

**THE EFFECTIVENESS AND EFFICIENCY OF THE SPECIAL
COURT FOR SIERRA LEONE IN DEALING WITH SEXUAL
WAR CRIMES: IHL AND IHRL PERSPECTIVES**

BY

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Dedication

To all International Human Rights litigants, and practitioners in International Humanitarian Law:

“Cowardice asks the question “is it safe?” Expediency asks the question “is it politic?” Vanity asks the question, is it popular?” But conscience asks the question “is it right?” And there comes a time when one must take a position that is neither safe nor politic but one must take it because one`s conscience tells one that it is right.” **Martin Luther King Jr.**

“The intelligentsia must be able to unmask the marauders masquerading as protectors of human rights nationally and internationally. When free thinking intellectuals with no axe to grind get thinking, they are expected to handle the theme without any preconceived notions in all its facets, with an open mind, freely, frankly, critically, fearlessly” **S.C Kashyap**

Abstract

This dissertation assesses the effectiveness and efficiency of the Special Court for Sierra Leone (SCSL), in implementing International Human Rights Law (IHRL) and International Humanitarian Law (IHL) principles in sexual war crimes. The dissertation draws from disparate literature on the SCSL and on IHRL and IHL. As such it is mainly exploratory and qualitative in nature. The research also draws much from the theories on special tribunals, conduct of civil wars and theories on the rights of individuals. ‘Efficacy’ of the SCSL includes mainly the backlog clearance rate of the SCSL, whilst ‘effectiveness’ explores the reasons for the establishment of the SCSL. The ultimate aim of this research work is to explore the role of the SCSL in punishing offenders who bear the greatest responsibility in sexual war crimes perpetrated in the Sierra Leonean conflict. The study situates IHRL and IHL principles in sexual war crimes since gender-based crimes are often overlooked by most researchers. The research is exploratory in nature and relies mainly on secondary data on IHL and IHRL as well as the SCSL. This study focuses on the SCSL, which is a hybrid criminal court established in 2002 by the United Nations (UN) and the Government of Sierra Leone. As such, this study also gives brief backgrounds of the SCSL and the conflict in Sierra Leone. This study shows that serious IHL and IHRL violations have forced the international community to establish special courts the world over to deal with individual criminal liability. Tribunals that have been set up include: the Nuremburg or International Military Tribunal, Tokyo Tribunal, International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. The research also shows that IHL and IHRL are important areas of law that the international community is increasingly using in protecting victims of sexual crimes in peaceful and turbulent times by punishing offenders who bear the greatest criminal responsibility. It also demonstrates the role of the international community, governments, rights movements and victims in combating sexual crimes and dealing diligently with the culture of impunity in sexual crimes. It is against this background that this research shows that the SCSL has been effective though not very efficient in dealing with sexual war crimes. In spite of the challenges it faces, this research shows that the SCSL is implementing IHL and IHRL principles in punishing perpetrators of sexual war crimes committed during the strife in Sierra Leone. The research also shows that the international community has not taken a quasi-indifferent approach to issues of IHL and IHRL that arose during the civil war in Sierra Leone. This is because the United Nations and the government of Sierra Leone formed the SCSL together. The international community has thus set precedents on command, direct and indirect responsibility in internal conflicts, particularly in relation to crimes of a sexual nature. The jurisprudence on sexual crimes is now available. Future hybrid tribunals can now be established with clear time lines and basing on the SCSL model. The international community can also move towards restorative justice considering the fact that criticism of the SCSL includes its focus on retributive justice. Retributive justice is an important consideration in combating impunity in international crimes but it should be accompanied by restorative justice particularly in crimes of a sexual nature where victims are traumatized through being infected with sexually transmitted diseases, forced pregnancies, and forced illicit affairs or incest.

Keywords: *SCSL, IHRL, IHL, sexual crimes*

TABLE OF CASES

AFRC CASES

Prosecutor v. Brima, Kamara and Kanu, Case No, SCSL-04-16 T

Prosecutor v. Brima, Kamara and Kanu, Case No, SCSL-04-16-A (Feb 22 2008)

CDF CASES

Prosecutor v. Norman, Fofana and Kondewa, Case No SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment (May 20, 2004)

Prosecutor v. Fofana and Kondewa, Case No, SCSL 04-14-T, Trial Judgment (August 2, 2007)

Prosecutor v. Fofana and Kondewa, Case No SCSL-04-14-A (May 28, 2008).

RUF CASE

Prosecutor v. Sankoh, Case No SCSL-03-02-I (March 2003)

Taylor Case

Prosecutor v. Charles Ghankay Taylor, TC 11 Judgment Case No SCSL-03-I-T (26 April, 2012).

Abbreviations and Acronyms

AFRC	Armed Forces Revolutionary Council
CDF	Civil Defense Forces
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
ECOWAS	Economic Community for West African States
HIV	Human Immunodeficiency Syndrome
ICC	International Criminal Court
ICCPR	International Convention for Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJT	International Centre for Justice Transition
IHL	International Humanitarian Law
IHRL	International Human Rights Law
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SL	Sierra Leone
TRC	Truth and Reconciliation Commission
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNICEF	United Nations Children Fund

Resolutions, Rules and Geneva Conventions

Security Council Resolution 1315 of 14 August 2000

Statute of the Special Court for Sierra Leone (2002)

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of August 12 1949

Geneva Convention relative to the Treatment of Prisoners of War, of August 12 1949

Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12 1949

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Chapter 1

INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

This chapter is an outline of the problem statement, problem background, objectives of the study, hypothesis and methodology employed in this study. The chapter shows how the researcher will explore the activities of the Special Court for Sierra Leone (hereinafter, SCSL) in prosecuting perpetrators of sexual crimes that were committed during the Sierra Leone (hereinafter, SL) civil war.

1.2 BACKGROUND

The SCSL is a hybrid *ad hoc* tribunal which was created in response to a request from the United Nations Security Council (UNSC) ‘for the Secretary General to negotiate with the government of Sierra Leone to create an independent special court’ (SC Res 1325, 2000). It was established on 14 August 2000. Scarf (2000: par 6) notes that the ‘Special Court for Sierra Leone is a treaty-based Court established by the United Nations and Sierra Leone’.

Bates (2010: 6) notes that the ‘SCSL began its operations in mid-2002, with the first indictments appearing in 2003’. Pisik (2000: A13) notes that the Court has ‘the full backing of the Government of Sierra Leone’. The mandate given to the SCSL was to ‘prosecute persons who bear the greatest responsibility for serious war crimes’ (ibid). Such prosecutions included crimes of a sexual nature which this study seeks to explore. Al-Rashidi (2012: 3) notes that the SCSL ‘was the first internationalized criminal tribunal established by Agreement- in this case concluded between the UN and the government of Sierra Leone’. Al-Rashidi (ibid: 5) notes further that ‘most of the pre-existing *ad hoc* criminal tribunals were established by the UNSC resolutions’. As such the SCSL is not ‘a UN subsidiary or a part of the Sierra Leonean judicial system` (ibid). Of the prosecutions held so far, the SCSL has completed three cases involving the Armed Forces Revolutionary Council (hereinafter, AFRC), all of which were crimes of a sexual nature. The SCSL has also completed the trial stage of the case of the

Prosecutor v. Charles Ghankay Taylor where Taylor was accused of aiding and abetting the commission of crimes of a sexual nature. It has had trials of pro-Government forces such

as the Civil Defense Forces (CDF) case and has also tried members from the Revolutionary United Front (RUF) rebel group.

The SCSL's initial running period was three years from 2002. It is this mandate, purpose and activities which are essential considerations in this research work.

1.3 STATEMENT OF THE PROBLEM

The efficacy of the SCSL is a contentious issue particularly because the SCSL only punishes those with the greatest criminal responsibility. For the SCSL to be effective in punishing offenders and in preventing future impunity, the SCSL should have dealt with all known perpetrators of the heinous sexual war crimes that fell within the ambit of IHL and IHRL. This is because IHL deals with the protection of civilians during war times whilst IHRL instruments have broad considerations that have to be taken into account in peace and war times. The SCSL would have been very effective had the principles of IHL and IHRL been broadly applied.

1.4 JUSTIFICATION OF THE STUDY

The dearth in literature that is dedicated exclusively to sexual war crimes and the rampant underreporting of the crimes necessitated this research. The research also acknowledges the disparate literature on the SCSL. It gives a systematic analysis of the traumatic experiences of the victims of crimes of a sexual nature both as part of war crimes and crimes against humanity. It examines the concepts of IHL and IHRL from an academic's point of view, analyzing how the principles that are enmeshed in the two branches of law have been applied by the SCSL. It distinguishes human rights from general humanitarian rules and it immensely contributes to the current debate on the efficacy of the SCSL, particularly the recent conviction and lengthy sentence of Charles Taylor, a former head of State of Liberia. The research is also important in developing jurisprudence in sexual crimes because it limits the concept of IHL and IHRL to sexual war crimes which are usually sidelined by most

researchers. This research is also important because it analyses the problems associated with the application of IHL and IHRL in war situations. The application of IHL and IHRL principles by the SCSL as a hybrid court commits the government of Sierra Leone and other governments to take action and help shun the commission of atrocious crimes. This is because the SCSL has set a good precedent that even those in the echelons of power such as Charles Taylor can be prosecuted by foreign courts for violating international law and municipal laws of other countries like Sierra Leone. By taking the case of a special court, this research demonstrates that international justice mechanisms are increasingly becoming effective in preventing impunity by political leaders for war crimes and crimes against humanity. The work of the SCSL is important for the international community which is bedeviled by crisis situations in different continents. The research also shows that it is impracticable for the SCSL to target everyone responsible for sexual crimes and hence it narrowed its focus to those individuals who bear “the greatest responsibility” for crimes committed during the Sierra Leonean civil war. It also realizes the fact that its dependence on voluntary contributions from a few states can be a `problem` to the model. This research is significant and worthwhile since it analyzes the problems that stall the efficiency of the SCSL in its attempt to punish perpetrators of sexual war crimes. It evaluates the concerns from different political and social spheres concerning the role of the international community in combating the Sierra Leonean conflict. The concerns are addressed from an academic perspective and the research shows that the SCSL is a noble institution that the international community should embrace as a prime model for the prosecution of crimes of a sexual nature at present and in future. This is so because it has given more attention to these crimes than other tribunals such as the Nuremburg, ICRC, ICTY and others. As a hybrid institution, the SCSL will allow governments the world over to build their will and capacity of their citizens and other governments to fight impunity in crimes of a sexual nature during conflict situations.

