deploying children for combat" and requested the Secretary-General to report on "this inhumane and abhorrent practice". What is instructive about this debate, in August 1996, just before the temporal jurisdiction of this court commences, was that no delegate articulated the view of his or her State that the "abhorrent practice" was *already* a crime in international law. Ms Machel's report on the impact of armed conflict on children was not presented to the General Assembly and the Security Council until October 1996 and was not discussed until December of that year. It was endorsed, but the endorsement of a report by the United Nations cannot transform a recommendation in that report into a rule of international criminal law. Nor does a report from a UN subcommittee – in this case, the Committee on the Rights of the Child – which warned in October 1997 that in respect to abduction of children for fighting in Uganda, "violation of the rules of international humanitarian law entail responsibility attributed to perpetrators."[56] The majority opinion sets some store by this report, but a) it comes after November 1996 and b) it does not specifically refer to child *enlistment*.

42. The United Nations General Assembly, in its resolution on the rights of the child in December 1998, specifically recognises the contribution of the Rome Statute of the International Criminal Court as the key document making possible the ending of impunity for conscription of child soldiers.[57] Similarly, the Latin American and Caribbean Conference on the use of child soldiers in July 1999 welcomed the adoption of the Rome Statute "which confirms conscripting or enlisting children as

[55] United States, Statement before the UN Security Council, UN Doc S/PV.3694, 30 August 1996, p. 15.
[56] Concluding Observations of the Committee on the Rights of the Child: Uganda, 21 October 1997, CRC/C/15/Add.80, para. 34.
[57] A/RES/53/128, The Rights of the Child, 9 December 1998.

a war crime".[58] Both these conference resolutions can be read as assuming that the war crime of enlisting child soldiers crystallized with the Rome Treaty of July 1998 and not before. In May 2000 the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict was adopted by the General Assembly.[59] To this date, 115 countries have signed it although only 70 have ratified. It confirms the criminality of enlisting children under fifteen for military service in armed conflicts, and seeks to raise that age to eighteen. However, it does not indicate that the criminality in international law is capable of arising *prior* to the Rome Treaty.

43. That Optional Protocol in its preamble notes:

> the adoption of the Rome Statute of the ICC, in particular, the inclusion there as a war crime, of conscripting of enlisting children under the age of fifteen years or using them to participate actively in hostilities in both international and non-international armed conflicts.

This seems to me to recognise that the Rome Treaty has changed the position, and transformed what was previously a norm of international law into a rule of international criminal law, entailing punishment for individual perpetrators.

44. As Graça Machel herself writes, in "The Impact of War on Children" published in 2001,

> The Rome Statute establishing the International Criminal Court, overwhelmingly approved in July 1998, makes it an international war crime for children to be conscripted or enlisted into armed forces or groups - or otherwise used in hostilities. Although it sets the minimum age for recruitment at fifteen, the Rome Statute, now in the ratification

[58] Preamble to the *Montevideo Declaration on the Use of Children as Soldiers*, 9 July 1999.
[59] UN Doc. A/54/RES/263, 25 May 2000, entered into force 12 February 2002.

process, is nonetheless an important step towards the enforcement of international law forbidding children's participation in hostilities.

Conclusion

45. The above analysis convinces me that it would breach the *nullen crimen* rule to impute the necessary intention to create an international law crime of child enlistment to states until 122 of them signed the Rome Treaty. From that point, it seems to me it was tolerably clear to any competent lawyer that a prosecution would be "on the cards" for anyone who enlisted children to fight for one party or another in an ongoing conflict, whether internal or international. It is not of course *necessary* that a norm should be embodied in a Treaty before it becomes a rule of international criminal law, but in the case of child enlistment the Rome Treaty provides a *sufficient* mandate - certainly no previous development will suffice. It serves as the precise point from which liability can be reckoned and charged against defendants in this court. It did, of course, take four years before the necessary number of ratifications were received to bring the treaty into force. But the normative status of the rule applicable to States prior to 1998, the overwhelming acceptance by states in the Rome Treaty of its penal application to individuals and the consequent predictability of prosecution from that point onwards, persuades me that the date of the Treaty provides the right starting point.

46. There are many countries today where young adolescents are trained with live ammunition to defend the nation or the nation's leader. What the international crime most seriously targets is the use of children to "actively participate" in hostilities - putting at risk the lives of those who have scarcely begun to lead them. "Conscription" connotes the use of some compulsion, and although "enlistment" may not need the press gang or the hype of the recruiting officer, it must nevertheless involve knowledge that those enlisted are in fact under fifteen and that they may be trained for or thrown into front-line combat rather than used for

service tasks away from the combat zones. There may be a defence of necessity, which could justify desperate measures when a family or community is under murderous and unlawful attack, but the scope of any such defence must be left to the Trial Chamber to determine, if so requested.

47. I differ with diffidence from my colleagues, but I have no doubt that the crime of non-forcible enlistment did not enter international criminal law until the Rome Treaty in July 1998. That it exists for all present and future conflicts is declared for the first time by the judgments in this Court today. The modern campaign against child soldiers is often attributed to the behaviour of Holden Roberto in Angola, who recognised how much it demoralizes an enemy village to have its chief headman executed by a child. More recently, we have had allegations about children being indoctrinated to become suicide bombers - surely the worst example of child soldier initiation. By the judgments today, we declare that international criminal law can deal with these abhorrent actions. But so far as this applicant is concerned, I would grant a declaration to the effect that he must not be prosecuted for an offence of enlistment, under Article 4(c) of the Statute, that is alleged to have been committed before the end of July 1998.

Done at Freetown this thirty-first day of May 2004

Justice Robertson

[Seal of the Special Court for Sierra Leone]

The Special Court for Sierra Leone

1. **David M. Crane**[1]

INTRODUCTION

The Special Court for Sierra Leone is a unique institution that represents a bold new experiment in international criminal law: effective and efficient international criminal justice delivered within a politically acceptable time frame. The Special Court is a tribunal created by a bilateral treaty between the United Nations and the government of Sierra Leone, located in Freetown, geographically close to where the conflict took place. Responding to the inquiry on effective justice, the Special Court's Statute draws upon a combination of crimes under international and domestic law, and its staff is made up of a combination of international and national workers, and its Defence Office is an unprecedented effort to ensure equality of arms for the accused. The question of efficient justice is addressed by the Special Court's budget, which comes solely from voluntary donations, as well as its timetable. The design of the Special Court represents an attempt to draw lessons from the experiences of the ICTY and ICTR, which were established in 1993 and 1994, respectively.[2]

The Special Court is a tribunal empowered by its mandate to try "those bearing the greatest responsibility for serious violations of international humanitarian law and certain provisions of Sierra Leonean domestic law since November 30, 1996." This limitation on the temporal jurisdiction of the war, based on the date of the failed Abidjan Accord, was intended to keep the budget down in comparison to the other international criminal tribunals.[3] The Special Court's jurisdiction and procedure are governed by the Statute, which was appended to the Agreement, and by its Rules of Procedure and Evidence. The Special Court is referred to as a "hybrid tribunal" because of its mixed subject matter jurisdiction and composition. Structurally, it is independent and completely distinct from Sierra Leone's legal system, and enjoys primacy vis-à-vis domestic courts. This is particularly significant in respect to challenges that have been made to the jurisdiction of the Special Court under domestic law. UN administrations in Kosovo and East Timor have established other hybrid tribunals, but the Special Court is the first example of this particular model, and has the potential to serve as an important precedent for the future of international justice.

HISTORY

Due to a disastrous combination of socio-economic change(s) and oppressive governance, Sierra Leone has been politically unstable since gaining its independence from Britain in 1961.[4] The unchecked corruption of the ruling elite further provoked the situation.[5] Although rich in natural resources, including diamonds and minerals, Sierra Leone has remained among the poorest countries in the world since the 1980's.[6] Since independence, politics in Sierra Leone have been dominated by corruption and mismanagement. In 1985, military commander Joseph Momoh became President when dictator Siaka Stevens, in his late eighties and facing a student uprising, resigned.[7] Initially, Momoh was quite popular, but problems with student activists and dissidents such as Foday Sankoh, who were trained and funded by Libya, persisted.[8] In March 1991, with the support of Mohamar Qaddafi of Libya[9] and Charles Taylor of Liberia,[10] the new Rebel United Front (RUF) entered Sierra Leone from Liberia. Sierra Leonean troops, loyal to Momoh, engaged the RUF troops at the Liberian border.

After several months, a group of soldiers on the front line, disgruntled about not being paid, went to Freetown to protest. On April 29, 1992, these soldiers overthrew President Momoh, establishing the National Provisional Ruling Council (NPRC) under Army Captain and paymaster Valentine Strasser. The NPRC entered into unsuccessful peace talks with the RUF, and the civil war continued. Strasser remained in power for four years, despite the civil war, until he was overthrown in 1996. In March of 1996, Sierra Leone conducted its first multi-party elections, with Dr. Ahmed Tejan Kabbah elected president.[11] Kabbah's new government, with the support of the Executive Outcomes mercenaries and its newly organized "kamajor" (traditional tribal hunter) fighters, pushed the RUF to the brink of defeat. Under the leadership of Kabbah's deputy defense minister, Chief Sam Hinga Norman, the kamajors were transformed from an unorganized "home guard" into the Civilian Defense Force (CDF), a military organization capable of trailing the rebels into the bush.

During the early part of the hostilities, the RUF principally carried out attacks in the countryside, injuring or murdering countless civilians. Sierra Leone's army sought the help of the Economic Community of West African States Military Observer Group (ECOMOG) of the Economic Community of West African States (ECOWAS), but was unable to prevent army officers from overthrowing their own government and establishing the National Provisional Ruling Council (NPRC). Despite the regime change, the RUF continued fighting.[12] On November 30, 1996, the RUF entered into a cease-fire agreement with the new government by signing the Abidjan Peace Accord, which granted amnesty in exchange for the demobilization of RUF forces.[13] However, peace did not result from the Accord. Hostilities ensued, mainly due to the lack of organization concerning the implementation of key provisions in the Accord, such as demobilization of forces and registering the RUF as a political party.[14] After the hostilities resumed, the Armed Forces Revolutionary Council (AFRC), a rebel group of military officers, staged a successful coup and seized control of Freetown, inviting the RUF to join them.[15]

President Kabbah escaped to Guinea, where he worked to attract international attention and generate support for the situation in Sierra Leone. With the help of ECOMOG, President Kabbah was able to regain control of the government in March of 1998.[16] Although President Kabbah regained power, the hostilities raged on, with the RUF in control of over half of the country.[17] In 1999, the RUF forces invaded Freetown, affecting another series of atrocities.[18] In response to the international community's encouragement, President Kabbah decided to negotiate with the rebels. The negotiations resulted in a cease-fire agreement, and led to the signing of the Lomé Peace Accord in July of 1999.[19] In June 2000, the government of Sierra Leone officially asked for help. President Kabbah sought the assistance of the United Nations to establish a special court that could try those who were responsible for the atrocities committed during the decade long conflict. The merit of the court would be, according to President Kabbah, to bring and maintain peace in Sierra Leone, and the region, through accountability.[20]

Resolution 1315 recommended that the Special Court should have jurisdiction over crimes under international law and selected crimes under Sierra Leonean law. [21] To this effect, Resolution 1315 endorsed President Kabbah's appeal for creating an accountability mechanism in Sierra Leone. In accordance with the Statute of the Special Court (Statute), the crimes to be charged under international law were those recognized in customary international law at the time the alleged crimes were committed.[22] The Statute does not create the crimes to which it refers, rather, it simply grants the Special Court jurisdiction over existing crimes.[23]

As a result of negotiations with the government of Sierra Leone, UN Secretary- General Kofi Annan submitted his report to the Security Council, presenting recommendations for the structure of the new tribunal.[24] When the Security Council chose to support President Kabbah's request to create a special court for Sierra Leone, it unequivocally refused to establish another UN international criminal tribunal that necessitated a direct, prolonged UN role in its functioning.[25] Therefore, the Special Court for Sierra Leone would differ from the International Criminal Tribunal of Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR). To this effect, the court would exist as an independent institution having its legal basis in an agreement, rather than as a subsidiary entity administered and financed by the UN's regular budget.

