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Preserving the Legacy of the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone

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Abstract

Sierra Leone experienced particularly heinous and widespread crimes against humanity and war crimes during its eleven years of civil war from 1991 to 2002. During the war, the civilian population was targeted by all the fighting factions. Civilians were captured, abducted, and held as slaves used for forced labour. The Special Court for Sierra Leone was established by the government of Sierra Leone and the United Nations in 2002, through Security Council Resolution 1315. It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since 30 November 1996. The aim of this paper is to sketch out the extent to which the jurisprudence of the Special Court can serve as a model for efficient and effective administration of criminal justice nationally through the preservation of its legacy.

Key words

building a legal culture of accountability

1. Introduction

Many jurists over the years have pondered how to secure or preserve justice. At the international level, the preservation of justice aims to strengthen the rule of law, dispense justice fairly and efficiently, enforce international law, and build a new body of law.

However, if one goes a step further, beyond strictly legal aspects, securing justice could also entail larger goals, such as documenting what happened – for the benefit of victims, perpetrators, and society as a whole; securing trust and confidence in a legal system; and, last but not least, deterring potential perpetrators from future crimes.

In the case of Sierra Leone, the role of the Special Court is unique in preserving the legacy of justice, particularly in that it is an international tribunal located in the country of the conflict. This inevitably poses unique challenges in the administration and delivery of justice.

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The legacy of the Special Court can best be discerned through the lenses of its impact on the domestic judicial infrastructure and on international criminal law jurisprudence in general.

2. Background

The Special Court for Sierra Leone was set up jointly by the government of Sierra Leone and the United Nations in 2002, through UN Security Council Resolution 1315. It is mandated to try those 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.

The Special Court has two trial chambers and an Appeals Chamber. Each trial chamber comprises three judges, two of whom are appointed by the UN Secretary-General and the other by the government of Sierra Leone. The Appeals Chamber comprises five judges, three of whom are appointed by the Secretary-General and other two by the government of Sierra Leone. Two of the four cases tried before the Special Court are at the time of writing fully completed, namely the AFRC (Armed Forces Revolutionary Council) and the CDF (Civil Defence Forces) cases.

The AFRC Trial Judgement was issued on 20 June 2007.[1] The case is a success for the Office of the Prosecutor, as the three accused were found guilty and convicted on eleven of the fourteen counts in the indictment. The first accused, Alex Tamba Brima, and the third accused, Santigie Borbor Kanu, were sentenced to 50 years' imprisonment, while the second accused, Ibrahim Bazzy Kamara, was given a 45-year sentence.

The CDF Trial Judgement was delivered on 2 August 2007. The CDF Appeal Judgement, issued on 28 May 2008, substantially revised the sentences imposed on Moinina Fofana and Allieu Kondewa. It increased the sentences of six years for Fofana and eight years for Kondewa to 15 and 20 years respectively.

Judgement was delivered in the Revolutionary United Front (RUF) case on 25 February 2009.[2] The first accused, Issa Sesay, was sentenced to 52 years' imprisonment, the second accused, Morris Kallon, to 40 years, and the third accused, Augustine Gbao, to 25 years.

The case against Charles Taylor is being prosecuted in The Hague, but is still under the jurisdiction of the Special Court. The hearing of evidence started on 7 January 2008 and the prosecution, having called 91 witnesses, has now finished presenting its case. On 4 May 2009 the trial chamber dismissed in its entirety a motion for acquittal filed by the defence. The defence case was slated to begin on 29 June 2009.

2.1. Synopsis of the context of the conflict

Sierra Leone experienced particularly heinous and widespread physical and sexual violence during its 11 years of civil war from 1991 to 2002. During the war, the RUF

1 AFRC Trial Judgment, Case No. SCSL-2004-16-T, Judgment, 20 June 2007.
2 CDF Trial Judgment, Case No. SCSL-04-14-T, Sentencing Judgment, 2 August 2007.

and AFRC rebel groups fought against the government and a government-backed militia group, the CDF, which supported the Sierra Leonean Army.

The civilian population was targeted by all the fighting factions. The RUF, the rebel group that started the war in 1991, used civilians throughout the conflict as a workforce: thousands of civilians were captured, abducted and held as slaves used as forced labour, mainly for diamond mining but also for other tasks, such as farming and carrying looted goods, weaponry, and ammunition. Civilians were systematically mutilated: the severing of limbs was widely used as a tool of terror and control, as well as as a symbolic message to those who voted for the government of former president Kabbah. Thousands of civilians were killed in targeted attacks, women, children, and elderly people alike, whole families locked in houses which were then set on fire. The civilian population was kept in a constant state of terror, which would stop them from supporting the government. The use of children under 15 years of age and their conscription or enlistment into armed groups was widespread throughout the war. Systematic looting of civilian property allowed the armed groups to maintain their war efforts.

During this extremely brutal conflict an estimated 275,000 women and girls became victims of sexual violence. Massive sexual violence was used not only to sow terror among the civilian population; it further served military and supply purposes: rape and sexual slavery helped to maintain the morale of the fighting forces in a long-lasting and cruel guerrilla war.

