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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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1. Introduction:

Many jurists have over the years have pondered with the phenomenon of how to secure or preserve Justice. At the international level, the preservation of justice is by and large the sense to strengthen the rule of law, to dispense justice fairly and efficiently, to enforce international law, and to 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 had happened – both for the benefit of victims, perpetrators and the society as a whole; building a new body of law; 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 its legacy, particularly so, as it is an International Tribunal located in the country of the conflict. This invariably, poses unique challenges in the administration and delivery of justice.

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

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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 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 one Appeals Chamber. Each Trial Chamber comprises three Judges, two of whom are appointed by the United Nations Secretary-General and one of whom is appointed by the Government of the Republic of Sierra Leone. The Appeals Chamber comprises five Judges, three of whom are appointed by the Secretary-General and two of whom are appointed by the Government of the Republic of Sierra Leone. Two out of the four cases tried before the Special Court are to this date fully completed, namely the AFRC (Armed Forces Revolutionary Council) and the CDF (Civil Defense Forces) cases.

The AFRC Trial Judgement was issued on 20 June 2007. The case is a success for the Office of the Prosecutor, as the three Accused were found guilty and convicted on 11 out of the 14 counts in the Indictment. The First Accused, Alex Tamba Brima, and the Third Accused, Santigie Borbor Kanu, were sentenced to 50 years imprisonment, whilst the Second Accused, Ibrahim Bazzy Kamara, was given a 45 years 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 6 years for Fofana and 8 years for Kondewa to 15 and 20 years respectively.

Judgement has recently been delivered in the Revolutionary United Front Case on 25 February 2009. The First Accused Issa Sesay was sentenced to 52 years, Second Accused Morris Kallon, 40 years and Third Accused Augustine Gbao, 25 years.

The Charles Taylor case 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, after having called 91 witnesses, has now finished presenting its case. On May 4, 2009, the Trial Chamber dismissed in its entirety a Motion for Acquittal filed by the Defence. The Defence case is slated to begin on the 29 June 2009.

2. 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 that lasted from 1991 to 2002. During the war, the rebel groups known as the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC) fought against the government and a government-backed militia group, the Civil Defence Forces (CDF), which supported the Sierra Leonean Army in fighting the rebels.

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 in forced labour, mainly in diamond mining, but also for other tasks, such as farming, carrying looted goods, weaponry and ammunition. Civilians were systematically mutilated: massive and widespread, the chopping of limbs was used as a tool of terror and control, as well 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 conscription, enlistment, or use of children under 15 years 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 not only used to sow terror amongst 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 least, Legitimising international criminal justice initiates the processes of building a legal culture with regards to the primacy of fundamental human rights over the normal variable imperatives.

In post conflict societies, such as the case of Sierra Leone, legitimacy is essential in making a discredited justice system credible in the eyes of the public. There is credible body of supporting evidence that the machinery for the administration of criminal justice at the national level in Sierra Leone is presently not functioning efficiently and effectively, due to certain major philosophical, conceptual, practical and operational problems. However, it is not within the scope of this paper to conduct a diagnostic examination of the system. But it can readily be discerned that a key underlying assumption behind the aim of this paper, is to attempt 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 preserving the legacy of the Special Court, the first issue of controversy that poses its head for examination is that of jurisdiction. The Special Court is considered a "mixed institution" because its Statute[2] applies both international law and Sierra Leonean law. The question then is- does this mean that the Special Court falls

[2] Statute of the Special Court for Sierra Leone

within the jurisdiction of the Sierra Leone judiciary? If not, is it then a usurpation of judicial sovereignty of the nation State 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 (Special Court and 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".[3]

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.[4]

The lesson to be learnt from this experience with regards to the issue of jurisdiction is the potentiality of 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 cooperation 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 sitting Head of State, Alhaji Dr. Ahmed Tejan Kabba, to testify before the Special Court, the Attorney-General was not only served but was also invited by the Trial Chamber to

[3] *Prosecutor v. Charles Ghankay Taylor*, (Case No. SCSL-2003-01) Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004 at para. 40

[4] The Supreme Court of Sierra Leone S.C. No. 1/2003 at p.10 (Judgement delivered on 13th October 2005)

make submissions in response to the subpoena request, which he did. Thus it most be noted that the relationship and mutual cooperation 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 crucible in the ascertainment of the jurisdiction of the Special Court. Charles Taylor, former President of the Republic of Liberia filed a motion to quash his indictment and annul his warrant of Arrest issued while he was Head of State in office on the grounds that he is immune from the jurisdiction of the Special Court.[5]

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 effect the arrest. The absence of cooperation and support from the host country was responsible for the abortive attempt.