1.5 HYPOTHESIS

The working hypothesis of this research is that **if** Sierra Leonean victims of crimes of a sexual nature are to be emancipated and empowered, **then** the SCSL is commendable **because** it has practically punished offenders who bear the greatest responsibility in sexual crimes.

1.6 OBJECTIVES OF THE STUDY

- ❖ The main objective of this study was to examine the efficacy and effectiveness of the Special Court for Sierra Leone as a hybrid court in combating individual impunity in sexual war crimes. Focus on the SPCL was meant to illustrate how a special court's policies, structure and processes differ from other courts in delivering justice. The SCSL's purpose and activities were evaluated in order to assess its impact on sexual crimes committed in war situations.
- ❖ To examine the principles of IHL and IHRL that deal with sexual war crimes and relate them to the crimes that were committed in the Sierra Leonean civil war. The study critically showed the problems in applying IHL and IHRL simultaneously in war situations. The study showed the importance of applying both laws particularly in situations such as those that existed in Sierra Leone. The two laws were selected since they are central to the conduct of wars and the transition from war to peaceful times.
- ❖ To examine the extent to which victims of IHL and IHRL violations have benefited from the punishment of perpetrators of sexual war crimes committed during the civil war in Sierra Leone.

1.7 RESEARCH QUESTIONS

- ❖ Has the hybrid status of the SCSL been instrumental in its effectiveness and efficiency in protecting the victims of sexual crimes that were committed during the Sierra Leonean civil war? The sub-assumption is that it has failed by narrowing the scope of liability in war crimes but is has been successful in dealing with those who have been brought before it.
- ❖ Have IHL and IHRL principles relating to sexual war crimes been applied effectively by the SCSL in punishing offenders? The sub-assumption is that the SCSL has applied some of the principles effectively.
- ❖ Did the victims of sexual war crimes in Sierra Leone benefit from the punishments imposed by the SCSL on perpetrators of war crimes that were committed in Sierra

Leone? The sub assumption is that the victims have benefited but more should have been done in terms of applying IHL and IHRL principles broadly. This would have seen victims benefiting from the punishment of many perpetrators of sexual war crimes.

1.8 METHODOLOGY

The research relied on material from both primary and secondary sources. Interviews and internet searches were carried out in order to obtain data for this research. Interviews with the heads of embassies for Sierra Leone and Liberia were not carried out because the two countries do not have embassies in Southern Africa. E-mail correspondence took place with the SCSL Public and Research Affairs department to see the extent to which sexual war crimes were dealt with by the SCSL. The challenges that were encountered in this study included the dearth in literature on sexual violence dedicated exclusively to Sierra Leone. This hindrance was minimized by the primary sources of data collection such as email correspondence with the SCSL and by scrutinizing secondary sources such as reports from independent bodies who worked with victims of sexual violence during the Sierra Leone civil war. The research used methods which include:

- scrutinizing cases adjudicated by the SCSL in terms of their content and what they offer in combating sexual war crimes
- Email correspondence and telephone interviews with the representatives at the SCSL.
- Scrutinizing electronic work on the issues of human rights abuses and violation of IHL principles that prevailed in Sierra Leone during and after the civil war.
- Scrutinizing published and unpublished material on IHL on the conflict in Sierra Leone.

1.9 DELIMITATIONS

This research is limited to sexual crimes committed in Sierra Leonean conflict. The judgments which were given exclusive consideration were the judgments of the SCSL. The sexual crimes were dealt with by referring to the principles of IHL and IHRL applicable to sexual

war crimes. The research considered sexual crimes as part of crimes against humanity and war crimes. The research also analyzed human rights instruments that have a bearing on the efficacy of the SCSL in punishing offenders of sexual war crimes.

1.10 LIMITATIONS

This research took cognizance of the supervening difficulties that were likely to be encountered such as the reluctance of diplomats from the concerned embassies to give evidence, absence of embassies for Sierra Leone or Liberia in Southern Africa, and lack of first hand information from Sierra Leonean victims. The researcher could not control the views of interviewees or impose his views on them.

1.11 BACKGROUND OF SIERRA LEONE AS AN AREA OF STUDY

A series of Security Council resolutions were passed to deal with the conflict in Sierra Leone. Resolution 1315 for instance mandated the UN Secretary General to negotiate the establishment of the special court between the Government of Sierra Leone and the UN. Paragraph 3 of the Resolution noted that the Court would have:

Personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in Article 2 (Crimes against Humanity, War Crimes and other serious violations of international humanitarian law, as well as crimes under relevant international Sierra Leonean law committed in the territory of Sierra Leone), including those leaders who, in committing such crimes, have threatened the establishment and implementation of the peace process in Sierra Leone.

This research argues that the framing of the UN Resolution 1315 augurs well with the general argument that 'the perpetrators of genocide, war crimes and crimes against humanity are subject to universal jurisdiction' (Brownlie 2003: 305). It is also worth noting that personal jurisdiction against perpetrators who bear the greatest responsibility was justified because

most of the perpetrators held positions of authority. Human Rights Watch (2003b: par 8) notes `victims interviewed by Human Rights Watch indicated that the violence was often premeditated and organized, suggesting command responsibility on the part of the military hierarchy`.

1.12 DATA ANALYSIS

Data collected through interviews, email correspondence and documentary research was analyzed and presented. The presentation of data from findings was done through the use of tables. Wegner (1993: 23) notes `tables have the advantage that no data is lost when presented in this form. When using tables, one can be able to compare between classes under study and more so the majority of people can easily understand tables`.

1.13 THE EXPRESS PURPOSE OF THE SCSL

The express purpose is to prosecute `those persons who bear the greatest responsibility for serious violations of International humanitarian Law and Sierra Leonean law` (Article 1 (1) of the SCSL`s Statute). This express purpose is thus not meant to limit responsibility to political and military leaders who usually commanded those responsible in committing crimes of a sexual nature during the political crisis obtaining in SL during the civil war. It is from the express purpose that this research considered the violations of IHL and IHRL principles since IHRL principles are also to be found from the membership of SL to many human rights conventions.

1.14 PRIMARY PURPOSE OF THE SCSL

The SCSL`s primary purpose is regulated by article 7 (2) of the SCSL`s Statute which is `to punish those responsible for grave human rights violations`. It is from this primary purpose that this research explored the situations where the SCSL dealt with the violations of IHRL during the civil war.

CHAPTER 2

LITERATURE REVIEW AND THEORETICAL FRAMEWORK

2.1 INTRODUCTION

There is a dearth in literature that is dedicated exclusively to sexual war crimes that were committed during the civil war in Sierra Leone that officially ended in 2002. This research however acknowledges the disparate literature on the SCSL, IHL and IHRL. The Government of Sierra Leone signed the Lome Agreement with the RUF in 1999. The UN Secretary General's Special Representative to SL clearly explained that 'international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law would not be protected by the amnesty proviso (in the Lome Accord)' (Gallagher, 2000: 162). Human Rights Watch (2003b: par 4) notes that 'following the 1999 Lome Peace Accord, there was a relative decrease in human rights violations, except sexual violence, which continued unabated'. The war in Sierra Leone finally ceased when 'UN, Britain and the United States dispatched to Sierra Leone the world's largest peacekeeping mission' (Fara, 2000: A42). Even after the conflict, there has not been official documentation of sexual crimes committed during the conflict. Human Rights Watch (2003: par 5) notes that:

'There are no official statistics on the number of girls and women who suffered sexual violence during the war. This is due both to underreporting because of cultural factors, fear of retaliation, lack of faith in the criminal justice system and to a lack of resources devoted to the problem and the participation of the relevant government ministries'.

This researcher argues that the international community played a pivotal role in ending the protracted civil war in Sierra Leone. This researcher explored literature on the SCSL, war-related sexual crimes, IHL and IHRL and theories about special criminal tribunals in an endeavor to show the effectiveness and efficiency of the SCSL. The study examined the effectiveness of the SCSL, explores the intricacies about war-related sexual crimes, and explores the effectiveness of IHL and IHRL related to sexual war crimes. This is because crimes such as sexual violence that was committed during the Sierra Leonean conflict 'is not

only a war crime, but given its widespread and systematic nature-is also a crime against humanity` (Human Rights Watch, 2003b: par 7).