3. Jurisdictional issues

One of the challenges of transitional justice is the legitimization of international criminal justice. At the very least, legitimizing international criminal justice initiates the processes of building a legal culture with regard to the primacy of fundamental human rights over the normal variable imperatives.

In post-conflict societies such as Sierra Leone, legitimacy is essential in making a discredited justice system credible in the eyes of the public. There is a credible body of evidence that the machinery for the administration of criminal justice at the national level in Sierra Leone is at present not functioning efficiently and effectively, due to certain major philosophical, conceptual, practical, and operational problems. While it is not within the scope of this paper to conduct a diagnostic examination of the system, it can readily be discerned that a key aim of this paper is to sketch out the extent to which the jurisprudence of the Special Court can serve as a model for efficient and effective administration of criminal justice nationally through the preservation of its legacy.

In a critical analysis of how this may be achieved, the first issue of any controversy to present itself for examination is that of jurisdiction. The Special Court is considered a 'mixed institution' because its Statute[3] applies both international law and Sierra Leonean law. The question then is: does this mean that the Special Court

3 Statute of the Special Court for Sierra Leone, (2002) 2178 UNTS 138.

falls within the jurisdiction of the Sierra Leone judiciary? If not, is it then a usurpation of the judicial sovereignty of Sierra Leone? These were among questions posed to the Appeals Chamber and the Supreme Court of Sierra Leone for determination.

This issue that was once controversial is now settled law. The two jurisdictions (the Special Court and the Sierra Leone judiciary) are separate and distinct. The Appeals Chamber, the highest judicial organ of the Special Court, held that the Special Court is not part of the judiciary of Sierra Leone, and had this to say:

> We affirm, as we decided in the Constitutionality Decision, that the Special Court is not a national Court of Sierra Leone and is not part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone.[4]

The Supreme Court of Sierra Leone also held that the Special Court is not part of the judiciary of Sierra Leone as established by the Constitution.[5]

The lesson to be learnt from this with regard to the issue of jurisdiction is the potential for intense rivalry between national criminal law systems and international criminal law. The intensity can go beyond the realm of the institutions to the personnel.

The Special Court was able to engage in the domestic legal process in establishing its claim of jurisdiction. A collaborative relationship was developed with the Office of the Attorney General to effectuate mutual co-operation and understanding. The Office of the Prosecutor participated and contributed to the submissions filed to the Supreme Court by the Attorney General.

In a related development, on a matter of the issuance of a subpoena ordering the then incumbent head of state, Alhaji Dr Ahmed Tejan Kabbah, to testify before the Special Court, the Attorney General was not only served but was also invited by the trial chamber to make submissions in response to the subpoena request, which he did. Thus it must be noted that the relationship and mutual co-operation between the domestic institutions and ad hoc tribunals is crucial to the successful workings of the latter.

The issue of head of state immunity was another thorny issue in ascertainment of the jurisdiction of the Special Court. Charles Taylor, the former president of Liberia, filed a motion to quash his indictment and annul the warrant of arrest issued while he was still head of state, on the grounds that he was immune from the jurisdiction of the Special Court.[6]

The indictment for war crimes and crimes against humanity and the arrest warrant concerning Taylor, issued on 7 March 2003, were disclosed on 4 June 2003 for onward transmission to the Ghanaian authorities, where he was apparently travelling to attend peace talks. The indictment was unsealed but the Special Court was unable to effect the arrest. The absence of co-operation and support from the host country was responsible for the abortive attempt.

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4 *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003–01, Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004, at para. 40.
5 The Supreme Court of Sierra Leone, SC No. 1/2003, at 10 (Judgment delivered on 13 October 2005).
6 SCSL-03-01-015, 23 July 2003.

In August 2003, Taylor was persuaded to step down from the Liberian presidency and was able to obtain asylum in Cabala, Nigeria.

The issue of law that the Appeals Chamber was called upon to decide was whether it was lawful for the Special Court to issue an indictment and to circulate an arrest warrant in respect of a serving head of state. If it was unlawful and the warrant is quashed, the question may then arise as to the extent of Taylor's immunity as a former head of state. After a careful consideration of international jurisprudence, the Appeals Chamber found that the principle seems now established that the sovereign equality of states does not prevent a head of state from being prosecuted before an international criminal tribunal or court.[7] The Appeals Chamber further found that Article 6(2) of the Special Court's Statute is not in conflict with any peremptory norm of general international law and its provisions must be given effect. The Appeals Chamber had this to say:

> We hold that the official position of the Applicant as an incumbent Head of State at the time when these criminal proceedings were initiated against him is not a bar to his prosecution by this court. The Applicant was and is subject to criminal proceedings before the Special Court for Sierra Leone.[8]

Express reference and an analogy were made to the judgment in the *Arrest Warrant* case before the International Court of Justice (ICJ).[9] In that case the ICJ deliberated the issue of immunity with regard to the position of current foreign ministers. The conclusion was reached that customary international law makes provision for a serving foreign minister to enjoy full immunity from a foreign national court. It also concluded, admittedly, that such persons may be tried before certain international courts.[10]

It is instructive to note that the Appeals Chamber adopted and endorsed the view of the ICJ on the need to draw a distinction between proceedings before a foreign national court and an international criminal court. Full immunity from proceedings before foreign national courts is enjoyed by high-ranking state officials, but they may be subject to criminal proceedings before international criminal courts.