In August of 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, namely, 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 Mr. 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.[6] The Appeals Chamber further found that Article 6(2) of the Special

[5] SCSL-03-01-015, 23 July 2003

[6] Decision On Immunity from Jurisdiction, Appeals Chamber, 31 May 2004

Court 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*".

Expressed reference and analogy was made to the judgement of *Arrest Warrant* case of the International Court of Justice.[7] In that case the ICJ deliberated the issue of immunity with regards 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.[8]

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 is enjoyed by high ranking state officials before foreign national courts, but yet 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 on the conduct of another state. This position today is that this principle does not apply before 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 Taylor's criminal proceedings before it.

[7] ICJ, Arrest Warrant of 11 April 2000 (Belgium v Democratic Republic of Congo), 14 February 2002

[8] Supra, § 61 ICJ Arrest Warrant Judgement

The value lesson here from a legacy perspective for the peoples of West Africa and the world in general, is that punishment for war crimes and crimes against humanity imposed by rogue leaders is no more a far-fetched phenomenon. Every man can now be held accountable for international war crimes notwithstanding status. In Eastern Africa, we have witnessed the issuance of a warrant of arrest for the Sudanese president, the message is loud and clear, respect human rights and dignity of your people, failing which the long arm of the law will 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 be used to improve the lives of war victims and other vulnerable people. They also point out that sentencing a few people the court has in its custody will not be enough to deal with the culture of impunity in Sierra Leone.[9]

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 post-election violence that usually occasion the conclusion of national presidential elections. People did not resort to arms for fear of criminal prosecutions before the Court.

4. Procedural Matters

I will now proceed to examine the procedural aspects of the law as applied by the Special Court within the context of preserving the experiences and lessons learnt in investigations and prosecutions of war crimes. Comparatively speaking, our *Rules of Procedure and Evidence*[10], constitute a body of procedural law governing the investigation, prosecution, and adjudication of cases involving crimes against humanity and war crimes can, which, with appropriate modifications and adaptations, could serve as models or building-blocks

[9] Reconciliation and traditional justice: tradition-based practices of the Kpaa Mende in Sierra Leone, Joe A.D. Alie, p.132

[10] Rules of Procedure and Evidence of the Special Court for Sierra Leone, as Amended, 27 May 2008

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 *Rules and Procedure and Evidence of the Special Court* 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.[11]

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

- Public trial[12]
- Rights of suspects during investigation[13]

  -right to legal assistance of his own choosing

  -free assistance of an interpreter

  -right to remain silent

- Rules on Indictment[14]

  -review of Indictment for confirmation by a Pre-trial judge

  -particulars and specificity-right to know the case for which he is charged[15]

  - Personal service of Indictment[16]

[11] Lessons and Insights from the Jurisprudence of the Special Court- Hon. Justice Dr. Bankole Thompson

[12] Rule 78, Rules of Procedure and Evidence of the Special Court for Sierra Leone, as Amended, 27 May 2008

[13] Supra Rule 42

[14] Rule 47-52

[15] Rule 47(c)

[16] Rule 52(A)

- Questioning of an accused shall not proceed without the presence of Counsel[17]
- Disclosure Regime[18]

-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 prosecutor

-notification of the names of the witnesses prosecutor intends to call

-disclosure of exculpatory evidence

- Right to Appeal[19]

-additional evidence not available at trial[20]

-Request for Review[21]

Upon 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 its consequent ineffectiveness.

The Special Court since its inception has generated samples of law-making of a voluminous nature that can, objectively 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 nationally.[22]

[17] Supra, Rule 63

[18] Rule 66-68

[19] Rule106

[20] Rule 115

[21] Rule 120

[22] Supra-footnote 11

5. Case law Development

Child Soldiers

The Special Court is the very first in history to find an Accused guilty for 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 to participate actively in hostilities an 'other serious violation 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 consented 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[23] which states as follows-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."

[23] Report of the Preparatory Committee on the Establishment of the ICCA/CONF.183/2/Add.1, 14 AApril 1998, p. 21

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 actively participate 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;
- The Accused intended to use the said persons to actively participate 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.