The Special Court would be a hybrid court, overseen jointly by the UN and the government of Sierra Leone, to be composed of both international and domestic judges, prosecutors and staff, and would have subject matter jurisdiction over violations under both international humanitarian law and selected crimes under Sierra Leonean law.[26] The Special Court's temporal jurisdiction would start from November 1996, and continue to a date yet to be decided.[27] Also, the amnesty provisions featured in the Lomé Peace Accord would not constrict the Special Court's jurisdiction, the reason being that the amnesty agreements do not apply to violations of international law, such as crimes against humanity.[28] Article 2 of the Statute for the Special Court presents two categories of elements for crimes against humanity – the first to be described as contextual elements, and the second to be described as the elements of the acts enumerated.[29] There are four contextual elements: (1) an attack against a civilian population[30]; (2) the attack is widespread or systematic[31]; (3) the act in question was committed as part of that attack[32]; and (4) the accused knew of the broader context in which their act was committed[33]. Once these four elements have been satisfied, one or more of the nine types of acts enumerated must be established.[34]

On-Site Location of the Special Court

The Special Court is unique with regard to its location. Whereas the ICTR is located 600 miles from where the crimes were committed,[35] there was strong pressure for the Special Court to be set up in Freetown, rather than in a neighboring State. In addition, the Court's on site location facilitates a greater analysis of its impact on the Sierra Leonean people and judiciary.[36] From its beginning, the Court demonstrated considerable concern over its perception among Sierra Leoneans. Between September 2002 and February 2003, the Chief Prosecutor and the Registrar started a series of "town hall meetings" in each of Sierra Leone's 12 districts to describe the Court's work and elicit the people's views.[37] By April 2003, the Registry had developed an Outreach Unit (OU) that would eventually be comprised of 17 people, operating offices spread throughout the countryside in a District Grassroots Network. Through this network, the Outreach Unit has expanded its capacity for getting information to and from the 12 districts in a 36-hour period, notwithstanding the lack of telephone service and inadequate transportation infrastructure. By September 2003, the OU had conducted a number of important activities, including a targeted outreach program among the military and the distribution of a booklet explaining the Court to schoolchildren. In addition, the OU developed a detailed strategy for the future, including the creation of a forum facilitating communication between the people and the Court (Special Court Interactive Forum).[38]

THE COURT

International Support and the Management Committee

Whether through funds, equipment, or staffing, the Special Court is funded exclusively through voluntary contributions, rather than the regular budget of the UN.[39] Notably, the parties to its treaty, the U.N. and the government of Sierra Leone, are not fiscally responsible for the Court's support.[40] A Management Committee comprised of representatives from the UN, major donor States, and the government of Sierra Leone, directly oversees the general administration of the Special Court. The Agreement between the UN and the government of Sierra Leone stipulates that the Management Committee assists "the Secretary-General in obtaining adequate funding, and provide[s] advice and policy direction in all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested states."[41] The intent was to lessen the problem of "donor fatigue," so voluntary funding from Management Committee States supports the Special Court.[42] The committee meets regularly to monitor the administrative aspects of the Court, to include its budget.[43]

In addition to donations, international tribunals depend on State cooperation in matters of enforcement, such as arrest and transfer of suspects, detention, witness protection, etc. Both the ICTY and ICTR have a Chapter VII mandate by virtue of being created pursuant to a UN Security Council Resolution under that Chapter, which makes it mandatory for all UN member states to cooperate. The Special Court for Sierra Leone was created by an Agreement between Sierra Leone and the UN, not under a Chapter VII resolution.[44] Therefore, the Court has no power to compel cooperation outside of Sierra Leone.[45] This was evident when Nigeria granted Taylor asylum, refusing to deliver him to the Court. However, some States have aided the Court despite the lack of such a legal obligation. For example, Switzerland froze millions of dollars of Charles Taylor's assets at the request of the Prosecutor.[46]

Mandate

The U.N. created the Special Court through an agreement with the government of Sierra Leone, and pursuant to U.N. Security Council Resolution 1315. The Statute, signed on January 16, 2002, confers upon the Court the power to prosecute persons who bear the greatest responsibility for serious violations of national and international humanitarian law since November 30, 1996.[47] According to its mandate, the crimes within the jurisdiction of the Court include: crimes against humanity; violations of Common Article 3 of the Geneva Conventions and Additional Protocol II; other serious violations of international humanitarian law; and crimes committed under domestic Sierra Leonean law.[48] The government of Sierra Leone officially ratified the Agreement for the Court in March 2002.[49]

Rules of Procedure and Evidence

The Rules of Procedure and Evidence of the Special Court for Sierra Leone standardize the conduct of the legal proceedings before the Court.[50] To this effect, they are limited by both the Agreement that established the Special Court and its Statute.[51] The Rules represent other facets of the Court's legal framework, including the Special Court Agreement Ratification Act, the Headquarters Agreement between the Republic of Sierra Leone and the Special Court for Sierra Leone and relevant case law. Notably, Article 14(1) of the Statute provides that "[t]he 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*[52] to the conduct of the legal proceedings before the Special Court." Therefore, when the Special Court was established on April 12, 2002,[53] the then-current Rules of Procedure and Evidence of the ICTR[54] became applicable *mutatis mutandis* to the conduct of the legal proceedings before the Court.[55] Through application of these rules, this provision exhibits a degree of uniformity between the rules of the Special Court, ICTR and ICTY. This follows the mold cast by the Statute of the ICTR, which required its Judges 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.[56]

The Special Court's Rules of Procedure and Evidence are currently categorized in nine parts.[57] The current Rules of Procedure and Evidence are based in substance on those of the ICTR, with amendments that have been made by the ***Special Court*** judges over time.[58] The Rules themselves provide for an amendment procedure,[59] and most of the amendments appear to underscore the motivation to expedite the procedures to the extent fundamental fairness dictates. Any interpretation of the Rules must be made in the spirit of the Agreement and Statute, which sets forth the manner in which the Court is mandated to function.[60]

Organization of the Special Court

The Court has three statutory organs[61]: the Chambers[62] consisting of an appellate chamber[63] and two trial chambers; the Office of the Prosecutor, headed by a Prosecutor appointed by the Secretary-General; and the Office of the Registrar, led by the Registrar, also appointed by the Secretary-General. Since its creation, the Registrar has established the Public Defender's office[64] headed by the Principle Defender, an administrator within the Registrar's office. It is considered a fourth organ of the Court.[65] The Defense Office is responsible for the initial representation of indictees and in providing logistic support for the defense teams. This is a unique development in the administration of international criminal justice, as it represents the first instance where an international criminal tribunal has supported defense counsel in an equivalent manner as prosecution counsel.[66] Defense counsel is assigned to defendants through a directive issued by the Registry.[67] After counsel is assigned, staff members from the Defender's office are responsible for the supervision of defense teams.[68] The daily operations of the Court are managed by the Registry,[69] which comprises the offices of Court Management, Detention Library, Outreach, Public Affairs, Security, Procurement, Witness and Victim Support, and various other administrative units.[70]

The Special Court has two Trial Chambers and one Appeals Chamber. The Trial Chambers consist of three Judges, one nominated by the Government of Sierra Leone and two by the United Nations Secretary-General.[71] The Appeals Chamber consists of five Justices, two nominated by the

Government of Sierra Leone and three nominated by the Secretary-General.[72] The Presiding Judge of the Appeals Chamber is the President of the Court. 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. 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."[73] In fulfilling their judicial obligations, the judges are required to be "independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source."[74] Each of the judges was appointed for a three-year, renewable term.

Pursuant to the Statute of the Special Court, the Prosecutor is charged with the responsibility to investigate and prosecute the individuals who "bear the greatest responsibility[75] for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[76] The Office of the Prosecutor acts "independently as a separate organ of the Special Court."[77] The Agreement and Statute, respectively, provide that the Prosecutor shall be appointed by the United Nations Secretary-General for a three-year term and shall be eligible for reappointment.[78] The Prosecutor is required to be a person of high moral character who possesses the highest level of professional competence 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, the Prosecutor is assisted by a Deputy Prosecutor, appointed by the Government of Sierra Leone, in consultation with the Prosecutor and the Secretary-General. The Deputy Prosecutor performs the functions of the Prosecutor in the event of the Prosecutor's absence or inability to act or upon his express instructions. 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. The Prosecutor can delegate his powers to staff members or other identified individuals under Part IV through VIII of the Rules.[79]

The Prosecutor has a wide range of duties and powers aimed at enabling him to perform his task in accordance with the mandate. The Statute contains a range of investigatory powers granted through the Rules, relating to the questioning of suspects, victims and witnesses;[80] the collection of evidence; and the conduct of on-site investigations.[81] In addition, the Rules authorize the Prosecutor to take provisional measures in specific instances, such as: an emergency situation; in order to request States to arrest suspects and take them into custody; to seize physical evidence; measures necessary to prevent the escape of a suspect; and to prevent actions against victims or witnesses or the destruction of evidence.[82] 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.[83] This is exhibited by subject matter jurisdiction of the Special Court, which does not cover all crimes under international law. For example, due to the lack of *prima facie* evidence that the crime of genocide actually occurred in Sierra Leone, the Statute does not grant the Court jurisdiction over the crime of genocide.