2.2 THE SPECIAL COURT FOR SIERRA LEONE

The Special Court of Sierra Leone (hereinafter referred to as 'SCSL') is `a treaty-based *sui generis* Court of mixed jurisdiction and composition` (Fritz and Smith, 2009: 404). It is considered the best scenario for Sierra Leone`s victims as it fits into the ideal institutions which offer `both the physical accessibility of proceedings and the dissemination of objective information to the local population` (Kritz, 1996:132). The SCSL seat `is located in the capital city of Sierra Leone, where the crimes occurred` (SCSL Agreement, Article 10). Bigi (2007: 303) notes that `the SCSL use the STL (Special Tribunal for Lebanon) courtroom in The Hague, not in Sierra Leone, to hold its trial of Charles Taylor for security reasons`. It also falls within `the currently favored UN discourse of capacity-building by which individuals, groups, organizations, institutions and societies, increase their abilities to perform core functions, solve problems; define and achieve objectives` (Fritz and Smith, 2009:406). Rapp (2008:34) notes `SCSL and the ECCC (Extra-ordinary Chambers in the Courts of Cambodia) have dedicated significant resources and funding to ensure that there is a strong public outreach program`. Rapp (ibid) notes `each year, the Special Court for Sierra Leone`s outreach program...has conducted hundreds of meetings, across the country to provide information and answer questions about the special court`s operations`. The program `help ensure that the tribunal is understood and perceived as fair by the population affected by the atrocities as well as by the broader international community` (ibid). The SCSL has prosecuted more war-related sexual crimes compared to other tribunals. In Japan, the crimes were committed against more than 200000 `comfort women` including systematic rape and sex slavery by the Japanese Imperial army but `these crimes were ignored by the Tokyo Tribunal` (Phelps, 2006: 512). In 2001, a year before the establishment of the SCSL it has been argued that `legislative procedures to address gender-based violence were weak and ineffective` (UNFPA, 2005:12). It is against this backdrop that the SCSL has to be understood as a Court

whose personal jurisdiction punishes persons who bear the greatest responsibility for serious violations of IHL and Sierra Leone law committed in the territory of Sierra Leone since 30 November 1996 (Draft Statute SCSL article 1 (1), Fritz and Smith, 2001: 410). To achieve this goal of prosecuting those with the greatest criminal responsibility, its subjective jurisdiction covers crimes under international humanitarian law considered to have had the status of criminal international law at the time the alleged crimes were committed (Fritz and Smith, *ibid*: 407). Accordingly the court avoids challenges to its legality, particularly the principle *nullum crimen sine lege* and the prohibition of retroactive criminal legislation (*ibid*). The court also has temporal jurisdiction because as hostilities had not ceased at the time of the Statute's first drafting, the temporal jurisdiction was left open-ended (*ibid*: 410). The SCSL prosecution understands the complexities in collecting evidence of sexual violence but is keen to assist victims. Sleenger et al (2011: 20) quote Nick Koumjian, a senior trial attorney at the SCSL, as saying that the average sexual assault in a domestic trial might involve a single victim over the course ten minutes. In an international crime case, there are many victims-most of whom understandably, choose not to report the crimes.

PHR (2002) notes 215,000-217,000 women and girls in Sierra Leone had been affected by war-related sexual violence and thousands of women and girls who had suffered rape were willing to testify to the Special Court. In spite of these convictions, the perception amongst gender activists concerning the TRC and the SCSL is that both initiatives fell short in addressing the country's gender-based human rights violations (Tiale, 2009: 70). Be that as it may the SCSL is important in prosecuting sexual crimes because sexual and gender-based violence was given specific attention in its Statutes and the office of the Prosecutor has been praised for the empowerment placed on investigating and prosecuting gender crimes and handling them sensitively (*ibid*: 72). Significantly the court has set an international legal precedent in finding forced marriage to be a Crime against Humanity as another inhumane act (*ibid*).

2.3 THE SCOPE OF THE SEXUAL CRIMES

Article 2 (g) of the SCSL Statute mentions `rape, sexual slavery, enforced prostitution, forced pregnancy and any form of sexual violence as crimes against humanity`. Article 3 (e) mentions `Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault as serious violations of article 3 common to the Geneva Conventions of 12 August 1949`. Gendered crimes are regarded as `multilayered and complex and may include both sexual and non-sexual aspects` (Oosterveld, 2009:3). Meron (1993: 427) notes that `sexual violence, where particularly systematic, is a crime against humanity`. Cases relating to male victimization were underreported. This was probably because `male rape is a taboo subject; it happens but it is concealed by the victims who are too ashamed to speak out and by a society that is not prepared to listen` (Mezey and King, 2000: v). Sexual violence is `any violence, whether physical and or psychological, carried out through sexual means or by targeting sexuality` (Lewis, 2009: 3). Even crimes like rape have been `ignored and treated as a sad side-effect and not amounting to a severe crime of war` (Bedmont and Martinez, 1999: 65). Rape is different from gender-based violence which is `violence that is targeted at women or men because of their sex and or their sexually constructed gender roles` (Carpenter, 2006: 83). Sexual violence is considered a `result of the breakdown of social and legal frameworks` (Oosterhoff et al 2004: 70). This fits the argument that sexual violence is usually used for `personal gratification, military training or rewarding of soldiers` (Wood 2006: 321). It takes a myriad of forms like `sexual assault, rape, forced marriage, genital mutilation, sexual slavery or trafficking` (Seelinger et al, 2011: 1). A 19 year old victim of sexual violence recounted how ten rebels raped her and `left me alone in a very hopeless condition...Even now the pain is still in me...my husband drives me from my home and says I am barren` (Ben-Ari and Harsh, 2005: 1). Thus research on sexual violence becomes herculean due to `social taboos against speaking publicly about rape and other acts of sexual violence` (ibid). In its 1550 page, Africa Renewal found that `out of the 10,002 adult victims the commission was able to identify that 33.5% were female. Among the 1,427 child victims, that proportion rose to 44, 9 per cent` (ibid). Human Rights Watch (2003a) notes `thousands of women and girls of all ages, ethnic groups, and socioeconomic classes were subjected to widespread and systematic sexual violence, including individual and gang

rape and torture and sexual slavery`. Sexual violence affected `50% of all women in Sierra Leone` (Coomarasaswamy, 2002:15). Nowrojee (2005: 90) notes `rapes were perpetrated by both sides of the conflict, partly the pro-government forces (SLA) and the militia (CDF) but mostly by the rebel forces of the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council and the West Side Boys, a splinter group of the AFRC`.

The United Nations responded to increased violence against women `by making gender-based violence a security problem` (ibid: 85). The establishment of the SCSL emanated from the argument that `although interested NGOs later pressed for perpetrators to be prosecuted, few cases reached the courts and their logical conclusions` (UNFPA, 2005: 12). There were `limited orientation programmes from which perpetrators and survivors could benefit` (ibid). As such `women and girls were clearly singled out as targets of malice and violence during the conflict` (ibid). UNFPA (ibid) also notes that `more than 10000 women from Liberia who were living in refugee camps in and around Kenema continued to suffer some form of gender-based violence...and became mothers between the ages 13 and 16`. PHR (2000) notes `approximately 50,000 to 64,000 internally displaced women in Sierra Leone may have been victims of sexual violence, including rape (89% of the study participants), gang rape (33% of study participants), sexual slavery (15% of study participants), forced marriage of girls and women to combatants`. The statistics are disturbing for a country like Sierra Leone with a low life expectancy rate. In 2005, life expectancy `was 37, 0 years for males and 39.0 years for females. Child mortality was 297 and 270 (males and females, respectively) per 1000 live births` (UNFPA, ibid: 5). Cohen (2007: 6) notes `75% of the reported incidents of rape were committed by groups of people as opposed to lone perpetrators`. Both opponents used `rape as a weapon of war or as a tangible military strategy` (ibid: 7). Enforced rape has also been reported in `Sierra Leone, among other conflicts` (Carpenter, 2006: 95). This is when victims are forced `to rape other victims including family members or the dead` (Lewis, 2009: 14). It is also called `enforced incest` (Sivakumaran 2007: 263). It is against this agony of sexual victims that this research benefited from the above and other evolving literature in analyzing several key questions and sub-assumptions on the SCSL with the ultimate aim of evaluating its effectiveness and efficacy in punishing perpetrators of crimes of a sexual nature. Bastick et

al (2007: 57) note that `an estimated 250000 women were raped during the Sierra Leonean civil war`.