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 specifically indict persons with the crime of sexual slavery.

By this assertion, it is not to be suggested that the offence is entirely new. Sexual slavery is a particularized form of slavery or enslavement and acts which could be classified as 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 ICTY Appeals Chamber emphasized that "it finds that enslavement, even if based on sexual exploitation, is a distinct offence from that of rape."

The Trial Chamber of the RUF opined that the prohibition of the 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 instill 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 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 allegations are said to have occurred in different time periods relevant to the Indictment.

Primarily, the Chamber held that Count 7 of the Indictment is bad for duplicity and that the appropriate remedy is to proceed on the basis that the offence of sexual slavery is 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 at 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.

Forced Marriage

In that same RUF judgment, for first time in world history all three accused (all of them leaders of the Revolutionary United Front-RUF) were convicted for the crime of 'forced marriage' as a separate "crime against humanity", recognizing the particular suffering inflicted upon 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, further helped the armed groups to keep the fighters committed to the movement since they could easily satisfy their sexual and emotional lust.

The Appeals Chamber in the AFRC case defined forced marriage within 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.[24]

Hon. Judge Doherty, in her Partly Dissenting Opinion, in the trial 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."[25] 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 stigmatised and found it difficult to reintegrate into their communities. According to Judge Doherty, forced marriage qualifies as an "Other Inhumane Acts" causing mental and moral suffering, which in the context of the Sierra Leone conflict, is of comparable seriousness to the other crimes against humanity listed in the Statute.[26]

In a forced marriage scenario, a "wife" was exclusive to a rebel "husband," and any transgression of this exclusivity such as unfaithfulness, was severely punished.[27] A "wife" who did not perform the conjugal duties demanded of her was deemed disloyal and could face serious punishment, including beating and possibly death.[28]

They were often abducted in circumstances of extreme violence,[29] compelled to move along with the fighting forces from place to place,[30] and coerced to perform a variety of conjugal duties including regular sexual intercourse, forced domestic labour such as cleaning and cooking for the "husband," endure forced pregnancy, and to care for and bring up children

[24] AFRC Appeal Judgment, para. 190

[25] Doherty Partly Dissenting Opinion, para. 53.

[26] *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 stigmatise 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.").

[27] *Ibid* at paras 1122, 1139, 1161.
[28] *Ibid* at paras 1138, 1141.
[29] For example one witness was abducted as a 'wife' moments after her parents were killed in front of her. *See* AFRC Trial Judgment, paras 1078, 1088.
[30] AFRC Trial Judgment, paras 1082, 1083, 1085, 1091, 1096, 1154, 1164, 1165.

of the "marriage."[31] In return, the rebel "husband" was expected to provide food, clothing and protection to his "wife," including protection from rape by other men, acts he did not perform when he used a female for sexual purposes only.[32] As the Trial Chamber found, the relative benefits that victims of forced marriage received from the perpetrators neither signifies 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.[33]

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.[34] 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."[35]

Other Inhumane Acts in international criminal law was first introduced under Article 6.c of the Nuremberg Charter, the crime of "Other Inhumane Acts" is intended to be a residual provision so as to punish criminal acts not specifically recognised as crimes against humanity, but which, in context, are of comparable gravity to the listed crimes against humanity.[36] It is therefore inclusive in nature, intended to avoid unduly restricting the

[31] *Ibid* at paras 1080, 1081, 1130, 1165.
[32] *Ibid* at paras 1157, 1161. *See also* Doherty Partly Dissenting Opinion, paras 48, 49.
[33] *See* AFRC Trial Judgment, paras 1081, 1092.

[34] *Ibid* at paras 614, 617, 621.

[35] *Ibid* at para. 624.

[36] *Kupreškić* Trial Judgment, para. 563. The category of "Other Inhumane Act" was included in Article 6.c of the Nuremburg Charter to provide for any loophole left open by other offences not specifically mentioned. It was deliberately designed as a residual category as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive list would merely create opportunities for evasion of the letter of the prohibition. *See also Stakić* Appeal Judgment, para. 315; *Blagojević* Trial Judgment, para. 625; *Rutaganda* Trial Judgment, para. 77; *Kayishema* Trial Judgment, para. 149.