THE CASE

The civil war in Sierra Leone was one of the most brutal and most overlooked wars in recent memory.[84] Of the 4.2 million citizens of Sierra Leone, over 2.5 million are internally displaced. Additionally, over 500,000 Sierra Leoneans were murdered, raped, maimed or mutilated. The conflict featured a complicated perpetrator: the international criminal element that formed a joint criminal enterprise in West Africa led by three sitting presidents, Muammar Ghadaffi, Charles Taylor[85], and Blaise Compaore of Burkina Faso.[86] Over a period of eleven years, these individuals – one indicted, one named and shamed, and the other warned away – led gun runners, diamond dealers, Eastern European mafias, other international thugs, and terrorists, including Hezbollah and al-Qaeda, in a whirlwind of death and destruction the likes of which the world has never seen.[87]

For over a decade, a joint criminal enterprise, led by then President Charles Taylor on behalf of Mummar Ghadaffi, murdered, raped, maimed, and mutilated around 1.2 million human beings to further its own personal criminal purposes by moving diamonds about for guns and cash.[88] These guns and cash were used in the overall geopolitical plan to turn all of West Africa into a Libyan fiefdom. Many of the players in this horror were graduates of the terrorist training camps in Libya. In this internal armed conflict, the combatants committed atrocities beyond description – Sierra Leone became a killing field. The unrest throughout the West African region, particularly in Sierra Leone, the Ivory Coast, and Liberia, was started by criminals for their own personal and criminal gain and lasted for over a decade. The civil war in Sierra Leone did not begin on account of the more traditional causes behind warfare, legitimate or otherwise, such as political, religious, cultural, ethnic, or social reasons. Rather, the impetus for the civil war was pure criminal avarice and greed. The Special Court was created to try them for their actions, thereby restoring the rule of law.[89]

In international criminal law, all participants in a common criminal action are equally responsible if they (1) participate in the action, regardless of their position and extent of their contribution, and (2) intend to engage in the common criminal action.[90] Although not all participants performed the same act, a crime may result from the action of a group of individuals. When all individuals that take part in a common criminal action are aware of the purpose and nature of the action and share the requisite criminal intent, they must necessarily share the criminal liability, regardless of their role in the commission of the crime. This results multiple parties being treated as principals, leaving each individual's degree of culpability to be considered at the sentencing stage. To this effect, the prosecution's case was centered around a joint criminal enterprise.[91] This joint criminal enterprise presumes "a common plan, purpose or design," shared by the RUF and AFRC, to "gain and exercise political power and control over the territory of Sierra Leone."[92] Those who bear the "greatest responsibility" for the crimes committed during the conflict in Sierra Leone are individually criminally responsible for the final result: war crimes and crimes against humanity; 500,000 persons murdered, raped, maimed and mutilated; and 2.5 million individuals internally displaced. Therefore, the Prosecutor filed separate joint indictments against the leadership of the CDF, RUF, AFRC, and individually against Charles Taylor.[93] The indictments featured notice pleading, a short and concise standardized format that includes identification, general allegations, individual criminal responsibility, and charges brought against the accused.[94] This gave the indictees the requisite notice required for them to understand the crimes they committed, where they committed them, and when. Notice pleading had never been used previously in an international tribunal.

On March 3, 2003, eight indictments were signed. A trial chamber judge in London confirmed these

indictments four days later. At noon on March 10, only seven months after the Prosecutor had arrived, members of the investigations team and Sierra Leonean Police officers launched "Operation Justice." All the indictees who were in Sierra Leone at that time, including the Minister of Interior, Samuel Hinga Norman, were arrested and taken into custody. The six indictees arrested in March 2003, along with three more over a period of several months were eventually housed in a detention facility at the Court compound in Freetown facing three joint criminal trials.[95] The indictments contained charges of crimes under international humanitarian law. Each of the indictees has been jointly and severally charged with the use of child soldiers and various gender crimes to include a new crime against humanity: forced marriage in times of armed conflict,[96] among other international crimes.[97]

The various charges in the indictments stem from the enumerated crimes within the Statute. This provision allows the Prosecutor to indict a person for various international crimes that range from intentionally attacking civilians, various crimes against peacekeepers or humanitarian assistance workers, and the recruitment and use of child soldiers.[98]

Trials of the leadership of the various combatants (CDF, RUF, AFRC)

From its outset, the jurisdiction of the Special Court was restricted to "those who bear the greatest responsibility." Clearly, this was intended to prevent the Special Court from expanding in size and expense as a result of an unmanageable prosecutorial strategy, as portrayed by the ICTY and ICTR. The indictments reflect a focused prosecutorial strategy, concentrating on a few individuals from each faction.[99] By November 2003, 13 individuals had been indicted, 10 of who are now in the Special Court's custody and are in trial. The cases are anticipated to conclude at the end of 2007.[100]

Jurisdictional Motions

During the pre-trial phase, in the summer of 2003, several of the indictees made various jurisdictional challenges to the charges in the indictments and to the Court itself.[101] In response, the prosecution argued successfully that the Special Court is an international court.[102] On June 26, 2003, one of the indictees, Hinga Norman, specifically challenged the charge against him relating to the use of child soldiers as not being a crime at the time of its alleged commission.[103] On May 31, 2004, the Appeals Chamber issued the decision on the preliminary motion based on lack of jurisdiction (child recruitment) dismissing the motion. The Appeals Chamber held that child recruitment had been criminalized under customary international law by the time frames relevant to the indictment, thus protecting the legality and specificity principles raised by Norman. For the first time in legal history, a high court had ruled that the recruitment of child soldiers was a crime under international law.[104]

In consideration of another crucial pre-trial motion, the Appeals Chamber unanimously decided that Charles Taylor would not benefit from any immunity from prosecution by the Court even though he was the acting Head of State of Liberia at the time criminal proceedings were commenced.[105] The question of whether a head of state can be brought before an international criminal tribunal has been one of the most controversial issues in international criminal law.[106] Therefore, this decision by the Court represents a momentous contribution to the developing norm in modern customary international law stating that Heads of State and other high-ranking governmental officials are not absolved of their individual criminal responsibility for grave international crimes.[107] The Appeals

Chamber found that one's position, as an incumbent head of state, held when criminal charges were levied against them, does not preclude their prosecution before an international court.[108]

Another Appeals Chamber decision addressed the general amnesty included in the Lomé Accord.[109] The defense argued in a pre-trial motion that the amnesty represented a bar to prosecution for the accused, thus negating the Court's jurisdiction.[110] The Court held that the Lomé Accord, an agreement between the government of Sierra Leone and the RUF, did not qualify as an international instrument, and therefore imposed no commitment on an international court.[111] If followed, this holding has great precedental value: future amnesty agreements between governments and combatants will not impede the jurisdiction of international courts.[112]

Role of the Academic Consortium

Designed to be an education program for law students, as well as a support mechanism for the Office of the Prosecutor, the academic consortium proved its worth by saving countless hours and millions of dollars in attorney time. As an education program, dozens of law students have had the unique opportunity to be involved in a real world international criminal prosecution. Their work product, supervised by professors, has been exceptional and has contributed to the advancement of international criminal law and in the education of future lawyers in this new discipline.

Investigation/Witness Management

Effective protection and support for witnesses who testify during trials is a critical aspect of the Special Court's operations.[113] Prior to the Special Court, no witness management program had been attempted.[114] While the Court's local presence poses considerable challenges to protecting and supporting witnesses, it also minimizes the hardship(s) posed by forcing witnesses to travel. Due to the fact that all the prosecution's evidence would come from witness testimony, they needed to ensure the testimony was truthful and accurate, and that witnesses were secure in the knowledge that they would be protected, based on the threat level assessed against them over time. To this effect, the prosecution worked with the Victims and Witness Support Unit (VWSU) within the Registry, making sure that all witnesses arrived safe, healthy, were briefed, and had an understanding of the process they were about to undergo.[115] The VWSU, in conjunction with the Witness Management Unit within the Office of the Prosecutor, provided essential services to witnesses.[116] Additionally, witness identity remains protected through various methods, to include voice distortion, testifying behind a screen, and redaction of any identifying information from the trial transcript.[117] After their testimony, the WVSU provides support to ensure the safety of witnesses as they return to their homes, providing transportation and contact information in case of emergency. The office of the Prosecutor, as part of their legacy program, trained an entire unit of the Sierra Leonean Police to care for and protect witnesses throughout the trial process.[118]

Lessons Learned from the Special Court for Future Tribunals: Important Precedents

Perhaps the most important precedent set by the Special Court is the concept of a focused mandate. The Special Court has been generally successful because it is one of the first tribunals with a workable mandate of around five years. The Special Court is a successful test showing that a tribunal can be run effectively with a realistic mission. The other important part of the Special Court's mandate is that it shall try only those bearing the "greatest responsibility." If the mandate would have stated, "try those who bear most responsibility," Sierra Leone would have the same problems as the ICTY and the ICTR who have less focused mandates.

Under the Special Court's realistic mandate, the numbers of individuals indicted went from 30,000 to around 20,[119] which allows the job to get done in a politically acceptable time frame. Because a tribunal with an indefinite life span frustrates the expectations of that society and its citizens, a tribunal should be done with its work in five years or less. However, where authorities obstruct the work of a tribunal and shelter its indictees, artificial deadlines should not shut down a tribunal and allow obstructionists to out-wait the rule of law.

Another lesson to be drawn is that the tribunal should be placed at or near the scene of the crimes.[120] A tribunal is most effective when it is located in the region of the conflict. To the extent that this can be done, regional tribunals need to be located right where the alleged atrocity took place. It allows for the victims to see justice done and renews or restores a faith in the rule of the law. Doing so serves as a closure mechanism and those affected can actually see that justice is working. Because the Court is based in Sierra Leone, Sierra Leoneans have a genuine interest in what is happening in their Court.

Outreach is essential to assist in the understanding of the importance of the rule of law and international justice.[121] A tribunal can only complete its work if the citizens of the region appreciate and understand why the international community is there seeking justice and accounting for the various international crimes allegedly committed. At the end of the day, it will be the people living in the area who will have to live with the results. Therefore, it is imperative to reach out to them. It is also important to note that consideration of regional cultures helps to establish confidence in the rule of law. Cultural perspectives must be respected and factored into the prosecutorial strategy and plan. This also assists the investigators and witness managers in preparing West African witnesses to testify before an international tribunal in a way that they understand.

Furthermore, legacy activities bolster the future success of establishing the rule of law. Tribunals are for and about the people, who will truly benefit from a cadre of trained and dedicated Court personnel to carry on the implementation of justice. Working with bar associations, nongovernmental organizations, and civil society to develop creative projects that local and international organizations can sponsor can help to restore a devastated judiciary and promote peace.

To build a sustainable peace, there must be a truth and reconciliation commission juxtaposed with a tribunal. Having a truth commission concurrent to the investigations and indictments of war criminals allows the citizenry to tell their story officially. Because most citizens are reluctant or refuse to testify, a reconciliation commission (such as the Truth and reconciliation Commission in Sierra Leone) serves to calm and assure the citizens that their voice will be heard, and that more

likely than not the complete story will be told. Simply stated, "Truth + Justice = a Sustainable Peace." Where one of these mechanisms is missing, there may not be a true peace.

Challenges

There is no more pressing reason to ensure that the Special Court is able to do its work than the people of Sierra Leone themselves. Their collective pain and suffering during the brutal civil war went neglected for far too long. All too often in places where the light of law never shines – the "dark corners" – a horror erupts that shocks the international community. This condition is spawned by indifference bred by lack of understanding for or care about the affected region. As in Rwanda, the international community, overtaxed and burdened with other challenges to peace and security, turned away from West Africa. The result of this decade-long lack of care was chaos and the resultant commitment of serious international crimes. This indifference continues and challenges the Special Court politically and financially. Initially the Court was to have been financed purely through voluntary contributions from UN member states. After receiving enough voluntary funding to last one-and-a-half years, the political will to donate to a war-crimes tribunal waned.[122] In a war-crimes weary world, the international community is easily distracted. Political support is a key for a successful international tribunal. It is the central thread throughout the process. State support waxes and wanes depending on the process and/or progress of the prosecution of the indictees and the political will of the various interested States and other international organizations. It is the Achilles heal of the entire transitional justice process.

Conclusion

International criminal justice can be effectively and efficiently delivered within a politically acceptable time frame. The Special Court for Sierra Leone has shown that it can be done – proving that the bold new experiment works. Regional hybrid tribunals are effective in delivering justice directly to the victims, their families, districts, and towns; and they can work within the paradigm of the Rome Statute that established the International Criminal Court.[123] The rule of law needs to be shown to be fair, that no one is above the law, and the rule of law is more powerful than the rule of the gun. With the hybrid model such as the Special Court for Sierra Leone, we now have the tools in place to face down impunity wherever it rears its ugly head, so that the tragedies of the 20th century – mankind's bloodiest – are not repeated.