The thrust for the distinction stems from the principle that one sovereign state may not exercise adjudicatory powers over the conduct of another state. The position today is that this principle does not apply to international criminal tribunals, as these entities derive their mandate from the international community.

In the final analysis, given that the Special Court is considered an international criminal tribunal, and not a foreign national court, there is therefore no bar to criminal proceedings against Taylor before it.

The value lesson here in terms of a legacy for the peoples of west Africa and the world in general is that punishment for war crimes and crimes against humanity imposed on rogue leaders is no longer a far-fetched phenomenon. Every man can

7 Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004.
8 Ibid., para. 1.
9 *Case Concerning the Arrest Warrant of 11 April 2000 (Belgium v. Democratic Republic of Congo)*, Judgment, [2002] ICJ Rep. 3.
10 Ibid., para. 61

now be held accountable for international war crimes notwithstanding status. In east Africa we have witnessed the issuance of an arrest warrant for the Sudanese president, and the message is loud and clear: respect human rights and the dignity of your people, since failure to do so will cause the long arm of the law to pull you aside and demand accountability.

However, Sierra Leoneans still seem divided over the quality of justice as delivered by the Special Court. Some opponents of the court think that the huge amounts of money spent on it could better have been used to improve the lives of war victims and other vulnerable people. They also point out that sentencing a few people in the custody of the court will not be enough to deal with the culture of impunity in Sierra Leone.[11]

On the other hand, supporters of the court have opined that over and above the promotion of the rule of law, its presence staved off the violence usually occasioned by the conclusion of national presidential elections. People did not resort to arms for fear of criminal prosecutions before the Court.

4. Procedural matters

I shall now proceed to examine the procedural aspects of the law as applied by the Special Court in the context of preserving the experiences and lessons learnt in the investigations and prosecutions of war crimes. Comparatively speaking, our Rules of Procedure and Evidence[12] constitute a body of procedural law governing the investigation, prosecution, and adjudication of cases involving crimes against humanity and war crimes which, with appropriate modifications and adaptations, could serve as models or building blocks for a refurbished machinery for the investigation, prosecution, and adjudication of conventional crimes at the national level.

A close examination of some of the core provisions of the Special Court's Rules of Procedure and Evidence will reveal that the rules are well crafted and formulated, with a view to simplifying, modernizing, and expediting the investigative, prosecutorial, and judicial processes without sacrificing due process guarantees and rights of the accused persons, and without undue adherence to legal technicalities that exist in some of the strict common law rules of procedure and evidence – for example, the inadmissibility of hearsay evidence.[13]

The right of the accused to a fair trial is the foundation on which the edifice of international criminal law is laid and the golden thread that runs through its fibres. Amongst the recognizable rights are:

- Public trial[14]
- Rights of suspects during investigation[15]

11 J. A. D. Alie, 'Reconciliation and Traditional Justice: Tradition-Based Practices of the Kpaa Mende in Sierra Leone', in L. Huyse and M. Salter (eds.), *Traditional Justice and Reconciliation after Violent Conflict* (2008), 132.

12 Rules of Procedure and Evidence of the Special Court for Sierra Leone, as Amended, 27 May 2008 (hereinafter RPE).

13 Hon. Justice Dr B. Thompson, 'Lessons and Insights from the Jurisprudence of the Special Court for the National Judiciary: A Legacy Perspective', public lecture, Freetown, 3 December 2008.

14 RPE, *supra* note 12, Rule 78.

15 Ibid., Rule 42.

  - the right to legal assistance of his own choosing
  - the free assistance of an interpreter
  - the right to remain silent
- Rules on indictment[16]
  - review of indictment for confirmation by a pre-trial judge
  - particulars and specificity – the right to know the case for which he is charged[17]
  - personal service of indictment[18]
- Questioning of an accused shall not proceed without the presence of counsel[19]
- Disclosure regime[20]
  - statements of all witness whom the Prosecutor intends to call
  - copies of all statements of additional witnesses
  - inspect any books, documents, photographs, and tangible objects in the custody or control of the prosecutor
  - notification of the names of the witnesses the prosecutor intends to call
  - disclosure of exculpatory evidence
- Right to appeal[21]
  - additional evidence not available at trial[22]
  - request for review[23]

On a close examination of the criminal procedural laws of Sierra Leone, Liberia, Gambia, and, to a certain extent, Ghana and Nigeria, one will easily find encoded in most of these laws some of the main causes of the inefficient functioning of the national criminal justice systems and their consequent ineffectiveness.