2.4 EFFECTIVENESS OF SPECIAL TRIBUNALS

While the ad hoc tribunals have furthered the principles of criminal accountability greatly, the current trend is towards `winding these institution down in favor of a more durable system` (Kirsch, 2005: 292). Fritz and Smith (2001: 403) note `criminal tribunals are a legitimate response to conflict, albeit not the only response that can or should be employed`. Some tribunals that were established before the SCSL did not pay particular attention to sexual crimes committed in war situations. Carlson (2006: 17) for instance notes that `the Nuremburg trials saw no convictions based on sexual violence`. This observation is important in so far as it helps to explain why the Government of SL established a Truth and Reconciliation Commission to augment the efforts of the SCSL in combating impunity in heinous crimes. This becomes more important considering salient aspects such as the fact that `sexual violence is more prevalent in conflicts of identity` (Skjelsbaek, 2001: 79). Conflict of identity was also rampant in Sierra Leonean conflict where men were made to watch their relatives being abused. Turner (2000: 105) notes that `when men are made to watch sexual violence against their female relatives, this secondary victimization is particularly effective`. Fritz and Smith (ibid: 403) note `the establishment of the ad-hoc tribunals and the efforts to create an ICC reflect an increasingly sensitive international response to the treatment of international conflict`. Wartime crimes of a sexual nature will attract attention in the future for instance the International Criminal Court (ICC) has indicted war criminals for sexual crimes. Human Rights Watch (2002) notes that `ad hoc tribunals have been extremely expensive and have outlived their original estimated timelines significantly`. The SCSL for instance had a three year time period beginning in 2002 but still continues today. This is crucial from a human rights perspective as justice is delayed and denied to victims and also alleged perpetrators are incarcerated for long periods before they know their fate. As such the rights of victims and perpetrators are usually trampled upon. Al-Rashidi (2012: 16) notes that `the UN and states have developed the model of hybrid tribunals before the SCSL and STL

were constructed`. Romano et al (2004: 41) note that `the hybrid court concept was introduced for the first time in February 2000 within the UN interim Administrative Mission in Kosovo (UNMIK)`. The UN also utilized hybrid tribunals in `East Timor (from July 2000 to May 2005), in Sierra Leone (since July 2001), in Bosnia (since March 2005), in Cambodia (since July 2006) and in Lebanon (since I March 2009, the time of the STL upstart)` (ibid).

2.5 THE FUTURE OF SEXUAL CRIMES

The SCSL has set the pace for the prosecution of wartime sexual crimes. This acknowledgment is important and augurs well with observations of scholars like Karen Gallagher. Gallagher (2000: 156) states that `institutionalizing war crimes tribunals will have as much effect on future war crimes as Geneva Conventions have had on the Iraqi and Serbian militaries`. This salient observation shows that the prosecution of wartime sexual crimes is gradually gaining recognition. Gender barriers are being attacked by some convincing scholarly assertions. The judicial arm of the SCSL is gradually being scrutinized by scholars in as far as sexual crimes are concerned, particularly in the CDF case. Oosterveld (2009: 373) notes `victims were silenced by the denial of the indictment amendment, which has led to lasting negative psychological effects`. This literature is important because it leads to effective legal arguments on wartime sexual crimes in the future.

2.6 THEORETICAL FRAMEWORK

Caron (2012: 6) notes `theorizing about International Courts and Tribunals often takes theories of international relations as a point of departure`. It is against this salient observation that this study evaluates traditional normative and other theories that help explain the theoretical framework of the SCSL and other criminal tribunals. Wood (2006:308) argues that `theories of sexual violence are often derived from single case studies`.

2.7 TRADITIONAL THEORIES

Traditional theories are an age-old concept. Sohn (1982: 1) notes `the oldest method of protecting the rights of individuals was self-help, not only by the victim, but also by his family, his clan, his nation and ultimately his sovereign or state`. In relation to this conceptualization about human rights, this study seeks to show that tribunals such as the SCSL fit into the Sohnean classification of rights since the Sierra Leonean Government stood behind the birth of the SCSL with the help of the UN. The research examined the unique approaches to war-related sexual crimes by the SCSL with the aim of linking the approach to the traditional function of institution that protect human rights. This study analyzed the efficacy of the SCSL in enforcing the substantive rights of victims of war-related sexual crimes through procedural measures in the SCSL`s Statute. Sohn (ibid) notes:

`At the termination of the Second World War, two events completely changed the status of individuals under international law. Both were closely connected with Nazi actions and with atrocities before and during the war. The first event was the part of war criminals at Nuremburg and Tokyo; the second was the desire to prevent the recurrence of such crimes against humanity through developing of new standards for the protection of human rights`.

This research examined the SCSL`s capability to combat war-related sexual crimes and in doing so, IHL and IHRL principles will be considered. The just war tradition has also been considered together with the traditional theories since the tradition is enmeshed in the need to do justice during the war.

2.8 NORMATIVE THEORY

Martinez (2003: 429) postulated a normative and prescriptive theory to promote a `functioning system of international courts for solving disputes across borders`. It is in relation to this theory that the SCSL`s prosecution of former Liberian leader Charles Taylor was examined. This study explored the SCSL`s supranational jurisdiction as it operates outside Sierra Leone`s law and can override the decisions of the national courts of Sierra

Leone in adjudicating on international crimes of a serious nature. Its jurisdiction is not therefore derived from the Sierra Leonean municipal law alone but is also derived from international law. This study examined the cumulative effect of the appointments of international court personnel and adoption of the views of international judges in developing the jurisprudence of supranational bodies of the nature of the SCSL.

2.8.1 Theory of Bounded Strategic Space

Caron (2012: 2) notes `the design and operation of international courts and tribunals can be understood through a theory of bounded strategic space within which actors in at most five and at least two, institutional positions contend with one another or against the space itself, so as to fulfill the logic of their position`. In relation to this theory, this study examined the roles of the Sierra Leone Government and the UN in ensuring that the SCSL will effectively deal with war-related sexual crimes. It also examined the different arguments advanced by the Trial and Appeal Chambers of the SCSL in determining crimes of a sexual nature.

2.8.2 Independence v Dependence Approaches

This approach considers the effectiveness of independent and dependent tribunals. Posner and Yoo (2005: 8) note the `only effective tribunals are dependent tribunals, by which they mean ad hoc tribunals staffed by judges closely controlled by Governments through the power or threats of retaliation`. Independent Tribunals `pose a danger to international cooperation` (ibid: 7). The reason for this is because they are `likely to allow more ideals, ideological imperatives, or the interests of other states to influence their judgments` (ibid). It is in relation to this theory that this study examined the Taylor judgments and judgments against the RUF and AFRC members in Sierra Leone. Posner and Yoo (ibid: 6) note `tribunals render judgments that reflect the interests of the states at the time that they submit the dispute to the tribunal` (ibid). It is from this approach that this study considers the SCSL`s trials of the CDF, RUF, AFRC members and that of Charles Taylor.

2.8.3 Theory of Constrained Independence

This theory postulated by Lawrence Heifer and Anne-Marie Slaughter came as a counter-theory to Posner and Yoo (ibid) who venerated dependent tribunals. Heifer and Slaughter (2005: 4) note `states establish formally independent international tribunals to enhance the credibility of their commitments and then rely on a range of structures, political and discursive mechanisms to ensure that independent judges are nevertheless operating within a set of legal and political constraints`. It is in relation to this theory that this research examined the administrative structures and time-lines of the SCSL. The views of the judges were also examined from the perspective of the SCSL`s Statutes and administrative structures and other theories like feminism and realism. These theoretical considerations show that the SCSL is affected by different people`s perceptions about tribunals and these considerations may have positive or negative impacts on the SCSL`s operation. It goes without mentioning that the different theories were very important in the testing the working hypothesis of this study. By parity of reasoning, each theoretical standpoint was considered in terms of what it offers to this study.

CHAPTER 3

IMPLEMENTATION CHALLENGES OF THE SPECIAL COURT

3.1 INTERNATIONAL HUMANITARIAN LAW

IHL has attracted the attention of many scholars. Stratton (2009: 15) notes that `the law of war of IHL governs what happens in situations of armed conflict. Historically, there are two streams of law that govern armed conflict-the `Law of the Hague` and the `Law of Geneva``. The Law of Geneva is `concerned with the principle of humanity and the protection of civilians and other non-combatants` (ibid). The law of The Hague `governs the use of military force and focuses on the behavior and rights of combatants` (ibid). Basically the law as a whole `seeks to balance respect of human life in armed conflict against military necessity` (ibid). This research focuses mainly on the law of Geneva because the bulk of victims under consideration were mainly non-combatants. For this basis, it is vital for starters to refer to Common Article 3 of the Geneva Conventions which reads as follows:

‘In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as minimum, the following provisions:

1. *Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.*

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) *Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture*
- (b) *Taking of hostages*
- (c) *Outrages upon personal dignity, in particular, humiliating and degrading treatment, and*

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” (emphasis added).

This researcher argues that the Article in its emphasis on humane treatment realized the importance of human rights in line with the 2nd Additional Protocol to the Geneva Conventions which relates to internal armed conflicts prohibits in Article 4 ‘outrages against personal dignity, rape, enforced prostitution and any form of indecent assault at any time and any place when committed against persons who do not take a direct participation or have ceased to take part in hostilities’. It is argued in this research that the SCSL has prosecuted sexual offenders in furtherance of the spirit of these important Conventions.

Al-Rashidi (2012: 5) notes that IHL ‘governs *jus in bello*-the laws that govern hostilities’. Al-Rashidi (ibid: 6) notes that ‘despite the normative de jure legal proscription of sexual violence in early IHL, the de facto situation attested to utter disregard of sexual assault prohibitions’. It is against this background that Al-Rashidi (ibid: 18) lauds the conviction of AFRC members for ‘rape as a crime against humanity and as a war crime’. The SCSL’s structure is venerated as a ‘treaty-based sui generis court of mixed jurisdiction and composition’ (UN Report, 2000: par 9). As such, Judges of the Trial Chamber dismissed count 7 charges on sexual slavery and other forms of sexual violence committed by the AFRC members on the grounds that they were vague and duplicitous. They opined that the accused did not know ‘what evidence pertained to sexual slavery and what evidence substantiated the charge of sexual violence’ (AFRC case, par 92). The Trial Chamber also acquitted the AFRC members in count 8 on inhumane treatment on the basis that it ‘should have been charged only in count 7, as a crime against humanity’ (ibid). Be that as it may, the SCSL convicted AFRC members of rape as a crime against humanity, ‘relying on the same sexual assault evidence of sexual slavery that it used to dismiss count 7 charges and acquittal under count 8’ (ibid). The importance of IHL has also been reiterated in IHL instruments. CEDAW for instance in its paragraph 7 (c), places emphasis on the ‘right to equal protection according to humanitarian norms in times of international or internal armed conflict’.