1 Professor, Syracuse University College of Law. Founding Chief Prosecutor, international war crimes tribunal, called the Special Court for Sierra Leone, 2002-2005. Professor Crane wishes to acknowledge the work of his research assistant, Mr. Benjamin Flam, on this chapter.

2 Both tribunals have been criticized for their slow pace, prosecution strategies, high operational costs, and lack of connection to the societies where crimes were committed.

3 The Special Court was formed outside the parameters of the International Criminal Court (ICC), as the subject matter jurisdiction was outside of the ICC's temporal jurisdiction of July 1, 2002.

4 See, Jeana Webster, Note, Sierra Leone - Responding to the Crisis, Planning for the Future: The Role of International Justice in the Quest for National and Global Security, 11 Ind. Int'l & Comp. L. Rev. 731, 733-34 (2001), citing Bankole Thompson, The Constitutional History And Law Of Sierra Leone (1961-1995) 194-95 (1997).

5 See, Karsten Nowrot & Emily W. Schabacker, The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone, 14 Am. U. Int'l L. Rev. 321 (1998).

6 See, Id. 735, citing Eliphas G. Mukonoweshuro, Colonialism, Class Formation And Underdevelopment In Sierra Leone 201-40 (1993).

7 For an overview of the conflict, See David Pratt, Sierra Leone: The Forgotten Crisis, available at: http://www.sierra-leone.org/pratt.042399.html. For a more detailed history of the eleven year civil war, see Babafemi Akinrinade, International Humanitarian Law and the Conflict in Sierra Leone, 15 Notre Dame J.L. Ethics & Pub. Pol'y 391 (2001).

8 See, Id.

9 Id. The Green Book is a book written by the Qaddafi, first published in 1975, outlining his political views and plans for imposing his rule on all of western Africa. It consists of three parts: (1) The Solution of the Problem of Democracy: 'The Authority of the People'; (2) The Solution of the Economic Problem: 'Socialism'; and (3) The Social Basis of the Third Universal Theory. The book is controversial because it completely rejects modern conceptions of liberal democracy and encourages the institution of a form of direct democracy based on popular committees. Qaddafi uses these committees as tools of autocratic political repression in practice. Qaddafi has been involved in Sierra Leone since at least 1985, when he began funding and training students in "the art of revolution." Qaddafi is extensively involved in politics throughout Western Africa, through funding development programs and influencing government officials.

10 See, Id. Taylor first attacked Sierra Leone in 1989 with the support of Qaddafi. In addition, Taylor received additional support from political and business connections in Cote d'Ivoire and Burkina Faso.

11 See, Matthew Griffin, Note, Accrediting Democracies: Does The Credentials Committee Of The United Nations Promote Democracy Through Its Accreditation Process, And Should It?, 32 N.Y.U. J. Int'l L. & Pol. 725, 747 (2000), citing Jeremy Levitt, Humanitarian Intervention by Regional Actors in Internal Conflicts and the Cases of ECOWAS in Liberia and Sierra Leone, 12 Temp. Int'l & Comp. L.J. 333, 364-65 (1998).

12 The RUF seemed willing to discuss peace terms. The fighters from Executive Outcomes were successfully reclaiming control of RUF-held diamond mines. The diamond mines provided essential funding for the war, and without access to them, the RUF would be unable to support their troops. See, Ian Smillie, Lansane Gberie & Ralph Hazelton, The Heart of the Matter: Sierra Leone, Diamonds, and Human Security, PAC (2000), available at: http://www.sierra-leone.org/heartmatter.html. The peace fostered by the Abidjan Agreement lasted approximately nine months. Under the Agreement, Executive Outcomes was forced to leave Sierra Leone, replaced by Nigerian peacekeepers. The RUF also achieved increased political legitimacy, and it appeared it would be recognized as a political party. However, since the RUF never adopted any political platform, the widespread sentiment was that they were fighting for control of the diamonds, not political change. See, Footpaths to Democracy, (1995), available at: http://www.sierra-leone.org/footpaths.htm. In 1997, Johnny Paul Koroma of the Armed Forces Revolutionary Council (AFRC), which soon after joined with the RUF to form the AFRC/RUF, overthrew President Kabbah. The AFRC/RUF proved an especially brutal regime. Determined to protect innocent civilians, the Economic Community of West African States (ECOWAS), with the support of the U.N. Security Council, increased the number of Nigerian troops stationed in Sierra Leone. See, U.N. SCOR, 3889th mtg., UN Doc S/RES1171 (1998). The AFRC/RUF signed an agreement with Kabbah's deposed government, and with ECOWAS support, President Kabbah was returned to Freetown. The RUF continued to commit war crimes in the East, replenishing its war chest through diamond sales to President Taylor of Liberia. During this time, Foday Sankoh was captured in Nigeria and returned to Freetown, where he was tried and sentenced to death for his role in the civil war. In January 1999, the RUF once again attacked Freetown, this time defeating the peacekeepers in "Operation No Living Thing." Thousands of children were forcibly conscripted into the RUF army, drugged, killed, burned alive, or raped, before the rebels were driven away. See, Getting Away with Murder, available at: http://www.hrw.org/reports/1999/sierra/SIERLE99.htm. In early 1999, there was essentially a stalemate. Economic Community of West African States Monitoring Group (ECOMOG) peacekeepers protected the capital (although they also stood accused of summary executions, rapes, and murders), but seemed unable to defeat the RUF and its allies. The RUF seemed content holding only the diamond-mining districts, as they had never seemed as interested in political power as they were in controlling access to the mines.

13 See, Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Nov. 30, 1996, art. 1, available at http://www.usip.org/library/pa/sl/sierraleone10301996.html; Diane Marie Amann, Message as a Medium in Sierra Leone, 7 ILSA J. Int'l & Comp. L. 239 (2001).

14 See, Webster, supra note 4, at 738-39; Jeremy Levitt, Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone, 12 Temp. Int'l & Comp. L.J. 333, 343 (1998).

15 See, Abdul Tejan-Cole, Notes from the Field, The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission 6 Yale H.R. & Dev. L.J. 139, 141 (2003).

16 See, Id.; Matthew S. Barton, ECOWAS and West African Security: The New Regionalism, 4 DEPAUL INT'L L.J. 79, 80 (2000).

17 See, Tejan-Cole, supra note 15, at 141.

18 The rebel forces committed the most atrocious human rights violations of Sierra Leone's civil war during the invasion on the capital. See *e.g.*, Jon M. Van Dyke, The Fundamental Human Right to Prosecution and Compensation, 29 Denv. J. Int'l L. & Pol'y 77 (2001). ECOMOG forces were eventually able to regain control over Freetown. However, the fighting was fierce, resulting in the deaths of approximately 7,000 people and two-thirds of Freetown being destroyed. See, The Secretary-General, Fifth Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, para. 1, UN Doc. S/1999/237 (Mar. 4, 1999) (describing the RUF attack on Freetown and the resultant effects). As a result of the anarchy, about 600,000 of Sierra Leone's estimated population of 4 million people sought sanctuary in neighboring nations, and two-thirds of those who remained in Sierra Leone were internally displaced. See, The Secretary-General, Sixth Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, para. 9, UN Doc. S/1999/645 (June 4, 1999) (describing the then-current status of the Sierra Leonean refugees and internally displaced persons).

19 See, Id. and Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999 [hereinafter Lomé Peace Agreement], available at:

http://www.sierra-leone.org/Loméaccord.html. Most controversially, the Lomé Accord granted complete amnesty to all combatants. Article IX reads in part: (2) After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement. (3) To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organizations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality. The Lomé Peace Accord also established a Truth and Reconciliation Commission (TRC), created as an instrument for addressing the abhorrent violence to promote and facilitate reconciliation for a deeply fragmented people (Lomé Peace Agreement, Part Two art. VI and XXVI). Disregarding the terms of the Accord, the RUF resumed its practice of committing violent acts against the people of Sierra Leone. See, Daniel J. Macaluso, Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lomé Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone, 27 Brook. J. Int'l L. 347, 350 (2001). Seeking to take power from the AFRC, the RUF did not fully comply with the Lomé Accord. In May of 2000, rebel forces attracted the international community's attention by taking 500 UN Peace Keepers as hostages. Thereafter, Foday Sankoh, leader of the RUF, was captured and arrested, initiating a dialogue calling for the creation of an international criminal court for Sierra Leone to try those responsible for the grave crimes committed in violation of international law.

20 Not only did the national courts of Sierra Leone lack the expertise and resources to prosecute the crimes committed during the conflict, but problems were posed by the existence of an amnesty and gaps in Sierra Leonean criminal law, respectively. President Kabbah suggested that the Special Court should have as its applicable law a combination of international and domestic law. In the letter, President Kabbah requested, "[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." In August 2000, the United Nation's Security Council adopted Resolution 1315, which requested that the Secretary-General consult with the government of Sierra Leone on the creation of an independent international court that would have jurisdiction over those most

responsible for the notorious human rights violations committed during the conflict, such as crimes against humanity and war crimes. See, Avril McDonald, Sierra Leone's Shoestring Special Court, 84 No. 845 Int'l Rev. of the Red Cross 124, 124 (Mar. 2002); see also, Letter from the President of Sierra Leone to the U.N. Secretary-General, U.N. Doc. S/2000/786, Annex, available at http://www.sc-sl.org.

21 In 2000, UN Security Council Resolution 1315 created a framework for the establishment of an independent special court in Sierra Leone to address "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. See, U.N. Doc. S/RES/1315 (2000).

22 See, 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. Examples include: crimes against humanity, violations of common Article 3 of the Geneva Conventions and Additional Protocol II, and other serious violations of international law, such as crimes committed against peacekeepers and the use of child soldiers.

23 These crimes were drawn from the Rome Statute of the International Criminal Court. Some of the provisions of the Statute come directly from the Rome Statute of the ICC. Rome Statute of the International Criminal Court, July 12, 1999, art. 28. The text of the ICC Statute is available online at: http://www.un.org/law/icc/statute/romefra.htm. The language "persons who bear the greatest responsibility" from Article 1 of the Special Court's Statute came from the Rome Statute. See, Statute, art. 1. Distinct from the ICTR and the ICTY Statutes, but succinct with the Special Court's Statute, sexual crimes are defined as crimes against humanity by the Rome Statute. See, SCSL Statute, art. 2(g); see also, ICC Statute, art. 7(1)(g). Article 4(b) of the Special Court's Statute mirrors Article 8(2)(b)(iii) of the ICC Statute. Both operate to protect humanitarian assistance and peacekeeping missions. See, Statute, art. 4(b); see also, ICC Statute, art. 8(2)(b)(iii). These incorporations of the Rome Statute in the Special Court's Statute indicate gradual development in international criminal law.

24 Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, P 1, U.N. Doc. S/2000/915 (2000) [hereinafter Report of the Secretary-General].

25 Operative paragraph 1 of Resolution 1315 "[r]equests the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court."

26 Id. This includes the abuse of girls in violation of the Prevention of Cruelty to Children Act (1926), for the rape of countless girls under 14 years of age and the abduction of girls under 16 years of age subjected to forced marriage. This also includes the wanton destruction of property carried out in violation of the Malicious Damage Act (1861), such as burning people in their homes, burning down homes with people locked inside them, and burning public buildings.

27 Statute of the Special Court for Sierra Leone, August 14, 2000, art. 12(1)(a), U.N. - S.L. at http://www.sierra-leone.org/specialcourtstatute.html. [hereinafter Statute].