Statute's application to crimes against humanity.[37] The prohibition against "Other Inhumane Acts" is now included in a large number of international legal instruments and forms part of customary international law.[38]

The jurisprudence of the international tribunals shows that a wide range of criminal acts, including sexual crimes, have been recognised as "Other Inhumane Acts." These include forcible transfer,[39] sexual and physical violence perpetrated upon dead human bodies,[40] other serious physical and mental injury,[41] forced undressing of women and marching them in public,[42] forcing women to perform exercises naked,[43] and forced disappearance, beatings, torture, sexual violence, humiliation, harassment, psychological abuse, and confinement in inhumane conditions.[44] Case law at these tribunals further demonstrates that this category has been used to punish a series of violent acts that may vary depending upon the context.[45] 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

[37] *Blagojević* Trial Judgment, para. 625; *Akayesu* Trial Judgment, para. 585 ("The categories of crimes against humanity are set out in Article 3, 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.").
[38] The crime of "Other Inhumane Acts" has been included in the following international legal instruments: Charter of the International Military Tribunal, Article 6.c; Charter of the International Military Tribunal for the Far East, Article 5.c; Control Council Law No. 10, Article II.c; Statute of the International Criminal Tribunal for the former Yugoslavia, Article 5.i; Statute of the International Criminal Tribunal for Rwanda, Article 3.i; Rome Statute of the International Criminal Court, Article 7.k. The crime of "Other Inhumane Acts" is also referred to in the 1996 ILC Draft Code of Crimes Against the Peace and Security of Mankind, Article 18.k. *See also Stakić* Appeal Judgment, para. 315; *Blagojević* Trial Judgment; *Galić* Trial Judgment; *Čelebići* Trial Judgment; *Akayesu* Trial Judgment; *Tadić* Trial Judgment.
[38] *See* AFRC Trial Judgment, para. 698 (defining "Other Inhumane Acts" as "1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; 2. The act was of a gravity similar to the acts referred to Articles 2.a to 2.h of the Statute; and 3. The perpetrator was aware of the factual circumstances that established the character of the gravity of the act."). The Trial Chamber's definition mirrors the definition of "Other Inhumane Acts" in the Rome Statute, Elements of Crimes, Article 7.1.k. The *mens rea* for "Other Inhumane Acts" and the *chapeau* elements are not at issue in this Appeal.
[39] *Stakić* Appeal Judgment, para. 317; *Blagojević* Trial Judgment, para. 629; *Krstić* Trial Judgment, para. 523.
[40] *Kajelijeli* Trial Judgment, para. 936; *Niyitegeka* Trial Judgment, para. 465.
[41] *Naletilić* Trial Judgment, para. 271; *Vasiljević* Trial Judgment, para. 239; *Blaškić* Trial Judgment, para. 239; *Tadić* Trial Judgment, paras 730, 737, 744.
[42] *Akayesu* Trial Judgment, para. 697.
[43] *Ibid* at para. 697.
[44] *Kvočka* Trial Judgment, paras 206-209.
[45] *See Kordić* Trial Judgment, para. 800 (finding that conditions varied from camp to camp but detained Muslims were used as human shields and were forced to dig trenches); *Galić* Trial Judgment, para. 599 (finding that there was a coordinated and protracted campaign of sniping, artillery, and mortar attacks upon civilians); *Tadić* Trial Judgment, paras 730, 737, 744 (finding that there were several incidents of assaults upon and beating of prisoners at a camp) and *Niyitegeka* Trial Judgment, paras 462, 465 (finding that the accused was rejoicing when a victim was killed, decapitated, castrated and his skull was pierced with a spike).

circumstances of the victims including age, sex, health, and the physical, mental and moral effects of the perpetrator's conduct upon the victims.[46]

The Appeals Chamber in the AFRC case afore-mentioned, 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.[47] As noted above, it serves as a residual category designed to punish acts or omissions not specifically listed as crimes against humanity provided these acts or omissions meet the following requirements:

(i) inflict great suffering, or serious injury to body or to mental or physical health;
(ii) are sufficiently similar in gravity to the acts referred to in Article 2.a to Article 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. [48]

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

At this point, it is instructive to note that the Concurring and Partly Dissenting Opinions, of both Justice Sebutinde and Justice Doherty 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.[49] Justice Sebutinde went further to add, 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 Forms of Discrimination against Women

[46] *Galić* Trial Judgment para. 153; *Vasiljević* Trial Judgment, para. 235; *Krnojelac* Trial Judgment, para. 131; *Čelebići* Trial Judgment, para. 536; *Kayishema* Trial Judgment, paras 150, 151.