Sanhi (2010: 67) notes that IHL `seeks to place on transnational actors not just negative immunities but affirmative obligation (and) does not accept traditional excuses, i.e. following orders; part of our culture`. Copelon (2000: 5) notes that `IHL can be formulated as the laws and customs that seek to limit the effects of armed conflict for humanitarian reasons, by protecting persons who are not or who are no longer participating directly in hostilities and by restricting the means and method of warfare`. IHL applies `in situations of armed conflict (whether international or non-international) and in situations of occupation` (Harvard Policy Brief, 2002:7). Lewis (2009: 20) notes `though often still women-specific, ICL and IHL contain instruments that are worded capacious enough to implicitly include men as a category of victims`. IHL is thus very important in combating heinous sexual crimes.

3.2 INTERNATIONAL HUMAN RIGHTS LAW

Pasayat (2010: 540) notes that human rights are `those rights which inhere in every human being by virtue of being a member of human family`. Basic human rights `constitute what might be called sacrosanct rights from which no derogation can be permitted in a civilized society` (ibid). They are, `universal, and cut across all national boundaries and political frontiers` (ibid). Copelon (2000: 6) notes that IHRL is `international system of norms, legal standards, and enforcement mechanisms that safeguard individuals` fundamental rights against abuse by states`. This researcher argues Copelon`s view above augurs well with the normative theory. Thus he notes that `violations of certain cultural norms can also act as sexual violations in wartime` (ibid: 14). He notes that `during the conflict in Sierra Leone, for example, rebels broke other taboos, forcing male family members to rape female family members or to watch them dance naked or being raped by others` (ibid).

There are international human rights instruments that seek to protect the dignity of individuals as human rights. The ICCPR and the ICESCR together with UDHR form `the International Bill of Rights` (Pasayat 2010: 58). CEDAW (1992) in article 6 defines gender-based violence as `violence that is directed against a woman because she is a woman or that affects women disproportionately`. The ICCPR also prohibits inhumane or degrading treatment in Article 7. Article 10 of ICCPR states that, `all persons deprived of their liberties shall be treated with humanity and with respect for their inherent dignity of the human person`.

Copelon (2000: 19) notes however that `IHL provides inadequate legal protection for adult male victims of sex violence in part because international human rights instruments define sexual violence in ways that exclude men from the class of potential victims`. This researcher however argues that this inadequacy explains the SCSL`s emphasis on retributive justice in its punishment of sexual offenders.

Notably the SCSL prosecuted those who violated Sierra Leonean law during the decade-long civil war. The SCSL is different from other international or special tribunals because it did not ignore the human rights of victims, like women and children. Copelon (ibid: 4) notes that `it is likely that rape was not explicitly prosecuted at the Nuremburg, though it was a small part of the evidence, because some of the Allied troops were equally guilty of raping women-an example of the banality of the evil in militarizing patriarchal culture`. The SCSL venerated IHL since it even prosecuted CDF members who helped the government of SL fight the rebels. They were prosecuted just like the AFRC and RUF members were prosecuted. There was impartiality in prosecuting the crimes unlike in the Nuremburg tribunal where rape was not prosecuted to protect Allied members who were guilty of the crime. Thus it has been noted that `women`s human rights activists have insisted in many contexts, that rape is an atrocity whatever the purpose and whether or not widespread or systemic` (Copelon, ibid).

IHL applies at all times, `but allows for the potential for to derogate from certain treaty obligations at a time of public of `public emergency threatening the life of the nation` under the condition set out in article 4 (1) and 4(3) of the ICCPR` (Harvard Policy, 2002: 7). Davies (2010: 1) notes that `states lacking a demonstrated commitment to the promotion and protection of human rights could not properly set standards to enforce human rights`. It is argued in this research that the government of SL was not complicit when it established a special court with the help of the UN to show its commitment to IHL principles in prosecuting those who bear the greatest criminal responsibilities in violating Sierra Leone law. Sierra Leone is one of the states which are members of the Human Rights Council of the United Nations that was inaugurated in 2006. Lauren (2007: 327) notes that `states that gained membership in 2001 included such luminaries of human rights protection as the Sudan, Sierra Leone, Uganda and Togo`.

3.3 IHL AND IHRL DISCOURSES

The contradiction between IHL and IHRL is more apparent than real. IHRL realizes the need for peace as a norm whereas IHL is an exception to the all-time existence of peace.

The Harvard Policy Brief (2002: 3) notes there is `potential for interaction in theory and practice between the two branches of law, including the meaning of the maxim that during an armed conflict or occupation, IHL is *lex specialis* in relation to IHRL`. The *lex specialis derogate legi generali* simply means a more specific rule will trump more general rules. The Harvard Policy Brief (ibid: 8) notes `IHL as *lex specialis* trumps the more general norms of IHRL`. The Harvard Policy Brief (ibid) notes in the Nuclear Weapons case, the ICJ (International Court of Justice) held that:

`IHL is the applicable *lex specialis*: it sets the scope of IHRL obligations in situations of armed conflict`.

It is convincingly noted however that `the *lex specialis* rule does not oust the application of IHRL. IHRL can continue to apply in situations of armed conflict, but its scope is set by IHL norms` (ibid).

3.4 CHALLENGES FACED IN IMPLEMENTING IHL AND IHRL DISCOURSES

There is jurisprudential problem in as far as categorizing sexual crimes as part of crimes against humanity or sexual war crimes. This researcher argues that it is necessary to decide whether certain crimes are punishable as crimes against humanity or as war crimes to avoid unnecessary split or duplication of charges. The principle that rape or sexual violence can be part of crimes against humanity or sexual war crimes create problems in formulating jurisprudence for prosecuting sexual crimes. The Trial Chamber arguably illustrated the difficulty in categorizing sexual crimes in the AFRC case. The court however came up with some essential elements that constitute the crime of “other inhumane acts”. These include inter alia:

1. `Person 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 in **Article 2 to 4** of the present Statute and
3. The perpetrator was aware of the factual circumstances that established the character or gravity of the act` (AFRC, Par 698).

This researcher argues that there is need for a clear legal infrastructure that categorizes sexual crimes so that the crimes could be prosecuted efficiently. Chinamasa (1995: 40) notes for instance that `rights should not be viewed as operating in a vacuum and their sphere of operations recognized for the effect played upon the scope of such rights`. From the observation by Chinamasa (ibid), this researcher argues that although the SCSL is doing what is humanly possible in being the only hybrid court which is established in an area where conflict occurred, sexual crimes have not been clearly set out in the indictments leaving it to the Trial and Appeal Chambers to decide on the crimes. The concept of human rights according to Chinamasa (ibid: 41) `should be recognized that in any country such rights will still operate with regard to that particular country`s circumstances`. One needs to be careful that circumstances do not become a means for watering down the content of rights. This observation is very critical considering the SCSL`s mandate to prosecute those bearing the greatest responsibility in human rights violations. Chinamasa (ibid: 42) notes that `a nation`s adoption of recognizing and protecting these rights is a statement of a commitment to human dignity`. Chinamasa (ibid) further notes `there can be seen to be three important factors, the recognition of a right, its implementation and enforcement`. It is from the above salient observations that this researcher lauds the arguments by the SCSL Trial and Appeals judges in developing jurisprudence on sexual crimes.

3.5 IHRL AND OPERATING ENVIRONMENT

3.5.1 Non-Compliance

This research noted that the instances of compliance with IHRL principles on crimes of a sexual nature were not followed in the CDF case. The CDF leaders were not found guilty of having violated crimes against humanity of a sexual nature despite the Trial Chamber's finding that the leaders were guilty of other crimes. The Trial Chamber recognized the importance of Article 3 common to Geneva Conventions and Article 11 of the Additional Protocol but the CDF leaders were exonerated from violating the Articles on the basis that the Prosecution had failed to prove that the leaders had committed crimes against humanity. The Appeals Chamber however disagreed and increased the sentences of the leaders from six years to fifteen and eight to twenty respectively.

It is important to note that the SCSL was also not found on the basis that victims had to be compensated but that offenders have to be punished. Peter Andersen (2013) the Chief of Outreach and Public Affairs at the SCSL, in an email correspondence with this researcher indicated that:

‘The SCSL is somewhat different from the ICC, which has compensation or reparations as part of its mandate. The SCSL was set up along other transitional justice mechanisms such as the TRC and the Victims Trust Fund, so compensation of victims is not part of our mandate’.