28 Statute, Article X. The subject matter jurisdiction of the SCSL is similar to the Statutes of the ICTR and the ICTY. Article 2 of the Statute of the SCSL lists the crimes against humanity that the SCSL will have the power to prosecute. These include crimes such as murder, extermination, enslavement, imprisonment, torture, rape, or other inhumane acts, if they were committed as "part of a widespread or systematic attack against any civilian population." Article 3 covers Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. The crimes in Article 3 are defined exactly the same as those in Article 4 of the Additional Protocol for Non-International Armed Conflict. These crimes include mutilation, torture, collective punishments, hostage-taking, terrorism, pillage, summary executions, and outrages on personal dignity. Article 4 enumerates Other Serious Violations of International Humanitarian Law, including intentional attacks on civilian targets, intentional attacks on humanitarian and peacekeeping personnel, and abduction and recruitment of children under the age of fifteen into armed groups. Not included on this list of crimes is genocide, since the attacks on civilians in Sierra Leone do not appear to have had an ethnic element. In addition to the crimes against humanity, war crimes, and other serious violations of international humanitarian law, Article 5 of the Statute provides jurisdiction for Crimes under Sierra Leonean law. The ICTR and ICTY do not provide jurisdiction for

Rwandan and Yugoslavian crimes.

29 Article 2 of the Statute of the Special Court for Sierra Leone confers "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." Statute, Article II.

30 An "attack against a civilian population" refers to conduct that involves repeated commission of one or more of the acts enumerated in the text of Article 2. The "attack" need not be physical, as alternate forms of inhumane mistreatment of a civilian population qualify. Further, customary international law does not necessitate discriminatory intent surrounding the "attack". (Although the ICTR Statute, art. 3, limits ICTR jurisdiction in crimes against humanity cases to attacks made on discriminatory grounds, the Statute of the Special Court does not.) A civilian population is one that is predominantly civilian in nature, meaning that the people do not directly take part in the hostilities, or have ceased to take part in the hostilities (including those who are injured or incapacitated.) See, e.g. common article 3 to the Geneva Conventions and the Additional Protocols. A population will not lose its civilian character simply because non-civilians are found within it. See, Prosecutor v. Tadic, Case No. IT-94-I, ICTY Trial Chamber, Judgment, 7 May 1997. To establish a crime against humanity, a showing that a civilian population was the primary target of an attack is sufficient (there is no requirement that the whole population has been victimized by the attack). Prosecutor v. Bailishema, Case No. ICTR-95-1 ICTR Trial Chamber, 7 June 2001.

31 See, e.g. Rome Statute, art. 7. To establish the contextual elements for a crime against humanity, an attack must be either widespread or systematic. To be widespread, the attack must have taken place on a large scale directed against a large number of victims. To be systematic, the attack must have been carried out according to an organized plan.

32 To establish that the act was committed as a "part of" the attack against a civilian population, it must be shown that the act was related to the attack. This effectively excludes random and/or isolated acts from qualifying under the definition of crimes against humanity. However, a single act could well constitute a crime against humanity with a showing that it was perpetrated as a part of a larger, deliberate attack. See, ICTY Trial Chamber Rule 61.

33 See, Tadic, note 30 supra. This requirement represents the mental facet that must be proven to establish crimes against humanity. It must be shown that the accused had knowledge about the extensive nature of their actions, and that they had knowledge that their act contributed part of the broad attack on the civilian population.

34 Whereas the ICTY and ICTR do not consider all of the acts, the Special Court has the power to do so. See, Statute, Article 2, para. (a)-(i).

35 Originally, the government of Rwanda had wanted the ICTR to be established in Kigali, but due to concerns regarding security and the independence of the tribunal, this was not possible. This lack of physical connection to the people that suffered the violence is a major source of criticism for the ad hoc tribunals. Regrettably, ten years after its creation and seven years after trials began, the ICTR has little impact on the citizenry and judiciary of Rwanda. According to some accounts, Rwandans feel no sense of ownership of the ICTR and do not generally perceive the tribunal to be for them. This is aggravated by the fact that many ICTR staff members have not even visited Rwanda, with the exception of those who have worked for the Office of the Prosecutor on investigations.

36 In April 2002, three months after the Government of Sierra Leone and the UN signed the agreement establishing the Special Court, UN Secretary-General Kofi Annan appointed the Registrar and the Chief Prosecutor. They arrived in Freetown in late July and early August 2002, respectively. They began operations in difficult conditions. An advance planning task force had determined the necessity of the erection of a new facility to house the Court. ICTR, the Court lacked formal ties to the UN. However, assistance from the government of Sierra Leone was forthcoming. An 11.5-acre plot of land in central Freetown, donated by the Government, would serve as the Court's site; to include staff offices, courtrooms, and prison facilities. Until January 2003, the Registry operated in provisional offices owned by the Bank of Sierra Leone, while the Office of the Prosecutor, located in a private residence a few kilometers away, was not relocated to the permanent site until August 2003. One year after the Court began its operations, the Registry was still in the process of formation. By April 2003, Because the top priority was getting the Office of the Prosecutor up and running, the Special Court had only hired 55 percent of its expected total personnel of 256 by April of 2003. By the time the Court had to deal with its first detainees, with the first wave of indictments and arrests on March 10, 2003, it had

made much progress. However, there existed no permanent prison facilities, courtroom, or functional defense office. Rehabilitated buildings on Bonthe Island were used to house the detainees during the initial months. Forty minutes from Freetown by helicopter, the island's remote nature, selected for security reasons, posed accessibility problems for relatives, legal counsel, and journalists. On August 10, 2003, the accused were transferred to the permanent detention facility in Freetown.

37 The Special Court's ad-hoc predecessors did not engage in outreach at their outset, although each has since established similar programs.

38 See, Human Rights Watch interview with Special Court staff, Freetown, April 14, 2005; Human Rights Watch separate interviews with two members of Sierra Leone civil society, Freetown, April 12 and 14, 2005; Human Rights Watch group interview with members of civil society, Freetown, April 14, 2005, available at: http://hrw.org/reports/2005/sierraleone1105/6.htm.

39 Security Council Resolution 1315 recommended that the SCSL be funded voluntarily. The U.N. Security Council directed the Secretary-General to negotiate a treaty with the government of Sierra Leone that would create an independent, hybrid special court. Resolution 1315 directed the Secretary-General to determine the "amount of voluntary contributions, as appropriate, of funds, equipment and services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations." See, UNSC Res. 1315 (August 14, 2000) para. 8(c). Notably, the Management Committee, as a policy, does not publicize the identity of donors and the amount given.

40 More than 30 countries have contributed to the Special Court, although four of them (the United States, Great Britain, Canada, and the Netherlands) provided two-thirds of the Court's first-year budget. This has two consequences: the budget is tight overall, and these few states theoretically have great influence, although the Registrar has said that he has not experienced any interference. The Special Court's $19 million first-year budget was about one-fifth of the size of the ICTR's current annual budget of more than $100 million.

41 See, U.N.-Sierra Leone Agreement, art. 7 (explaining the duties of the management committee).

42 The management committee is currently made up of the U.S., Great Britain, Canada, the Netherlands, Lesotho, Nigeria, and Sierra Leone.

[43]43 Some of the assumptions behind the budget, particularly in trying to keep costs down in its first year, resulted in unexpected challenges. For example, when the Office of the Prosecutor came out with indictments in March 2003, the Registry had not filled key posts that were necessary to process the detainees, such as the Court Management section and a Chief of Detention, because they were budgeted to be hired only in the next fiscal year, which started in July 2003.The Special Court's annual budget is currently around $30 million (U.S. dollars), about one-third of which is contributed by the U.S.

44 Because the Special Court is not a UN body it has suffered some weaknesses. For example, Foday Sankoh might have been able to benefit from medical treatment abroad if there had been legal obligations on states to cooperate with the Court's pleas to host him. The other ad hoc tribunals also may have been more inclined to keep Hinga Norman in detention if the Special Court had a similar mandate and powers.

45 As to the arrest of suspects, when the arrests were first announced, the only accused who were not in Sierra Leone were believed to be in Liberia, whose own head of state had been indicted by the Special Court. It is worth noting, however, that once the Court failed to attain Charles Taylor's arrest in Ghana, the President wrote to the Secretary-General on June 10, 2003, requesting Chapter VII powers for the Court, which was not granted.

46 See, UN News Centre, Sierra Leone: Swiss freeze assets of Liberian leader Taylor's associates, 23 July 2003, available at: http://www.un.org/apps/news/story.asp?NewsID=7811&Cr=sierra&Cr1.

47 Statute of the Special Court, art. 1 (Jan. 16, 2002), Annex to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, available at: http://www.sc-sl.org/scsl-statute.html. See also, Ratification Act 2002, art. 1.

48 See, Statute, arts. 2-5.

49 See, Ratification Act.

50 The official language of the Special Court is English, which is the official language of Sierra Leone. See, Statute, art. 24. Notably, some of the defendants, like many Sierra Leoneans, speak only Krio, or one of many other local tongues. To this effect, non-English speaking defendants are granted the right to have an interpreter "if he or she cannot understand or speak the language used in the Special Court." (Statute, art. 17(4)(f)). See also, Antonio Cassese, The ICTY: A Living and Vital Reality, 2 J. Int'l Crim. Just. 585, 595 (2004) (addressing problems in international tribunals regarding language barriers).

51 See, Statute, preamble.

52 Black's Law Dictionary defines *mutates mutandis* as: "all necessary changes having been made; with the necessary changes."

53 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." The notification required under article 21 took place on April 11, 2002.

54 The then-current ICTR Rules of Procedure and Evidence were those last amended on May 31, 2001

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

56 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 to the proceedings of the Special Court were designed for a different court having a different legal basis, jurisdiction and powers, they contained provisions that did not mesh with the legal framework established 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. 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.

57 The Rules are categorized as follows: 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. See, http://www.sc-sl.org/scsl-procedure.html.

58 The Rules were last amended on May 29, 2004. 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 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, December 3, 2003, available from http://www.specialcourt.org/.

59 Article 14(2) of the Statute states that the "judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules". Rule 6 provides a two-step amendment procedure. First, there must be a proposal for amendment, which may come from a judge, the Prosecutor, the Registrar, the Defence Office, the Sierra Leone Bar Association or any other party invited by the President to make a proposal. (Rule 6(A)). Second, the proposal must be adopted by the judges of the Court at a plenary meeting, or approved unanimously by the judges through any appropriate means, which if not in writing, must be confirmed in writing. (Rule 6(B) and (C)). Upon adoption or

unanimous approval, the amendment enters into force immediately, unless otherwise indicated, and the Registrar must publish the amendment appropriately. (Rule 6(D)). In reviewing and deciding on proposals, 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." Article 14(2) of the Statute also directs the judges to find guidance in the Criminal Procedure Act, 1965, of Sierra Leone. Notably, one Court's early findings acknowledged that the Criminal Procedure Act, 1965, of Sierra Leone is a source of guidance. See, 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. This provision of the Statute appears to be intended in part to deal with proceedings regarding crimes under Sierra Leone law. See. 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. The judges could reference the rules of international courts such as the ICTY and ICC, as well as to amendments of the rules of the ICTR made after 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". See, 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. However, this power is not without limits, as the judges have decided that the effect of amending the Rules cannot "contravene any express provision of the Agreement and Statute". See, Id., para. 27.