[47] *Stakić* Appeal Judgment, para. 315; *Blagojević* Trial Judgment, para. 624.

[48] AFRC Trial Judgment, para. 698.

[49] Sebutinde Separate Concurring Opinion, paras 10, 12; Doherty Partly Dissenting Opinion, para. 36.

(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.[50]

Attack on Peacekeepers

Intentionally Directing Attacks against Personnel involved in a Peacekeeping mission

It is no new occurrence or crime to prohibit attacks against peacekeeping personnel. But rather, as personnel and objects involved in a peacekeeping mission are only protected 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 United Nations observer and peacekeeping missions have traditionally relied on their identification as United Nations representatives to ensure that their personnel and equipment are not targeted.

As attacks on United Nations personnel have increased, in particular 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 legislations also, have notably prohibited attacks against personnel and other objects involved in a peacekeeping mission.

In further support in establishing that the offence of intentionally attacking peacekeepers is now recognized in international customary law, the Trial Chamber applied the Convention on the Safety of the United Nations and Associated Personnel-which specifically prohibited attack on peacekeepers as being an offence subject to Universal Jurisdiction. It is trite to point out, that Sierra Leone signed the Convention on 13 February 1995.

[50] Sebutinde Separate Concurring Opinion, para. 12.

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 United Nations operations "authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."

The Trial Chamber further noted the distinction between peacekeeping from enforcement actions authorized by the Security Council under Chapter VII. Article 42 of the United Nations 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 member States or coalitions of member States to conduct military enforcement action on a voluntary rather than mandatory basis.

By opposition 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 demonstrates State practice and opinio juris.

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 UN.
- 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 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 UN.

In analyzing the elements, the Chamber viewed, 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 intent 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 to require 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, 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.

In conclusion therefore, the legacy of the RUF judgment in international criminal law could be discerned through the lenses and footprints 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 upon women through conscription as 'bush wives' during the conflict in Sierra Leone.

Fighting to restore democracy-a just cause

In another jurisprudential development and in the ***CDF*** case, the Appeals Chamber considered that the Trial Chamber erred in considering as a mitigating circumstance in favor 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 firstly by stating that the alleged motive of "just cause" could not be considered as a defence against criminal liability for the Accused 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".[51]

Witness 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 and generally seen as 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.[52] 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 prosecutor is under a duty to disclose to the Defence statements of all witness whom the Prosecutor intends to call and copies of all statements of additional witnesses.[53] But most important of all, is the legal obligation on the Prosecutor to disclose to the Defence exculpatory material within 30 days of the initial appearance of the accused, such obligation it must be noted is a continuing one.

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[51] CDF Appeal Judgement, 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."[51] The political motivations of a combatant do not alter the demands on that combatant to ensure their conduct complies with the law."

[52] Charters Simon *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, Freetown 2008.

[53] Supra footnote 18

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 the notice of the accused. It is therefore of paramount importance that these jurisdictions make for the introduction of this type of disclosure regime not only for the furtherance of the Rule of Law in general and more specifically 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 that testify before such courts deserve protective measures depending on the level of risk assessment.

The Special Court has adopted protective measures similar to its sister tribunals, amongst 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 CCTV
- Assignment of pseudonym
- Closed session

It is imperative to note in this instance that the right of the accused takes precedence and if even it requires the veil of anonymity to be lifted in his favor, and to the extent that if even the veil must continue to obstruct the view of the public and the media, so be it.

International criminal tribunals as instruments of securing justice, go far and beyond merely prosecutions for gross violations. It is 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, 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, the vulnerable and by seeking an understanding of a conflict.

However, while pointing out the importance of international tribunals in securing international justice, one cannot stop to underline 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 the local communities are unaware of or disinterested 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 and this can lead to gross distortions and disinformation.

In this regard, the Special Court for Sierra Leone has been more successful in terms of its exemplary outreach information system and the recognition of the fair 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 fraught with technicalities.

One is however, cognizant of the fact that setting an example is very different to actually ensuring that the example is acted upon. The Special Court notwithstanding has set a standard of independence and fairness, hitherto unknown in the sub-region. The recognition of the Rule of Law is a bastion of the Special Court. The question that I will leave for stakeholders is whether there is the political will prepared to emulate the set standards?