It also became clear from the email correspondence with Mr. Andersen (ibid) that there was no proper investigation of sexual crimes through surveys. Mr. Andersen (ibid) further stated categorically that:

‘The Court did not do a survey to find how many sexual crimes were committed during the war. The Prosecution was required to prove, to support a count of crimes against humanity, that the crimes were widespread and systematic’. Had that been done, this researcher argues that the prosecution of other perpetrators such as child soldiers would have gone a long way in promoting transitional justice in Sierra Leone. Child soldiers have not been prosecuted when in actual fact they were the ones who committed the most heinous crimes such as rape. It however emerged from the correspondence with Mr. Petersen that the evidence was limited

to certain districts where surveys would have been very critical in establishing the number of sexual crimes that were committed. Mr. Andersen stated that:

“The Office of the Prosecutor built their cases in RUF, AFRC and I believe Taylor on 7 of the 12 Districts of Sierra Leone plus the Western Area (the old “Colony”) which includes Freetown”.

In a telephone interview with Mr. Andersen on the 11th of February 13, 2013, Mr. Andersen indicated that “The SCSL is important because it is the first court to be established in the area where the conflict occurred”. He also indicated that “he could not compare the SCSL to other tribunals like ICTR and ICTY because the SCSL works well with non-governmental organizations and the national Police in Sierra Leone”. This researcher argues that this is fundamental from a human rights standpoint since there is no doubt that cooperation amongst various institutions will strengthen the protection and promotion of women’s human rights. The organizations help each other in mobilizing resources and in ensuring that transitional justice mechanisms are well oiled. It also became clear from the correspondence with Mr. Andersen that the SCSL realizes the need for the general public to be updated on the developments at the SCSL, the Court’s mandate. In essence, it is the SCSL’s concomitant duty to bring to book perpetrators who bear the greatest criminal responsibility.

3.5.2 Compliance

The hybrid court itself is a noble institution which punishes those who bear the greatest responsibility in violating IHL and Sierra Leonean laws. IHRL is applicable in peace and war times. This research notes that the reasons behind the establishment of the SCSL were enmeshed in this realization that IHRL is important although it is not the *lex specialis* in crisis times. The punishment of those who violate Sierra Leonean law also realizes the need for IHRL.

Judicial activism initiatives were carried out in the ARFC and RUF cases especially through the dissenting judgments of erstwhile judges of the Trial Chambers such as Justice Doherty whose findings were upheld by the Appeals Chambers. Justice Doherty has been at the

forefront of an objective inquiry into sexual crimes, especially the presentation of sensitive evidence.

3.5.3 The Crime of Forced Marriage

Justice Doherty noted that “the conduct contemplated as forced marriage does not necessarily involve elements of physical violence such as abduction, enslavement or rape” (AFRC case, SCSL-04-16, Par 104). This was contrary to Justice Sebutinde’s assertion that:

“Any other form of sexual violence” in Article 2 (g) is the creation of a category of sexual violence of a character that do not amount to any of the earlier enumerated sexual crimes, and that to permit such other forms of sexual violence to be charged as “other inhumane acts” offends against the rule against multiplicity and uncertainty”

The Appeals Chamber concurred with Justice Doherty’s treatment of forced marriage as a distinct crime. It found that forced marriage is “the appearance, the veneer of a conduct (i.e. marriage) by threat, physical assault or other coercion” (AFRC, par 189). In February 2008, the SCSL Appeals Chamber recognized forced marriage into the jurisprudence of sexual crimes as a “separate and distinct crime” (Prosecutor v Brima, Kamara, Kanu, Case No SCSL-2004-16-A). Steinberg (2008: 9) notes that this was a “breakthrough in the recognition of gender crimes”. This view augurs well with the criticism leveled against tribunals like ICTR for “failure to charge forced marriage as a crime of sexual violence” (Satya, 2001: 197). The observations by Justice Doherty, by the Appeal Chamber and Steinberg, are fundamental in as far as they augment the findings of other human rights organizations like UNICEF. UNICEF (2005) notes:

“in 2000 under a project cofounded by the UN Observer Mission in Sierra Leone, seventy-three percent (73%) of women interviewed (twenty percent of whom were girls between six and seven years old) reported having experienced human rights abuses, forty-seven percent (47%) reported having been raped; and twenty percent (20%) reported having been gang raped”. Three percent (3%) said they “were forced to marry their abductor” (ibid).

3.6 IMPORTANCE OF THE HUMAN RIGHTS APPROACH

Human rights refer to `the concepts of human beings as having universal rights, or status, regardless of legal jurisdiction or other localizing factors, such as ethnicity, nationality, and sex` (Pasayat 2010: 62). Human rights legislation commonly contains `security rights that protect people against crimes such as murder, massacre, torture and rape` (ibid). The SCSL is a vital institution to influence sexual policies in Sierra Leone. The prosecution of sexual war crimes is vital in empowering victims to seek justice in a free and peaceful manner. Easton (2010: 37) notes that:

`The protection of victims, including psychosocial support, is essential to increase the number of public statements and complaints that lead to prosecution of those responsible for state crimes. Strategies in this regard include...entering the realm of political debate. Victims develop a public voice, increase their access to the media, and win over the conscience of urban middle classes. Seeking justice, organizing victims, ensuring legal approaches to deal with criminality; coordinates the efforts of human rights lawyers, documenting attacks, reconstructing the truth, documenting cases and making specific demands`.

This research reiterates that state resources are not for personal, political or private use but are meant for the wholesome benefit of all citizens.

CHAPTER 4

RESEARCH FINDINGS AND IMPLEMENTATION MEASURES

4.1 FINDINGS ON THE HYBRID NATURE OF THE SCSL

The major finding in this research was that the efficacy of the SCSL emanated from the quasi-cooperation between the UN and the Sierra Leonean government. This cooperation in dealing with sexual crimes justified its establishment and the support from donors like France and Britain. Trials started in 2007 and by 2010, three completed trials had been held at the court's seat in Freetown (Bates, 2010: 6). The AFRC trial for instance started on 7 March 2005 and lasted 20 months-making it the shortest trial before the SCSL (ibid). This augurs well with the theories on special tribunals such as normative and bounded space.

The court was also effective in dealing with command responsibility. Bates (ibid: 60) notes 'most senior leaders of each of the main factions (at least down to a certain level) have been prosecuted (save for President Ahmad Tejan Kabbah)'. Bates (ibid) aptly notes that, 'the SCSL was not established to solve all the problems of Sierra Leone'. The Court was "mandated specifically for international justice". Bates (ibid) also notes 'in assessing the effectiveness of the Special Court as a whole, it must be borne in mind that the primary aim was to address what the Security Council described as the prevailing situation of impunity'.

Locally however the 'supposed benefits of the hybrid system for the Special Court did not materialize, the court was still distant from those most affected; it was neither significantly cheaper nor efficient' (ibid: 3). Bates (ibid: 39) notes in relation to the SCSL that 'there has been no real impact upon Sierra Leone society'. The outreaches by the SCSL have however been described as 'exceedingly effective, exemplary and the strongest of any tribunal to date' (Perriello and Wierde 2006: 35). The outreaches show that 'sexual violence prosecutions were acclaimed as bold and forward thinking' (Bates, 2010: 46).

4.2 FINDINGS ON THE VICTIMS OF SEXUAL CRIMES

The research found out that women were the major victims. The average age of rape victims was fifteen (Amowitz et al, 2002:518). Cohen (2007: 23) notes that 1/3 of rapes involved female perpetration or acknowledgment. Cohen (ibid: 24) also notes female rebels diverged from Sierra Leonean norms by acting more violent than their male counterparts. PHR (2002: par 1) notes that internally displaced women and girls in Sierra Leone have suffered an extraordinary level of rape, sexual violence and other human rights violations during the country's civil war. PHR (ibid: par 3) notes of a survey of 991 households (13percent) interviewed by PHR reported some form of war-related sexual violence, and 9 percent of individual female respondents reported such abuses. It was also noted that:

as many as 215,000-250,000 women and girls in SL currently may have been affected by sexual violence (ibid: par 5). By 2002, studies showed that war-related sexual violence had, rape (89percent), being forced to undress/ stripped of clothing (37percent), gang rape (33 percent), abduction (33percent), molestation (14 percent), sexual slavery (15 percent), forced marriage (7percent), and insertion of foreign objects into genital opening or anus (4 percent) (ibid: par 7).

The SCSL is considered by this research to have effectively prosecuted sexual crimes. It dealt with cases like rape, forced marriage, sexual slavery in the four major cases brought before its Trial and Appeals Chambers.

Male victims were however less prioritized. This was despite the fact that women made up roughly 9% of the (total) combatants (Mazurana and Carlson, 2004: 12). Further, CDF members were acquitted of sexual crimes in spite of the fact that the CDF was responsible for 12% of all rapes and 7.3% of other instances of sexual abuse (ibid). In *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-PT, the Prosecutor, tried to amend the CDF indictment to include crimes like rape, sexual slavery, other inhumane acts like forced marriage and outrages upon personal dignity but was unsuccessful. Expert evidence was however gathered well in AFRC and RUF cases and at the trial experts testified about the extensive interviews they had conducted with women who had been "bush wives" or sexual slaves of combatants, building a picture of widespread gender criminality (ibid).