The Special Court since its inception has generated numerous examples of law-making that can be described not only as a treasure trove for international criminal lawyers but also as a rich and impressive jurisprudential legacy from which the national criminal law system can derive tremendous inspiration and benefit for the purpose of fair and impartial administration of criminal justice.[24]

5. Case law development

5.1. Child soldiers

The Special Court is the first in history to find an accused guilty of the crime of conscripting children and forcing them to participate in hostilities. The RUF indictment charged the accused persons with the offence of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them

16 Ibid., Rules 47–52.
17 Ibid., Rule 47(c).
18 Ibid., Rule 52(A).
19 Ibid., Rule 63.
20 Ibid., Rules 66–68.
21 Ibid., Rule106.
22 Ibid., Rule 115.
23 Ibid., Rule 120.
24 Thompson, *supra* note 13.

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to participate actively in hostilities and 'other serious violations of international humanitarian law' pursuant to Article 4(c) of the Statute.

In the CDF appeal judgment it was held that this offence constitutes a crime under customary international law which entailed individual criminal responsibility prior to the time frame of the indictment.

Enlistment has been defined as 'accepting and enrolling individuals when they volunteer to join an armed force or group'. It requires that the person voluntarily consents to be part of the armed force or group. Conscription, on the other hand, refers to the 'compulsory enlistment of persons into military service'.

In defining the phrase 'using children to participate actively in hostilities', the chamber expressed agreement with the commentary, which states the following:

> The words 'using' and 'participate actively' have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage, and use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the frontline or activities at the frontline, would be included within the terminology.[25]

The Chamber in the RUF judgment held that the specific elements of using children under the age of 15 years to participate actively in hostilities are as follows:

- one or more persons were used by the accused to participate actively in hostilities;
- such person or persons were under the age of 15 years;
- the accused knew or had reason to know that such person or persons were under the age of 15 years; and
- the accused intended to use the said persons to participate actively in hostilities.

The chamber was equally cognizant of the application of the special protection provided by Article 4(3)(d) of Additional Protocol II in the event that children under the age of 15 years are conscripted, enlisted, or used to participate actively in hostilities.

5.2. Sexual slavery and any other form of sexual violence

The specific offence of sexual slavery was included for the first time as a war crime and a crime against humanity in the ICC Statute. The offence is characterized as a crime against humanity under Article 2(g) of the Statute and the indictments before the Special Court were the first to indict specifically persons with the crime of sexual slavery.

This is not to suggest that the offence is entirely new. Sexual slavery is a particularized form of slavery or enslavement, and acts which could be classified as

25 Report of the Preparatory Committee on the Establishment of an International Criminal Court, ICCA/CONF.183/2/Add.1, 14 April 1998, 21

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sexual slavery have been prosecuted as enslavement in the past. In the *Kunarac* case, for instance, the accused were convicted of the offences of enslavement, rape, and outrages on personal dignity for having detained women for months and subjected them to rape and other sexual acts. In that case, the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber emphasized that 'it finds that enslavement, even if based on sexual exploitation, is a distinct offence from that of rape'.

The RUF trial chamber opined that the prohibition of more particular offences such as sexual slavery and sexual violence criminalizes actions that were already criminal. The chamber further considered that the specific offences are designed to draw attention to serious crimes that have been historically overlooked and to recognize the particular nature of sexual violence that has been used, often with impunity, as a tactic of war to humiliate, dominate, and instil fear in victims, their families, and communities during armed conflict.

The indictment in count 7 charges the accused persons with sexual slavery and any other form of sexual violence as a crime against humanity under Article 2 of the Statute. This count relates to the accused persons' alleged responsibility for the abduction and their use as sexual slaves of women and girls. The accused are also alleged to be responsible for the subjection of women and girls to other forms of sexual violence. All of the alleged offences are said to have occurred at different times relevant to the indictment.

Primarily, the chamber held that count 7 of the indictment is bad for duplicity and that the appropriate remedy was to proceed on the basis that the offence of sexual slavery was properly charged within Count 7, and to strike out the charge of 'any other form of sexual violence'. The chamber therefore considered only the elements of the offence of 'sexual slavery'.

The chamber also took the view that the offence of enslavement is prohibited in customary international law and entails individual criminal responsibility. It was thus satisfied that this would equally apply to the offence of sexual slavery, which is 'an international crime and a violation of *jus cogens* norms in the exact same manner as slavery'.

The chamber considered that the *actus reus* of the offence of sexual slavery is made up of two elements: first, that the accused exercised any or all of the powers attaching to the right of ownership over a person or persons (the slavery element), and second, that the enslavement involved sexual acts (the sexual element).

In the RUF judgment the trial chamber emphasized that the lack of consent of the victim to the enslavement or to the sexual acts is not an element to be proved by the prosecution, although whether or not there was consent may be relevant from an evidentiary perspective in establishing whether or not the accused exercised any of the powers attaching to the right of ownership.

The chamber subscribed to the statement of the ICTY Appeals Chamber that 'circumstances which render it impossible to express consent may be sufficient to presume the absence of consent'. The duration of the enslavement is not an element of the crime, although it may be relevant in determining the quality of the relationship.