60 See, Statute, preamble. In addition, the Rules should be read in light of relevant domestic law to which it makes explicit or implicit reference, particularly the Special Court Agreement Ratification Act. 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." Further, interpretation of the Rules must be guided by decisions made by ICTY, ICTR and the Sierra Leone courts. Guidance may also be sought from relevant decisions by other courts such as the International Criminal Court (ICC), and customary international law such as relevant international human rights law. Other important individual characteristics of the Court's Rules include: permitting the Court to exercise its functions outside of Sierra Leone (Rule 4); allowing closed sessions for national security and the security of the Special Court (Rule 79); removing the prima facie standard of proof for confirmation of the indictment (Rule 47); reducing time limits for filings on preliminary motions (Rule 50) and appeals (Rule 111); permitting the accused to be handcuffed in court (Rule 83); and limiting the Prosecutor's responsibility to disclose exculpatory evidence (Rule 68).

61 Article 11 of the Statute of the Special Court provides for the organization of the Court by stating: "[t]he 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."

62 Within the Chambers, there is a hierarchy of seniority, envisioned 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. See, Statute art. 12(3); Rule 18. The President is required to undertake a number of functions, including issuing Practice Directions on the conduct of proceedings before the Special Court (Rule 19(B)), convening and chairing the plenary meetings of the Judges, coordinating the work of the Chambers and overseeing the work of the Registry (Rule 19(A)). The President is also charged with authorizing 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 (Rule 4)).

63 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. See, ICTY Statute, articles 11 and 12; ICTR Statute, articles 10 and 11. 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 harmonization of international criminal law. See, Security Council Resolution 1315 (2000), U.N. Doc. S/RES/1315 (2000), OP 7. 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. See, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, October 4, 2003, U.N. Doc. S/2000/915.

64 While the Defense Office was not specifically foreseen within the Court hierarchy in the founding instruments, it was

recognized early on that the Special Court represented a good opportunity to overcome the problems faced by the ICTY and ICTR by dealing with defense issues in a more systematic and structured way. See, Report on Defence Provision for the Special Court for Sierra Leone, available at: http://www.specialcourt.org.

65 In February 2003, the Management Committee approved an innovative composition, suggested by the Registrar. This system attempted to strike a balance between two competing difficulties, which have posed a difficult challenge for other international tribunals: addressing donor states' concerns by strictly controlling the costs of legal aid, and ensuring fair trials by importing highly qualified lawyers. Largely inspired by previous British practice, the Court established the Defence Office, in essence, a public defender's office. The Defence Office is led by a senior international lawyer, assisted by up to four additional attorneys, all of who are on the Court's payroll. This Office provides support in legal research; whereas the defense teams hire investigators separately each accused defendant is assigned an experienced lawyer, using a lump-sum payment system in order to avoid inflation of fees. This system is an experiment in international justice and seems promising. However, it has been difficult to hire someone into the top post of Public Defender, because there is no representational role envisaged for this person in court, and it is difficult to entice experienced criminal practitioners to abandon their practices and relocate to Sierra Leone.

66 See, Defence Office, Office of the Principal Defender, available at: http://www.sc-sl.org/defence.html (describing how the Special Court houses defense counsel similar to prosecution counsel).

67 See, Directive on the Assignment of Counsel, available at http://www.sc-sl.org/assignmentofcounsel.html (describing the procedure through which defense counsel is assigned).

68 The Defence Office was originally conceived on a Public Defender model, that is the Defence Office would represent all accused at all stages. It soon became apparent, however, that there was potentially a grave conflict of interest in the Defence Office's representing accused who are charged with many of the same crimes and who could therefore implicate each other in the course of their defense. Therefore, it was clear that the Defence Office could not represent each of the accused in any meaningful sense. The mandate of the Defence Office is set out in Rule 45 of the Rules of Procedure and Evidence of the Special Court. First, under Rule 45(B)(i), Duty Counsel in the Defence Office offer "initial advice and assistance." This takes place at the Initial Appearance, held under Rule 61. In order to avoid conflict of interest, the Duty Counsel must be unaware of any attorney-client confidences and any information about the defense(s) that will be raised by an accused at trial. This does not prevent the Defence Office from providing consequential assistance, since various legal issues, such as the legality of an arrest, may be contended without the knowledge about an accused individual's answer to the substantive charges. Second, under Rule 45(C) and subject to the ultimate approval of the Registrar, the Defence Office assigns counsel to any accused individual who requests representation and who cannot afford to hire their own private counsel. Third, the Defence Office provides support to appointed and assigned counsel, which includes administrative assistance, selection of investigators, legal research and drafting motions to the Court. For example, the Defence Office identifies legal issues be raised before the judges, does the necessary research, writes legal briefs and shares the results of their research with Defence Counsel. Finally, the Defence Office has a very important "outreach" role. The Defence Office has a role in educating the people of Sierra Leone about the Defence, the presumption of innocence, the burden and standards of proof and the rights of the accused.

69 See, Statute for the Special Court, art. 16 (detailing the necessary security measures for the government of Sierra Leone to execute); See also Michael P. Scharf, The Role of Justice in Building Peace, 35 Case W. Res. J. Int'l L. 153, 157 (2003) (describing the Registry's position in relation to the Special Court and the Office of the Prosecutor).

70 See Rules of Procedure and Evidence, available at: http://www.sc-sl.org/scsl-procedure.html. The Special Court's Rules of Procedure and Evidence place great responsibility in the Registry, charging it with the responsibility of assisting "the Chambers, the Plenary Meetings of the Special Court, the Council of Judges, the Judges and the Prosecutor, the Principal Defender and the Defense in the performance of their functions." The Registry is also responsible for "the administration and servicing of the Special Court and shall serve as its channel of communication." (Rule 33(A)).

71 The Trial Chamber is the "court of first instance," where charges against the accused are tried before a panel of judges. 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). Since then, in accordance with the Special Court's Statute, a second trial chamber was created. Currently, there are two chambers. Trial

Chamber I is presided over by Justice Rosolu John Bankole Thompson (Sierra Leone), Presiding Judge (Nominated by the Government of Sierra Leone), Justice Pierre G. Boutet (Canada) (Appointed by the Secretary-General of the United Nations), and Justice Benjamin Mutanga Itoe (Cameroon) (Appointed by the Secretary-General of the United Nations). Trial Chamber II is presided over by Justice Richard Lussick (Samoa), Presiding Judge (Nominated by the Government of Sierra Leone) Justice Teresa Doherty (Northern Ireland) (Appointed by the Secretary-General of the United Nations) Justice Julia Sebutinde (Uganda) (Appointed by the Secretary-General of the United Nations).

72 The Appeals Chamber is the "court of appeal," where the parties may appeal a decision made by the Trial Chamber on legal grounds specified in the Statute. The Appeals Chamber is composed of five justices, two appointed by the Government of Sierra Leone and one appointed by the United Nations Secretary-General. These Judges were also named in the aforementioned joint press conference: 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), and Hassan Jallow (The Gambia, appointed by the Secretary-General. Judge Jallow 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.) The Appeals Chamber is currently presided over by: Justice George Gelaga King (Sierra Leone), President (Nominated by the Government of Sierra Leone), Justice Emmanuel Ayoola (Nigeria), Vice President (Appointed by the Secretary-General of the United Nations), Justice A. Raja N. Fernando (Sri Lanka) (Appointed by the Secretary-General of the United Nations), Justice Renate Winter (Austria) (Appointed by the Secretary-General of the United Nations), Justice Geoffrey Robertson QC (U.K.) (Nominated by the Government of Sierra Leone).

73 See, Statute, art.13(1).

74 Id.

75 The Special Court is the first international tribunal to utilize "greatest responsibility" as its standard for prosecution. Although this standard was recommended in the initial UN Security Counsel Resolution, a subsequent report by the Secretary-General suggested replacing it with the more general phrase "persons most responsible." According to the Secretary-General, this broader mandate would permit the prosecution of "others in command authority down the chain of command" who could be regarded as "most responsible judging by the severity of the crime or its massive scale." See, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone (October 4, 2000), Document S/2000/915, paragraph 30. Ultimately, the Special Court's Statute employed the language of the Security Counsel Resolution; however, the mandate's interpretation is left to the prosecutor's discretion.

76 Statute, art. 15(1).

77 See, Id. A Deputy Prosecutor heading the appellate section of the office, a Chief of Prosecutions heading the prosecution section, and a Chief of Investigations, supports the Prosecutor. The trial lawyers are divided into two teams: "Task Force One" for the RUF and AFRC trials, and "Task Force Two" for the CDF trial. Each has a lead counsel, and both teams directly answer to the Chief of Prosecutions.

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

79 It is worth noting that the staff of the Office of the Prosecutor 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, were intended to "root… the process in Sierra Leone and makes it uniquely Sierra Leonean" and had been an integral part of the Court's conception since before the initial negotiations began. See, Letter from President Alhaji Dr. Ahmad Tejan Kabbah to the Security Council, U.N. Doc. S2000/786.

80 Article 16(4) of the Statute gives the Prosecutor the right to be consulted on protective measures and security arrangements, counseling and other appropriate assistance for victims and witnesses.

81 See, Statute, art. 15(4); See also, Rule 39(iii) and (iv). To this effect, the Prosecutor is empowered to seek the assistance of States and international organizations, in particular INTERPOL.

82 The inclusion of these provisional measures is indispensable to give the Prosecutor the capacity to send requests to

States. However, the implementation of these measures depends on the States, as the Court has no power to compel cooperation by any State other than Sierra Leone.

83 This is exemplified by the scope of the personal jurisdiction of the Court granted though its mandate: "those who bear the greatest responsibility" represents a restriction on the Prosecutor. However, it should be remembered that no other international court or tribunal has had this restriction placed on their jurisdiction and, rendering the "greatest responsibility" phrase untested. As a result, the leeway and the discretion of the Prosecutor leave it up to him to interpret and apply this provision to his prosecution strategy and in each of cases. The temporal jurisdiction of the Court adds yet another restriction to the Prosecutor's discretion, as it only runs from November 30, 1996 (even though the conflict actually began in 1991). Therefore, irregardless of whether an individual bears the greatest responsibility, the Prosecutor is be precluded from prosecuting anyone who allegedly committed any violation(s) before to November 30, 1996. Conversely, the amnesty granted pursuant to the Lomé Peace Agreement, which applied to combatants for any acts undertaken before July 7, 1999, does not apply. Finally, there are special requirements in relation to the jurisdiction of the Special Court over crimes allegedly committed by peacekeepers, which have the effect of limiting the Prosecutor's discretion. For example, in the case of alleged violations committed by peacekeepers, their home State retains personal jurisdiction. The Court may only exercise jurisdiction in the event that the State is either unwilling or unable to exercise jurisdiction (and if the UN Security Council, on the proposal of any State, authorizes the Court to do so). This is a result of the Court's inability to require compliance with its orders by any State other than Sierra Leone.