4.3 FINDINGS ON THE IMPORTANCE ATTACHED TO GREAT RESPONSIBILITY IN CRIMES OF A SEXUAL NATURE

This was not expressly explained by the SCSL. The perpetrators who manned Internally Displaced People`s camps (IDP) were not prosecuted. IDP camps showed a `13% prevalence rate of war time sexual violence while other research has put this rate at 52.3%` (Bastick et al 2007: 57). Technically it was shown when the AFRC leaders `Brima and Kanu were sentenced to 50 years in prison while Kamara was sentenced to 45 years` (Bates, 2010: 52). In the RUF case, SCSL-04-15T, the leaders were also convicted of crimes of sexual slavery, forced marriage, rape, and mutilations. Sesay was sentenced to 693 years and had to serve a maximum of 52 years. Kallan was sentenced to 340 years and will serve a maximum of 40 years. Gbao was sentenced to 25 years. The sentences are important in combating sexual crimes in West Africa as a region. Lahai (2010: 3) showed the shared gendered conditions of West African countries during civil wars as shown in Table 1 below:

WEST AFRICA	PARAMETERS OF WAR	FAILED STATE RANK	GSV	PERPETRATORS	Domestic Violence
Nigeria	male-instigated	99.8	yes	male	yes
Senegal	male-instigated	not applicable	yes	male (mid)	yes
Ivory Coast	male-instigated	102.5	yes	male	yes
Liberia	gender-inclusive	91.8	yes	gender inclusive	yes (high)
Sierra Leone	gender-inclusive	92.1	yes	gender-inclusive	yes (high)

Table 1

Lahai (ibid) also showed West African countries which recently ended their armed conflicts as shown in Table 2 below:

Conflict countries in the sample (n=15) by ongoing and recently-concluded war status, and region	
Countries with ongoing armed conflicts, and Region (n=15)	
WA	Nigeria, Senegal (Casamance Region)
CA	Burundi; Chad; DRC (formerly Zaire)
EA	Sudan; Uganda; Ethiopia; Somalia
NA	Algeria
Countries with recently-ended (with year) armed conflict (n=15),	
WA	Sierra Leone (2002); Liberia (2003), Ivory Coast (2007)
CA	Rwanda (2002)
SA	Angola (2002)

Table 2

Table 2 justifies findings by the SCSL considering the fact that Gender-based violence was committed by both sexes. As such the SCSL's Statute clearly recognized the need to prosecute sexual crimes.

Oosterveld (2009: 2) notes that `ten out of the thirteen accused from the Sierra Leone conflict were charged with the crimes against humanity of rape and sexual slavery, and the war crime of outrages upon personal dignity`. The ten charged with these crimes include `Charles Taylor, three Armed Forces Revolutionary Council (AFRC) accused, three Revolutionary United Front (RUF) accused, Sam Bockarie, Johnny Paul Koroma and Foday Sankoh` (ibid). Bastick et al (2007: 57) note that `although all parties to the conflict committed human rights abuses and sexual violence, systematic abuses were attributed mainly to the RUF-infamous for its brutality-and the Armed Forces Revolutionary Council (AFRC). Fewer reports showed sexual violence by the Sierra Leone Army and Civil Defense Force`. Oosterveld (2009: 3) notes that `gendered crimes can be multilayered and complex, and may include both sexual and non-sexual aspects. This lesson emerges most noticeably from the AFRC trial and appeals judgments`. The crime of forced marriage for instance received a lot of attention from both the Trial and Appeal Chambers particularly following the objective inquiry by Justice

Doherty. Sadly, the Prosecutor was not allowed to enter new convictions in the AFRC case, SCSL-2004-16-A.

4.4 FINDINGS ON THE ESSENTIAL ELEMENTS OF THE CRIME AND EVIDENTIARY PROBLEMS

The SCSL decided on the gravamen for forced marriage. In the AFRC Appeals judgment, SCSL-2004-16 A, the SCSL held that “forced marriage was a distinct crime against humanity”. The AFRC and CDF Trial Chambers “both mistakenly concluded that acts of sexual violence should only be used to prove the Crimes against Humanity of rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence under Article 2 (g) of the SCSL’s Statute” (Oosterveld *ibid* :12). The Appeals Chambers also noted that the SCSL’s Statute “must be interpreted expansively to prevent the imagination of future torturers from getting around the crimes encompassed by the Statute” (*ibid*).

In *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-PT the SCSL categorized forced marriage solely as a crime of sexual violence on the basis that the Prosecutor had failed to establish the elements of forced marriage as a crime independent of sexual slavery. Oosterveld (*ibid*) notes “on Appeal, the Appeals Chamber corrected this misperception, characterizing forced marriage as a crime distinct from sexual slavery because it is a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury”. This argument fits the normative theory in that “the normative orientation of judges; their sensitivity to the concerns of the poor, and the political resonance base for social rights, are factors that matter to varying degrees” (Gloppen 2005: 18).

Apart from the constituent elements of the crimes, this study also noted that the consideration of evidence must be gender-sensitive. In the *Prosecutor v. Norman, Fofana and Kamara*, Case No. SCSL-04-14-PT (CDF case), Justice Itoe’s classification of evidence of gender-based crimes as prejudicial cannot escape scrutiny. Justice Itoe noted that evidence results in unfair “compromising of the interests and status of innocence of the good standing of the victim of such evidence”. Justice Itoe distinguished between prejudicial and incriminating evidence by

considering the probative value against the potential for prejudice. However Justice Bourdet in dissenting argued that the Prosecutor could only bring a charge forward when `the evidence meets the test of reasonable certainty of conviction` (ibid par 24-25). This was so because as of November 2003, the Prosecutor was now `assured of the full cooperation of witnesses willing to testify for gender-based violations` (ibid). There are many reasons why evidence was not treated as gender-sensitive in the CDF case. Oosterveld (2009: 17) notes:

`The majority judges improperly prospectively denied the introduction of evidence of gender-based crimes, one of the judges improperly viewed such evidence as inherently prejudicial, and the majority judges improperly excluded from their evaluation of timeliness consideration of the circumstances surrounding the collection of evidence of gender-based crimes`.

It is argued that the CDF case sets a bad precedent since the same court had granted the Prosecutor a similar request to add these crimes to the AFRC and RUF indictments (Prosecutor v Sesay, Kallon and Gbao, Case No. SCSL-04-15-PT; Decision in Prosecution Request for Leave to Amend the Indictment, par 25-28, May6, 2004). In the RUF case, the court held that in `the interests of justice, indictment may be amended, the crucial consideration being timing on the part of the Prosecutor`. In the AFRC case, SCSL-04-16-PT, the court held that `where the Prosecutor seeks to add only one count that expands on the existing indictment, the amendment does not unfairly prejudice the rights of the defendants`. The Appeals Chambers in the CDF case registered its displeasure with the majority finding in the Trial Chambers. Oosterveld (2009: 18) notes that `the Appeals Chamber has commented in both the AFRC and CDF appeals judgments that acts of gender-based crimes can be used to prove such crimes`.

4. 5 FINDINGS ON JUDICIAL ACTIVISM IN PUNISHING SEXUAL OFFENDERS

The research found that judicial activism is paramount in warding off stigma in sexual crimes. In a meticulous dissenting judgment, Doherty J noted that `forced marriage has sexual and numerous non-sexual aspects` (Brima Case No.SCSL-04-16T, PAR 14). This is because

`some of these “wives” contracted STDs or HIV. Bush wives were also expected to gratify the sexual wishes of their husbands without question` (ibid). Oosterveld (2009: 8) notes `by focusing entirely on the sexual aspects of forced marriage, the majority of Trial Chamber focused too much on the sexual aspects of the crime and too little on the harm cause by the non-sexual aspects`. In paragraph 5 of the Brima case, Doherty J in dissenting distinguished between sexual aspects of forced marriage like repeated rape, and non-sexual aspects like child bearing and child-rearing, cooking and laundering. The most important finding from Doherty J`s dissenting judgment is that `forced marriage does not require proof of physical violence`.

Gloppen (2005: 25) notes that `court judgments may have a profound impact on political actors, redefining priorities and providing political leverage and arguments for actors (whether in government or opposition) supporting policy reform in line with the judgments`. In this vein, the Taylor conviction becomes important for the sexual crimes jurisprudence considering the fact that `a single case may have a significant effect on jurisprudence and cause a change in public policy` (ibid: 26).

4.6 FINDINGS ON RESOURCES AND NETWORKING AND BACKLOG CLEARANCE

The findings showed that scarce resources affected the efficacy of the SCSL. The SCSL could not meet the set time line which was supposed to end in 2008. Financial constraints have also been worsened by the Taylor case which had to be transferred to The Hague. The Court has however efficiently dealt with the trials that it started in 2007.

Oosterveld (ibid) notes `in 2007 and 2008, the Special Court issued its first two trial-level and first two appellate-level judgments in what are popularly known as the Armed Forces Revolutionary Council (AFRC) and Civil Defense Forces (CDF) cases`. Due to financial constraints the UNHCR (2001:39) notes that `obstacles remain in the collection of accurate information in sexual violence due to inadequate coordination and information sharing between the various legal, medical and humanitarian institutions`. Resource constraints

prevent the SCSL's smooth collaboration with humanitarian organizations such as the ICRC which have issued aide-memoires clarifying rape crimes. ICRC (1992: par 2) notes that serious injury to body or health 'obviously covers not only rape, but any other attack on a woman's dignity'. Cooperation with the ICRC would allow expert evidence to be easily led in guiding the two chambers on the gravamen of sexual crimes.