5.3. Forced marriage

In that same RUF judgment, for the first time in world history all three accused (all of them leaders of the RUF) were convicted of the crime of 'forced marriage' as a separate 'crime against humanity', recognizing the particular suffering inflicted on women through conscription as 'bush wives' during the conflict in Sierra Leone. The use of so-called 'bush wives' – women and girls who were forced into 'marriage' with commanders and combatants – was a way in which the armed groups could keep fighters committed to their movement.

The Appeals Chamber in the AFRC case defined forced marriage in the context of the Sierra Leone conflict 'as a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim'.[26]

Hon. Judge Doherty, in her partly dissenting opinion in the judgment of the same case, expressed the view that forced marriage involves 'the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victim'.[27] She further considered that this crime satisfied the elements of 'other inhumane acts' because victims were subjected to mental trauma by being labelled as rebel 'wives'; further, they were stigmatized and found it difficult to reintegrate into their communities. According to Judge Doherty, forced marriage qualifies under 'other inhumane acts' as causing mental and moral suffering which, in the context of the Sierra Leone conflict, is of a seriousness comparable with that of the other crimes against humanity listed in the Statute.[28]

In a forced marriage scenario, a 'wife' was exclusively committed to a rebel 'husband', and any transgression of this exclusivity was severely punished.[29] A 'wife' who did not perform the conjugal duties demanded of her was deemed disloyal and could face a beating and possibly death.[30]

The women in question were often abducted in circumstances of extreme violence,[31] compelled to move with the fighting forces from place to place,[32] and coerced into performing a variety of conjugal duties including regular sexual intercourse, forced domestic labour such as cleaning and cooking for the 'husband', enduring forced pregnancy, and caring for and bringing up children of the 'marriage'.[33] In return, the rebel 'husband' was expected to provide food, clothing,

26 AFRC Appeal Judgement, Case No. SCSL-2004-16-A, 22 February 2008, para. 190.
27 Ibid., Doherty (Partly Dissenting Opinion), para. 53.
28 Ibid., at paras. 48, 51 (stating that '[s]erious psychological and moral injury follows forced marriage. Women and girls are forced to associate with and in some cases live together with men whom they may fear or despise. Further, the label 'wife' may stigmatize the victims and lead to their rejection by their families and community, negatively impacting their ability to reintegrate into society and thereby prolonging their mental trauma').
29 Ibid., at paras. 1122, 1139, 1161.
30 Ibid., at paras. 1138, 1141.
31 For example, one witness was abducted as a 'wife' moments after her parents were killed in front of her. See AFRC Trial Judgment, *supra* note 1, paras. 1078, 1088.
32 Ibid., paras. 1082, 1083, 1085, 1091, 1096, 1154, 1164, 1165.
33 Ibid., at paras. 1080, 1081, 1130, 1165.

and protection for his 'wife', including protection from rape by other men – these were acts he did not perform when he used a female for sexual purposes only.[34] As the trial chamber found, the relative benefits that victims of forced marriage received from the perpetrators neither signifies that there had been consent to the forced conjugal association, nor does it vitiate the criminal nature of the perpetrator's conduct, given the environment of violence and coercion in which these events took place.[35]

5.3.1. Does forced marriage satisfy the elements of 'other inhumane acts'?

The prosecution argued and continues to do so, that forced marriage amounts to an 'other inhumane act' and that the imposition of a forced conjugal association is as grave as the other crimes against humanity such as imprisonment, causing great suffering to its victims.[36] In particular, the prosecution argues that the mere fact of forcibly requiring a member of the civilian population to remain in a conjugal association with one of the participants of a widespread or systematic attack directed against the civilian population is at least of sufficient gravity to make this conduct an 'other inhumane act'.[37]

'Other inhumane acts' in international criminal law were first introduced under Article 6(c) of the Nuremberg Charter; the crime of 'other inhumane acts' is intended to be a residual provision in order to be able to punish criminal acts not specifically recognized as crimes against humanity, but which, in context, are of a gravity comparable with that of the listed crimes against humanity.[38] It is therefore inclusive in nature, intended to avoid unduly restricting the Statute's application to crimes against humanity.[39]

The jurisprudence of the international tribunals shows that a wide range of criminal acts, including sexual crimes, have been recognized as 'other inhumane acts'. These include forcible transfer,[40] sexual and physical violence perpetrated on dead human bodies,[41] other serious physical and mental injury,[42] forced undressing of