84 Although Sierra Leone's long civil war may technically have been declared over by the signing of the Lomé Peace Accord, it continued on until the winter of 2002, in reality. The effects of the war continue with every passing day. Thousands of men, women and children are reminded of the war every day of their lives because of the inhumane, barbaric treatment they endured. The rebel soldiers have become infamous for their systematic raping of women and girls, and the forced amputation of civilians' limbs. See, e.g., Human Rights Watch, African Division, Sierra Leone, "We'll Kill You if You Cry: Sexual Violence in the Sierra Leone Conflict," (Jan. 2003), available at: http://hrw.org/reports/2003/sierraleone/ (reporting studies that found 94% of Sierra Leone female-headed households have experienced some form of inhumane crime). Of those who have reported war-related sexual violence, 89% reported rape, 37% reported being forced to undress/stripped of clothing, 33% reported gang rape, 14% reported molestation, 15% reported sexual slavery, 9% reported being forced into marriage, and 4% reported having foreign objects forced into the genital opening or anus. Of the women who reported these violent acts, 23% were pregnant at the time of the attack. See, Press Release, Physicians for Human Rights, War-Related Sexual Violence in Sierra Leone, A Population Based Assessment (Jan. 23, 2002), available at: http://www.phrusa.org/research/sierra_leone/report_pr.html. As with the crimes of sexual violence, torture in the form of forced amputation was also systematic and widespread. Although the forced amputation of limbs was not an uncommon occurrence in Africa, there has never been as drastic a use of this form of torture as in Sierra Leone. The rebels used forced amputation as a form of punishment for civilians who dared to vote, resulting in a marked increase in amputations after the 1996 election. Rebels who frequently amputated civilians often carried back the amputated limbs to their commanders. It is believed certain rebel groups specialized in amputation and rebel soldiers were promoted if they returned to camp with a large amount of limbs. Radio Netherlands, Amputees, March 6, 2000, available at: http://www.rnw.nl/humanrights/html/amputees.html. The rebel forces were also known for kidnapping children and forcing the children to fight as soldiers. Often children were kidnapped from their families, and told that if they became soldiers, they would be reunited with their family. The RUF used "false threats, false promises and rumors" to convince children to rejoin the rebel forces. See, Human Rights Watch, Sierra Leone Rebels Forcibly Recruit Child Soldiers (May 31, 2000), available at: http://www.hrw.org/press/2000/05/sl0531.htm. Drugs also factored into the RUF's ability to keep the child soldiers and manipulate their ability to fight. See, B.B.C. News, Brutal Child Army Grows Up (May 10, 2000), available at: http://news.bbc.co.uk/1/hi/world/africa/743684.stm.

85 Charles Taylor was President of Liberia from 1997-2003. Further information on Liberia can be found at U.S. State Dep't, Bureau of African Affairs, Background Note: Liberia (Jan. 2006), available at: http://www.state.gov/r/pa/ei/bgn/6618.htm.

86 Blaise Compaore, President of Burkina Faso, first took office in 1991 after an unopposed election; he was re-elected in 1998 for a second seven-year term. See, U.S. State Dep't, Bureau of African Affairs, Background Note: Burkina Faso (Aug. 2005), available at: http://www.state.gov/r/pa/ei/bgn/2834.htm.

87 See, David Crane, Terrorists, Warlords, and Thugs, 21 Am. U. Int'l L. Rev. 505, 515. These factors, as expressed directly by Mr. Crane, the Founding Chief Prosecutor of the Court, were instrumental to the prosecutorial strategy

devised by the OTP for identifying those bearing "greatest responsibility" for the crimes committed during the conflict.

88 See, U.N. Sec. Council, Report of the Security Council Mission to Sierra Leone, paras. 42-43, U.N. Doc. S/2000/992 (Oct. 16, 2000) (expressing the general sentiment that Charles Taylor was connected to the illegal trade in diamonds and guns, although he denied accusations of such involvement). Commenting on former President Taylor's role in the atrocities, the Security Council report noted:

Regional leaders were clearly of the opinion that President Taylor's relationship with [the RUF] was a key to the situation in Sierra Leone, and that continued action was necessary to persuade him to use his influence to positive, rather than negative, effect. Illicit trafficking in diamonds and arms, the proliferation and encouragement of thuggish militias and armed groups, and the massive flows of refugees and internally displaced persons resulting from their activities must be addressed directly.

Id. para. 54(d). The civil war was a unique conflict – started by politicians, generals, financiers, gun runners, diamond dealers for international criminal purposes to take over the Eastern diamond fields so that the diamonds could fund the 10 year geopolitical plan promulgated by Gadaffi to take political control of West Africa. Therefore, the war has little in common with most African conflicts. There were no social, religious, or ethnic undertones, and the RUF had no political agenda. Further, the diamond trade has been linked to the al-Qaeda terrorist network. The Washington Post reported in November 2001 that RUF rebels sell diamonds for about one tenth their value to traders linked to Charles Taylor in Liberia. The RUF received weapons in return. The diamonds were especially desirable to terrorist organizations such as Hezbollah and al-Qaeda, which seek to avoid having their bank assets frozen. According to the Post, Antwerp had been flooded by Sierra Leonean diamonds, with amounts increasing rather than decreasing. See, Douglas Farah, Al-Qaeda Cash Linked to Diamond Trade: Sale of Gems from Sierra Leone Rebels Raised Millions, Sources Say, The Wash. Post, Nov. 2, 2001, at A1.

89 See, Press Release, The Hon. Solomon E. Berewa, Attorney-General and Minister of Justice for the Republic of Sierra Leone, Remarks for Signing Ceremony for Agreement for Special Court (Jan. 16, 2002) (highlighting the necessity of the Special Court in holding accountable and bringing to justice persons charged with grave crimes, by alluding to its inability to deal with punishing such atrocities due to the "erosion of the rule of law" in Sierra Leone), available at: http://specialcourt.org/documents/Planning mission/PressReleases/BerewaSpeech.html.

90 For an excellent review of criminal liability, as utilized by the prosecution, see Antonio Cassese's text, International Criminal Law, May 2003.

91 The prosecution's theory was that the actions of the accused "formed part of a common scheme to gain effective control of the territory and population of Sierra Leone." See, Decision and Order on Prosecution Motion for Joinder, 28 January 2004.

92 See e.g., Consolidated Indictment in the cases of Prosecutor v. Issa Hassan Sessay and 2 Others, Case No. SCSL-2004-15-PT, 13 May 2004 (Indictment). To prove the joint criminal enterprise, the prosecution must establish not only the substantive crimes charged, but also the existence of a common plan or conspiracy between the parties. Witness testimony can be used to establish specific acts stated in the indictment committed at specific times in specific locations. Further, insider witnesses can illuminate the command structures and composition of the RUF and AFRC, as well as the relationship between the two groups.

93 Had Charles Taylor been handed over to the Special Court in the summer of 2003, he would have been tried jointly with the RUF.

94 In Prosecutor v. Kanu, the Court considered whether the indictments were valid under international criminal law. The Court had accepted references in the indictment to "an unknown number of," "hundreds of," in relation to victims, and "large-scale," widespread," and "other locations." The defense challenged the lack of specificity regarding the charges pertaining to the joint criminal enterprise. The Court rejected this position, finding that the indictment complied with Article 17(4)(A) of the Court's Statute, as well as Rule 47(c) of the Rules of Procedure and Evidence. See, Prosecutor v. Kanu, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, November 19, 2003, Case No. SCSL-03-13-PT, paras. 18-19. The Court stated that "the sheer scale of the offences may make it impossible to identify the victims," noting that "there is no applicable magical formula as to the degree of specificity required for the purposes of pleading an indictment alleging criminality in the international domain as distinct from

criminality in the domestic sphere," permitting such references where the alleged criminal acts have "cataclysmic dimensions" making statistics too difficult to determine. See, Prosecutor v. Brima, et al., Decision and Order on Defence Preliminary Motion on Defects in the form of the Indictment of April 1, 2004, Case No. SCSL-04-16-PT para. 46 (referencing Prosecutor v. Semanza, Case No. ICTR-97020-T, May 15, 2003). However, the Court did find in Brima that an indictment including the words "but not limited to those events" does not comply because of the overriding potential for ambiguity.

95 Initially, the indictees were housed in a facility on Bonte Island, located 150 kilometers southwest of Freetown.

96 The Court's Statute explicitly refers to crimes of sexual violence. See, Statute, arts. 2 and 3. In listing the crimes against humanity that can be prosecuted by the Court, it includes "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence" when committed "as part of a widespread or systematic attack" against civilians. The Court also specifically categorizes "rape, enforced prostitution and any form of indecent assault" as violations of international humanitarian law as codified by the Geneva Conventions. Gender crimes were the cornerstone to all of the indictments. Women paid a particularly brutal price in the conflict. As the Human Rights Watch reported in 2003, "[t]hroughout the conflict, thousands of women and girls of all ages, ethnic groups, and socioeconomic classes were subjected to widespread and systematic sexual violence, including individual and gang rape, and rape with objects such as weapons, firewood, umbrellas, and pestles. Rape was perpetrated by both sides, but mostly by the rebel forces. These crimes of sexual violence were generally characterized by extraordinary brutality and frequently preceded or followed by other egregious human rights abuses against the victim, her family, and her community… Thousands of women and girls were abducted by the rebels and subjected to sexual slavery, forced to become the sex slaves of their rebel 'husbands'… The rebels sometimes made escape more difficult by deliberately carving the name of their faction onto the chests of abducted women and girls… some escaped from one rebel faction or unit only to be captured by another. An unknown number of women and girls still remain with their rebel 'husbands,' although the war was declared over on January 18, 2002." See, Human Rights Watch Report, "We'll Kill You if You Cry": Sexual Violence in the Sierra Leone Conflict, January 2003 Vol. 15, No. 1 (A), available at: http://hrw.org/reports/2003/sierraleone/sierleon0103.pdf. For a more comprehensive account of the suffering women endured during the conflict, see, Binaifer Nowrojee, Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims, available at: http://www.law.harvard.edu/students/orgs/hrj/iss18/nowrojee.pdf#search=%22general%20amnesty%20motion%20and%20the%20special%20court%20for%20sierra%20leone%22.

97 The leadership of the RUF is charged in Count 12 of their amended indictment for the recruitment and use of child soldiers, specifically conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities. The leadership of the AFRC is charged in their further amended indictment in Count 12, as well. The dreaded leadership of the CDF is similarly charged in Count 8 of their indictment. See, Prosecutor vs. Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa, Case No. SCSL-03-14-1 (Indictment); Prosecutor vs. Issa Hassan Sesay, Morris Kallon, and Augestine Gbao, Case No. SCSL-2004-15-PT (Amended Consolidated Indictment); Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borlor Kanu, Case No. SCSL-2004-16-PT (Further Amended Consolidated Indictment). The former President of Liberia, Charles Taylor is charged with the recruitment and use of child soldiers, as is Johnny Paul Koroma. The deceased indictees Foday Sankok and Samuel Bockerie were likewise charged. The indictments alleged that all of the indictees are individually criminally liable for the use of children in times of armed conflict both under the aiding and abetting theory or in the alternative command responsibility. See Statute, arts. 6(1) and 6(3). Each of the indictees is charged with the recruitment and use of children during all times relevant to the indictment. As Charles Taylor had directed Foday Sankoh in Liberia in February of 1991, children were rounded up early to bulk up their forces in Sierra Leone. Later in the conflict, the CDF, specifically the Kamajors, initiated children into their ranks. Children served on all sides throughout the conflict. The extent of that involvement was widespread and systematic. Each of the indictees had command of the combatants that they led, to include child soldiers. The various combatants over the period of the conflict had small boy units (SBU's). Some of these SBU's had specific duties to perform. In the burning of Freetown (January 1999), children were part of squads specifically ordered to mutilate, to burn, and to pillage. Child soldiers were seen throughout the three-week occupation carrying burlap bags full of body parts, trailing blood along the way. They were required to deliver the bags to their commanders. Additionally, sexual violence charges figure prominently in both the RUF and AFRC indictments, both of which were amended to include the charge of forced marriage as a crime against humanity. See, Decision on Prosecution Request for Leave to Amend the Indictment, SCSL-04-16 (AFRC), 6 May 2004.