34 Ibid., at paras. 1157, 1161. See also Doherty Partly Dissenting Opinion, paras. 48, 49.
35 See AFRC Trial Judgment, *supra* note 1, paras. 1081, 1092.
36 Ibid., at paras. 614, 617, 621.
37 Ibid., at para. 624.
38 *Kupreškić* Trial Judgement, Case No. IT-95-16-T, Judgement, 14 January 2000, para. 563. The category of 'other inhumane act' was included in Art. 6(c) of the Nuremburg Charter to close any loophole left by offences not specifically mentioned. It was deliberately designed as a residual category as it was felt undesirable that this category be exhaustively enumerated. An exhaustive list would merely create opportunities for evasion of the letter of the prohibition. See also *Stakić* Appeal Judgement, Case No. IT-97-24-A, Judgement, 22 March 2006, para. 315; *Blagojević* Trial Judgement, Case No. IT-02-60-T, Judgement, 17 January 2005, para. 625; *Rutaganda* Trial Judgement, Case No. ICTR-96-3-T, Judgement, 6 December 1999, para. 77; *Kayishema* Trial Judgement, Case No. ICTR-95-1-T, Judgement, 21 May 1999, para. 149.
39 *Blagojević* Trial Judgement, *supra* note 38, para. 625; *Akayesu* Trial Judgement, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 585 ('The categories of crimes against humanity are set out in Art. 3, but this category is not exhaustive. Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are met').
40 *Stakić* Appeal Judgement, *supra* note 38, para. 317; *Blagojević* Trial Judgement, *supra* note 38, para. 629; *Krstić* Trial Judgement, Case No. IT-98-33-T, Judgement, 2 August 2001, para. 523.
41 *Kajelijeli* Trial Judgement, Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003, para. 936; *Niyitegeka* Trial Judgement, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003, para. 465.
42 *Naletilić* Trial Judgement, para. 271; *Vasiljević* Trial Judgement, para. 239; *Blaškić* Trial Judgement, para. 239; *Tadić* Trial Judgement, paras. 730, 737, 744.

women and marching them in public,[43] forcing women to perform exercises naked,[44] forced disappearance, beatings, torture, sexual violence, humiliation, harassment, psychological abuse, and confinement in inhumane conditions.[45] Case law at these tribunals further demonstrates that this category has been used to punish a series of violent acts that may vary depending on the context.[46] In effect, the determination of whether an alleged act qualifies as an 'other inhumane act' must be made on a case-by-case basis, taking into account the nature of the alleged act or omission; the context in which it took place; the personal circumstances of the victims including age, sex, and health; and the physical, mental, and moral effects on the victims of the perpetrator's conduct.[47]

The Appeals Chamber in the AFRC case agreed with the prosecution that the notion of 'other inhumane acts' contained in Article 2(i) of the Statute forms part of customary international law.[48] As noted above, it serves as a residual category designed to punish acts or omissions not specifically listed as crimes against humanity, provided that these acts or omissions meet the following requirements:

(i) they inflict great suffering, or serious injury to body or to mental or physical health;
(ii) they are sufficiently similar in gravity to the acts referred to in Articles 2(a) to 2(h) of the Statute; and
(iii) the perpetrator was aware of the factual circumstances that established the character of the gravity of the act. [49]

The acts must also satisfy the general *chapeau* requirements of crimes against humanity.

At this point it is instructive to note the concurring and partly dissenting opinions of Justice Sebutinde and Justice Doherty respectively, who made a clear and convincing distinction between forced marriages in a war context and the peacetime practice of arranged marriages among certain traditional communities, noting that arranged marriages are not to be equated to or confused with forced marriage during armed conflict.[50] Justice Sebutinde went further, adding, correctly in my view, that while traditionally arranged marriages involving minors violate certain international human rights norms such as the Convention on the Elimination of all

43 *Akayesu* Trial Judgement, *supra* note 39, para. 697.
44 Ibid., at para. 697.
45 *Kvočka* Trial Judgement, Case No. IT-98-30-T, Judgement, 2 November 2001, paras. 206–209.
46 See *Kordić* Trial Judgement, Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 800 (finding that conditions varied from camp to camp but that detained Muslims were used as human shields and were forced to dig trenches); *Galić* Trial Judgement, para. 599 (finding that there was a co-ordinated and protracted campaign of sniping, artillery, and mortar attacks upon civilians); *Tadić* Trial Judgment, *supra* note 39, paras. 730, 737, 744 (finding that there were several incidents of assaults upon and beating of prisoners at a camp) and *Niyitegeka* Trial Judgment, *supra* note 42, paras. 462, 465 (finding that the accused was rejoicing when a victim was killed, decapitated, castrated and his skull was pierced with a spike).
47 *Vasiljević* Trial Judgment, Case No. IT-98-32-T, Judgement, 29 November 2002, para. 235; *Krnojelac* Trial Judgment, Case No. IT-97-25-T, Judgement, 15 March 2002, para. 131; *Kayishema* Trial Judgment, *supra* note 37, paras. 150, 151.
48 *Stakić* Appeal Judgement, *supra* note 38, para. 315; *Blagojević* Trial Judgment, *supra* note 37, para. 624.
49 AFRC Trial Judgment, *supra* note 1, para. 698.
50 Ibid., Sebutinde Separate Concurring Opinion, paras. 10, 12; Doherty Partly Dissenting Opinion, para. 36.

Forms of Discrimination against Women (CEDAW), forced marriages which involve the abduction and detention of women and girls and their use for sexual and other purposes is clearly criminal in nature.[51]

5.4. Attacks on peacekeepers

5.4.1. Intentionally directing attacks against personnel involved in a peacekeeping mission

Attacks on peacekeeping personnel are not new, and neither is their prohibition. However, since the personnel and objects involved in a peacekeeping mission are protected only to the extent that 'they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict', this offence can be seen as a particularization of the general and fundamental prohibition in international humanitarian law against attacks on civilians and civilian objects.

It has been traditionally acknowledged that UN observers and peacekeeping missions have relied on their identification as UN representatives to ensure that their personnel and equipment are not targeted.

As attacks on UN personnel have increased, particularly since the 1990s, these attacks have been condemned and criminalized. Military manuals today evidence support for the criminalization of an attack on peacekeepers. Similarly, state legislation prohibits attacks against personnel and other objects involved in a peacekeeping mission.

In further support for establishing that the offence of intentionally attacking peacekeepers is now recognized in international customary law, the RUF trial chamber applied the Convention on the Safety of the United Nations and Associated Personnel, which specifically prohibits attacks on peacekeepers as being an offence subject to universal jurisdiction. It is unnecessary to point out that Sierra Leone signed the Convention on 13 February 1995.

It is instructive to note at this point, however, that this chamber observed that the said Convention on the Safety of United Nations and Associated Personnel expressly excludes from its application those UN operations 'authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies'.

The trial chamber further noted the distinction between peacekeeping and enforcement actions authorized by the Security Council under Chapter VII. Article 42 of the UN Charter allows the Security Council to 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'.

In practice, the Security Council has authorized UN member states or coalitions of member states to conduct military enforcement action on a voluntary rather than mandatory basis.

51 Sebutinde Separate Concurring Opinion, *supra* note 50, para. 12.

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As opposed to peacekeeping operations, enforcement action does not rely on the consent of the states concerned, but on the binding authority of the Security Council under Chapter VII.

The chamber further held that the offence is a particularization of the general and fundamental prohibition in international humanitarian law, in both international and internal conflicts, against attacking civilians and civilian property. Therefore the chamber was satisfied that this offence existed in customary international law in both international and non-international conflicts and entailed individual criminal responsibility at the time of the acts alleged in the indictment.

Finally, the trial chamber in the RUF judgment considered that the condemnation and criminalization of intentional attacks against personnel and objects involved in a humanitarian or a peacekeeping mission by states, international organizations, the finding of the ICRC, and the inclusion of the offence in the ICC Statute in 1998, demonstrate state practice and *opinio juris*.

5.4.2. Elements of proof

The following were put forward in the various trial chamber decisions as required elements of proof.

- The accused person directed an attack against personnel, installations, materials, units, or vehicles involved in humanitarian assistance or peacekeeping in accordance with the Charter of the United Nations.
- The accused person intended such personnel, installations, materials, units or vehicles to be the object of the attack.
- Such personnel, installations, materials, units, or vehicles were entitled to the protection accorded to civilians or civilian objects under the international law of armed conflict.
- The accused person knew or had reason to know that the personnel, installations, materials, units, or vehicles were protected in accordance with the Charter of the United Nations.

In analysing the elements, in the view of the chamber, the primary object of the attack must be the personnel, installations, material, units, or vehicles involved in a humanitarian assistance or peacekeeping mission. There exists no requirement that there be actual damage to the personnel or objects as a result of the attack, and the chamber opined that the mere attack is the gravamen of the crime. The chamber adopted the definition of attack in Article 49(1) of Additional Protocol I as an 'act of violence'.

The chamber further viewed that the second element reflects that this offence has a specific *mens rea*. The accused must have therefore intended that the personnel, installations, material, units, or vehicles of the peacekeeping mission be the primary object of the attack.

The third element was viewed by the chamber as requiring that such personnel or objects be entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

In the chamber's view, common sense dictates that peacekeepers are considered to be civilians only insofar as they fall within the definition of civilians laid down for non-combatants in customary international law and under Additional Protocol II, namely that they do not take a direct part in hostilities.

The chamber opined that by force of logic, the personnel of peacekeeping missions are entitled to protection as long as they are not taking a direct part in the hostilities – and thus have become combatants – at the time of the alleged offence. Where peacekeepers become combatants, they can be legitimate targets for the extent of their participation in accordance with international humanitarian law. As with all civilians, their protection would not cease if the personnel use armed force only in exercising their right to individual self-defence.

Likewise, the chambers concluded that the use of force by peacekeepers in self-defence in the discharge of their mandate, provided that it is limited to such use, would not alter or diminish the protection afforded to peacekeepers.

5.5. Conclusion

In conclusion, therefore, the legacy of the RUF judgment in international criminal law could be discerned in areas of charging and conviction for the offence of an attack on peacekeepers, the first convictions in world history of sexual slavery as crime against humanity, and, most importantly, recognition of forced marriage as a separate 'crime against humanity', recognizing the particular suffering inflicted on women through conscription as 'bush wives' during the conflict in Sierra Leone.