98 Statute, arts. 4(a), (b), and (c).

99 Although the first indictments were brought expeditiously, it seems that investigations have continued in order to gather additional evidence. The Prosecutor has stated that he applied an internal standard of "proof beyond reasonable doubt" prior to signing the indictments. In contrast, the Rules do not require a "prima facie" case for confirmation of an indictment by a judge, as has been common before the other tribunals (Rule 47).

100 The arrest and handover of Charles Taylor took place in March 2006. See, Statement by Special Court Prosecutor Desmond de Silva QC, 25 March, 2006, available at: http://www.sc-sl.org/Press/prosecutor-032506.pdf#search=%22special%20court%20for%20sierra%20leone%20and%20head%20of%20state%20motion%22. On March 29, 2006, then-President of the Court, Justice A. Raja N. Fernando, sent a letter to the President of the ICC, Judge Philippe Kirsch, requesting the use of ICC facilities to conduct Taylor's trial. This was in response to concerns about the stability in the West African region were Taylor's trial conducted in Freetown. On June 20, 2006, the Charles Taylor was transferred to the ICC's detention center in The Hague in accordance with the agreement between the Court and the ICC reflected in the Memorandum of Understanding (MOU) of April 13, 2006. See, http://www.icc-cpi.int/library/about/officialjournal/ICC-PRES-03-01-06_en.pdf. Under the terms of the MOU, Taylor's trial will be presided over by a Trial Chamber of the Court seated at The Hague, and the ICC will provide courtroom services and facilities, detention services and related assistance.

101 Motions on "joinder of trials" were also heard before the Trial Chamber in the first week of December 2003, requesting that the accused be joined into two large trials, one dealing with the RUF/AFRC and another with the CDF. In January 2004, the Court ruled that there would be three trials: one for the RUF indictees, one for the AFRC indictees, and one for the CDF indictees.

102 See, Decision on Constitutionality and Lack of Jurisdiction, Case No. SCSL-04-14 (CDF case), 13 March 2004, para. 80 (holding that the Special Court is "an international tribunal exercising its jurisdiction in an entirely international sphere and not within the system of the national courts of Sierra Leone") (similar decisions were made in the RUF and AFRC cases).

103 After the Prosecutor filed a response on July 7, the preliminary motion was referred to the Appeals Chamber pursuant to Rule 72(E). Various amicus briefs were allowed to be filed by the University of Toronto, International Human Rights Clinic, as well as inviting UNICEF to submit an amicus curiae brief. An oral hearing was held on November 6, with a post hearing submission by the Prosecutor on November 24. See, Amicus Curiae Brief of University of Toronto International Human Rights Clinic and interested International Human Rights Organizations, 3 November 2003. See also, Amicus Curiae Brief of the United Nations Children's Fund (UNICEF), 21 January 2003 (stating that "[s]tate practice demonstrates full awareness and abhorrence to the practice of recruiting children, and a firm commitment to ensuring that those responsible for such recruitment are held liable under criminal law. The prohibition on recruitment and use of child soldiers below 15 has been universally recognized. Most states have enacted legislation for the implementation of their minimum age for recruitment and use of children in hostilities. Some States have explicitly criminalized child recruitment. The prohibition was therefore well established and its violation considered a criminal act. […] and demonstrates opinio juris in the acceptance by States that this norm is legally binding").

104 Prosecutor v. Sam Hinga Norman (Case No. SCSL-2004-14-AR72(E)), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004: Therefore, child recruitment was criminalized before it was explicitly set out in treat law and certainly by the time frame relevant to the indictments. The principle of legality and the principle of specificity are both upheld. Justice Gelaga King authored a separate concurring opinion and Justice Geoffrey Robertson dissented, stating that the crime of child recruitment did not enter into international criminal law until the Rome Treaty [for the International Criminal Court] in July 1998, thus declaring that the applicant should not be prosecuted for any offense of enlistment before that date. For an interesting point of view related to the Norman decision, see A. Smith, Child Recruitment and the Special Court for Sierra Leone, Journal of International Criminal Justice 2 (2004), 1141-1153.

105 Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-1, Decision on Immunity from Jurisdiction, 31 May 2004 (Justices Emmanuel Ayyola, George Galaga King, and Renate Winter heard the motion in the Appeals Chamber).

106 This controversy was addressed in Article 6(2) the Special Court's Statute, which stated that the official position

of any accused person shall not relieve them of criminal liability.

107 See, Dapo Akande, International Law Immunities and the International Criminal Court, 98 A.J.I.L. 407 (2004) (summarizing the law of immunities in reference to international criminal proceedings).

108 Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-1, Decision on Immunity from Jurisdiction, May 31, 2004 (expressing that Charles Taylor, former President of Liberia, would not enjoy Head of State immunity from prosecution before the Special Court). On February 14, 2002 the International Court of Justice (ICJ) rendered a landmark ruling in a dispute between the Democratic Republic of the Congo and the Kingdom of Belgium concerning a Minister of Foreign Affairs' immunity from arrest. See, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2000 I.C.J. 235 (Dec. 13, 2000), available at: www.icj-cij.org. The case involved a Belgian arrest warrant issued against the Congolese Minister of Foreign Affairs, Mr. Yerodia Ndombasi, who was accused of broadcasting speeches aimed at inciting racial hatred in the Congo. Although Ndombasi's actions appeared to be an internal Congolese matter, they were codified as a crime under a Belgian domestic law that has since been repealed. See, Belgium's Amendment to the Law of June 115, 1993 (as amended by the Law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law, April 23, 2003, available at Westlaw, 42 I.L.M. 749 (2003). The Congolese argument before the ICJ was that the Belgian arrest warrant was issued in violation of a customary international law rule granting absolute immunity to a Minister for Foreign Affairs. When warrant was issued on April 11, 2000, Ndombasi was in office, the Minister of Foreign Affairs position until November 2000, when he was appointed Minister of Education, where he served until April 2001. However, when the hearings before the ICJ commenced, Ndombasi no longer held any official position. The ICJ found that a current Minister of Foreign Affairs, while abroad, enjoys full immunity from criminal jurisdiction. However, the ICJ affirmed that the immunity from jurisdiction enjoyed by current foreign ministers does not amount to impunity. Notably, the ICJ stated that under certain circumstances, the exceptions could apply: (1) where the person is tried within their own country; (2) when the represented State waives their immunity; (3) when a State invoking jurisdiction arrests a former minister for acts committed prior or subsequent to their term, or acts committed in a private capacity during their term; and (4) when the person is subjected to criminal proceedings by a recognized international criminal tribunal. The last exception serves as precedental justification for the prosecution of Charles Taylor before the Special Court, as reflected in Article 6(2) of the Court's Statute, which states: "[t]he official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

109 Prosecutor v. Alliew Kondewa, Case No. SCSL-2004-14-AR72(E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord, May 25, 2004. (The general amnesty is stated in Article IX of the Lomé Accord, which granted "absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives up to the time of the signing of the Agreement…" The complete text of the agreement is available at: http://www.sierra-leone.org/loneaccord.html.)

110 Id. Notably, the class of international crimes within the Court's jurisdiction represents grave violations of international humanitarian law, which generally illicit universal jurisdiction.

111 Id. See also, Prosecutor v. Taylor, supra note 108 (expressing the Court's status as an international criminal court notwithstanding its basis in treaty rather than a UN Security Council Chapter VII resolution).

112 As stated in Article 20 of the Court's Statute, "[t]he 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." Should future international courts follow this trend; the Appellate Chamber's decision on general amnesty will have a great effect.

113 The Court identified three categories of witnesses in need of protective measures: (1) witnesses residing in Sierra Leone; (2) witnesses residing outside Sierra Leone but in other parts of West Africa, or witnesses who have relatives in Sierra Leone; and (3) witnesses residing in other parts of the world who have requested protective measures. See e.g., 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, May 23, 2003. Notably, the Court does not differentiate between the categories in terms of the level of protective measures it offers: rather, a determination is made based on each individual witness.

114 Statute, art. 16(4). Article 16(4) calls for the creation of a witnesses and victims unit to provide "protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account to testimony given by such witnesses." This sentiment is also expressed in the Rules of Procedure and Evidence (Rule 34).

115 For witnesses in a third world setting with competing cultural perspectives, this process could take up to two years, particularly for those child and female victims of horrific crimes. Of the five hundred witnesses slated to testify, less than one percent refused to testify. Only one witness died, due to natural causes.

116 Most witnesses are placed in safe houses throughout Freetown when their identity is disclosed to the defense (or earlier in the event that a witness expresses concern for his/her safety). This involves separating victims, children, insider witnesses, and victims of gender based violence by placing them in different locations (with some witnesses being relocated abroad, but within the region). There are approximately 24 safe houses located throughout Freetown. In addition to housing, witnesses are provided with medical treatment and psychological counseling. They are also briefed on courtroom procedure, including visiting the courtroom and simulated direct examinations.

117 See, *e.g.*, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses (RUF) (Trial Chamber I), 8 June 2004.

118 The Canadian government provided RCMP personnel experienced in witness management and protection.

119 See, The Secretary General. Special Court for Sierra Leone Completion Strategy, para. 7-8, delivered to the Security Council and the General Assembly, U.N. Doc. A/59/816, S/2005/350 (May 26, 2005) (reporting that the Special Court has issued indictments for thirteen war criminals, two of whom have subsequently died).

120 See, Crane, supra note 87. As Founding Chief Prosecutor, Mr. Crane felt strongly that one of the Court's primary purposes was to bring justice to the people of Sierra Leone. His comments indicated that placing the Court near where the conflict took place made the proceedings accessible to the victims and their families.

121 Id.

122 After one-and-a-half years, the Court could no longer rely solely upon voluntary contributions to finance its operations. See, Human Rights Watch, Sierra Leone: War Crimes Court Impeded by Lack of Funds, available at: http://hrw.org/english/docs/2004/09/08/sierra9315.htm. In 2004, the Registrar expressed concern regarding the Court's dire financial situation. In response, Secretary-General Kofi Annan intervened, meeting with UN representatives to secure a "subversion grant" from pledged contributions with which to finance the Court's third year of operations. See, UN General Assembly, Request for a subvention to the Special Court for Sierra Leone, Report of the Secretary-General, A/58/733, March 15, 2004. He requested 40 million (in U.S. dollars) – 16.7 million for the period of July 1 to December 31, 2004 and the remaining 23.3 million for the year 2005. See, Request for a Subvention to the Special Court for Sierra Leone, Report of the Secretary-General, A/58/733, 15 March 2004. On April 26, 2004, the General Assembly authorized a subvention of up to 16.7 million for the period of July 1 to December 31, 2004, with the understanding that any regular funds appropriated for the Court would be repaid to the UN when the Court was completed with its mandate, assuming adequate voluntary contributions were received. See, General Assembly Resolution 58/284, A/RES/58/284, para 2. The General Assembly noted the Court's success in bringing justice to Sierra Leone when making this decision. See, UN General Assembly, Financing for Sierra Leone Court, Somalia Political Office Among Issues Taken Up in Budget Committee, GA/AB/3676, May 16, 2005.

123 Rome Statute of the International Criminal Court, arts. 1,5, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) (establishing the International Criminal Court in order to prosecute the "most serious crimes of concern to the international community," which include genocide, crimes against humanity, war crimes, and the crime of aggression).