6. Fighting to restore democracy – a just cause

In another jurisprudential development, in the CDF case the Appeals Chamber considered that the trial chamber erred in considering as a mitigating circumstance in favour of the accused the fact that the CDF was fighting to restore democracy and thus for a just cause. The Appeals Chamber corrected that error, first, by stating that the alleged motive of 'just cause' could not be considered as a defence against criminal liability for the accused's conduct. It then reaffirmed core principles of international humanitarian law by asserting that 'consideration of political motive by a court applying international humanitarian law not only contravenes, but would undermine a bedrock principle of that law'.[52]

52 CDF Appeal Judgement, SCSL-04-14-A, Judgment, 28 May 2008, para. 531. See also para 530: 'International humanitarian law specifically removes a party's political motive and the "justness" of a party's cause from consideration. The basic distinction and historical separation between *jus ad bellum* and *jus in bello* underlies the desire of States to see that the protections afforded by *jus in bello* (i.e., international humanitarian law) are "fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflicts." The political motivations of a combatant do not alter the demands on that combatant to ensure that their conduct complies with the law' (internal references removed).

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7. Witnesses and victims

The SCSL is also considered as a model regarding victim and witness protection. The Witness and Victims Section (WVS) of the SCSL is widely acknowledged to be a success. Its experiences, although tailored to the specific situation of post-conflict Sierra Leone, would be useful for other international and national bodies concerned with investigations of sexual crimes.[53] Requiring the establishment of offices to provide such services could be considered as a necessary part, even a condition, of justice sector development assistance. Two main principles underlie the relationship of witnesses and the court. These are disclosure obligations and witness protection. The prosecution is under a duty to disclose to the defence the statements of all the witnesses whom the prosecutor intends to call and copies of all statements of additional witnesses.[54] But most important of all is the legal obligation on the prosecution to disclose to the defence exculpatory material within 30 days of the initial appearance of the accused; such an obligation, it must be noted, is a continuing one.

Incidentally, there is no corresponding legislation in most criminal jurisdictions in west Africa. The significance of this is that the rights of the accused risk compromise, as there may be evidence in the possession of national prosecutors that will prove the innocence of the accused or mitigate his guilt that will never be brought before the court or to the notice of the accused. It is therefore of paramount importance that these jurisdictions introduce this type of disclosure regime for the furtherance not only of the rule of law in general, but more specifically of the rights of the accused.

Witness protection, on the other hand, as understood within the context of operations of international criminal tribunals, is more or less a novel concept to national criminal law systems in west Africa. It is a cardinal principle in international criminal law that witnesses who testify before such courts deserve protective measures depending on the level of risk assessed.

The Special Court has adopted protective measures similar to its sister tribunals, among which are the following:

- expunging names and identifying information from the public records;
- non-disclosure of information identifying the victim or witnesses;
- giving testimony through image- or voice-altering devices or closed-circuit television;
- assignment of a pseudonym; and
- hearings in closed sessions.

It is imperative to note in this instance that the rights of the accused take precedence, and if even they require the veil of anonymity to be lifted in his favour but to continue to obstruct the view of the public and the media, so be it.

53 S. Charters et al., 'Best-Practice Recommendations for the Protection and Support of Witnesses. An Evaluation of the Witness and Victims Section', Special Court for Sierra Leone, 2008.

54 RPE, *supra* note 12, Rules 66–68.

International criminal tribunals, as instruments for securing justice, go far beyond their prosecutions for gross violations. They are also about creating a legacy for the victims. Victims who survived a conflict can tell their story. Victims who perished can be remembered. All who endured can be given a chance to accept, possibly understand, and maybe forgive. And it must not be forgotten that when dealing with serious international crimes, the entire international community is affected, and international peace and security and the collective conscience of humankind are equally affected.

Therefore international justice can promote and secure peace by applying universal principles of accountability to protect human rights in principle, by protecting the victims and the vulnerable, and by seeking an understanding of a conflict.

However, while pointing out the importance of international tribunals in securing international justice, one must emphasize that the development of national prosecutions is absolutely essential for a successful functioning of international justice.

The capacity for using transitional justice to mediate change and build a legal culture of accountability and fairness is diminished when local communities are unaware of or uninterested in the trials. These problems can be exacerbated by failure to publicize a tribunal's work, which is all the more unfortunate as the unfamiliar law and proceedings are frequently reported by self-interested third parties, which can lead to gross distortions and disinformation.

In this regard the Special Court for Sierra Leone has been more successful than others in terms of its exemplary outreach information system and the recognition of the rights of the accused. It has set a positive example for the domestic courts in applying contemporary rules of procedure and evidence to avoid undue delays and excessive technicalities.

One is, however, cognizant of the fact that setting an example is very different from actually ensuring that the example is acted on. The Special Court has, notwithstanding, set a standard of independence and fairness hitherto unknown in the region. The recognition of the rule of law is a cornerstone of the Special Court. The question that I will leave for stakeholders is whether there is the political will to emulate the standards set.