Limited resources prevented special training for the judges. This is due to the fact that the SCSL judges were not privy to the laws governing sexual crimes in SL. Taylor (2003: 16) notes 'in Sierra Leone, customary law governs at least 65 percent of the population'. Women's consent to marriage 'is not required, often resulting in forced early marriages' (ibid: 17). This consideration would have been very important in the cases involving the crime of forced marriage on bush wives. Moreover crimes like enforced prostitution would have benefited from the general understanding that Sierra Leone 'traditionally condoned a high level of promiscuity, despite the high value placed on virginity' (ibid: 25). The court did not also find in aggravation the issue perpetrators who disregarded ethnic relations. Cohen (2007: 6) notes that '19% of rapes involved victims and perpetrators of the same ethnicity'.

4.7 FINDINGS ON CASE SELECTION STRATEGIES

The SCSL handled cases of those bearing the greatest responsibility in violating IHL and SL law. The cases handled did not include all the perpetrators. For instance there were 'reports of sexual violence perpetrated by UN forces and pro-government forces including the rape of a 12 year-old girl' (Nowrojee, 2005: 91). This research noted that 'the number of victims (in SL) is unknown' (ibid: 62). They constituted 'just 3.3 percent of total crimes reported to the Truth and Reconciliation Commission' (TRC Report 2004: 62). The narrow focus of the punishment though practically important leaves out the need to prosecute other perpetrators. Cohen (2007: 19) notes that 'sexual violence in Sierra Leone appears to have been a bottom-up initiative rather than a statement ordered from above'. The emphasis on command responsibility thus allowed other perpetrators to escape the arm of justice when they could have been easily prosecuted.

4.8 FINDINGS ON SOVEREIGN IMMUNITY-THE TAYLOR CASE

Justice indeed took place in SL. The Taylor judgment attracted the attention of different critics. Trust Sengwayo in *The Herald* (2013: 8) bemoans the politicization of the case and argued that Brenda J. Hollis, the Court's Prosecutor in the Taylor trial was 'a former US Defence Intelligence operative for 20 years, a member of the dreaded CIA who had been based in the US Air Force'. The Court's first chief of investigations, Dr Allan White, 'was a US Defence Intelligence who had worked for that department for 20 years' (ibid). Then there was James J. Johnson a former U.S Army member for 20 years. The Taylor Trial 'was therefore not the usual judicial engagement. It was a covert US military operation that was conducted under the guise of a criminal trial in a court room in much the same way computer fare will be waged in the near future' (ibid). The Taylor trial has been regarded as a US trial for the following reasons:

'The indictment of Taylor by Crane was effectively an indictment by the US as Crane reported to the US as shown by his unsealing of Taylor's indictment to US officials two months before it was officially unsealed. The US funded the Court at US12 million per year. The US gave the prosecution team millions of US dollars to pay witnesses to testify against Taylor' (ibid).

From the above observations alone, the Prosecutor appears biased. This seems to reverse the spirit of the UNSC Resolution 1315 (2000) which states in its Article 15 (1) that:

'The Prosecutor shall act independently as a separate organ of the Court. He or she shall not seek or receive instructions from any Government or any other source'.

This researcher argues that Article 15 (1) is couched in peremptory terms and the continued appointment of US nationals allows the US to score political points which undermine the credibility and independence of the SCSL. This may have ramifications if on Appeal the Taylor conviction and sentence of 50 years is not quashed. This researcher however argues that the SCSL followed the letter and spirit of the human rights instruments like the UDHR which states in Article 10 on full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge

against him. The SCSL also followed Article 11 (2) which relates to the presumption of innocence and Accused persons` right to legal representation. Those principles were followed in the Charles Taylor case. The rights of Charles Taylor are to be weighed with the rights that give dignity to humans and reaffirm faith in fundamental human rights. Article 14 (5) of the ICCPR says that `everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law`. This peremptory provision was followed in the Taylor case in the same manner the SCSL did with the RUF and AFRC cases. Article 14 (3) (a-e) which relates to trial aspects such as allowing the accused to prepare his defense, choose legal counsel, tried without undue delay, in his presence, and can examine witnesses and have his own examined were also followed. The SCSL thus did not sacrifice Mr. Taylor`s rights at the altar of political expediency. The case is important for sexual crimes since sovereign immunity is no longer a bar for prosecution. Mr. Taylor was found guilty of abetting and aiding sexual crimes and the conviction is important in the future if the fugitive RUF president is captured and brought before the SCSL. This finding explains why scholars like Yoo and Posner (2005: 8) are against the independence of special tribunals because international cooperation would be difficult in capturing fugitives from justice.

4.9 FINDINGS ON SELECTIVE APPLICATION OF THE LAW

4.9.1 The AFRC, RUF and CDF Cases

Indictments against AFRC leaders Brima, Kamara and Kanu were consolidated and amended and they were charged with seven counts of crimes against humanity, including systematic rape, sexual slavery, and forced marriage (as a separate inhumane act), six counts of violating article 3 to the Geneva Conventions, and one count of a serious violation of IHL, namely the conscription, enlistment, or use of child soldiers. This study attaches importance to the CDF case on IHL and IHRL principles since cultural factors and military discipline were respected. Bastick et al (2007: 27) note that `the CDF had rules forbidding sexual intercourse before combat in the belief that the power of its fighters depended upon sexual abstinence`. Sadly this case can negatively affect the evidentiary importance attached to the other cases in future. This is because the SCSL`s findings in CDF cases is diametrically opposed to the findings in the AFRC and RUF cases. The SCSL thus lacked uniformity in applying the evidentiary

sufficiency test in sexual crimes. In essence, the SCSL can set a bad precedent that may stall progress in combating impunity in the future. This may render the findings by the same court in AFRC and RUF cases inconsequential. To this end however, this research found that the Appeals Chamber managed to justify the CDF findings. What is worrying is that CDF members did not receive the same punishment meted on RUF members even though rights organizations documented heinous atrocities perpetrated by CDF leaders. HRW (2003b: par 11) documented `one case of sexual torture to death of a female RUF commander by a Kamajor (CDF) leader`. This research argues that the findings by Human Rights Watch do not suggest that the SCSL is not effective. This is so considering the argument that `litigation is by nature casuistic- cases emerge in an uncoordinated fashion and each case is treated on its own terms` (Gloppen, 2005: 30).

4.10 THE EXTRA-TERRITORIALITY OF CRIMES

The case of *The Prosecutor v. Charles Taylor* is a landmark case in this regard. The SCSL exercised jurisdiction over a foreigner, Charles Taylor, the former head of state of Liberia. The Taylor case clearly showed that the SCSL has jurisdiction over anyone who bears the greatest criminal responsibility for crimes committed during the Sierra Leonean conflict. Its extraterritorial jurisdiction has serious ramifications on sovereign and diplomatic immunities. A precedent has been set and heads of state who might again interfere in the political affairs of Sierra Leone do so at their own peril since the implications of such a conduct can now be referred to easily through the Taylor judgment.

In his indictment, Taylor was charged with violating sexual crimes under Article 2 of the SCSL's Statute. Count 2 had rape and count 5 had sexual slavery. He was also charged under Article 3 common to the Geneva Conventions and Additional Protocol 11, punishable under Article 5 of the Statute. In this regard count 6 had charges of Outrages upon personal dignity and count 7 had cruel treatment. In *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-1-T the judgment handed down on 26 April 2012, the SCSL sadly made no finding on these crimes against Taylor because they were not charged in the indictment despite the fact that Taylor had command responsibility. The court also made no finding on sexual slavery despite the

fact that the Prosecutor had proved the charges beyond a reasonable doubt (see page 6 of the Taylor judgment). The SCSL is credited however for finding Taylor guilty of:

- a) Aiding and abetting the commission of the crimes set forth in counts 1 to 11 of the indictment pursuant to Article 6 (1) of the statute (par, 168, page 40 of the judgment)
- b) Planning the crimes in terms of Articles 2, and 4 of the Statute. The SCSL exonerated him for having ordered and instigated the attacks.

This study noted that the Taylor judgment is however laudable because Mr. Taylor was found guilty of having planned, abetted and aided the crimes of rape, a crime against humanity punishable under Article 2 (g) of the Statute (count 6), sexual slavery, a crime against humanity punishable under Article 2(6) of the Statute and outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol 11 pursuant to Article 3 (e) of the Statute. This is crucial in as far as the implementation of IHRL principles is concerned because many reasons justify the conviction of Taylor. This is also because Taylor worked with the RUF who had ‘pervert enjoyment of criminal activity’ (Aman, 2000: 238). In *Prosecutor v Issa Hassan and others*, ‘the RUF used perverse methods of sexual violence against women and men of all ages including brutal gang rapes, the insertion of various objects into victims’ genitalia, the raping of pregnant women and forced sexual intercourse between male and female civilian abductees’ (par 1347). Taylor worked with the RUF members who refused ‘ceasefire, disarmament and demobilization’ (Gallagher 2000: 157). Because of the RUF’s activities, the peace treaties such as the Abidjan Peace Agreement of November 30 1996 ‘went unenforced however and the atrocities continued’ (ibid). The RUF ‘s Operation “No living Thing” was a cruel act ‘where rebel forces ripped through Freetown, raping thousands of women, killing innocent civilians and destroying the capital city’ (Fritz and Smith, 1995: 393). Because the RUF members were uncouth, this research Taylor was equally guilty and had to be convicted. His conviction and sentence of fifty years is almost similar to those his RUF accomplices and this study argues that this is laudable because ‘punishing those responsible for the atrocities in Sierra Leone by conveying a concrete message of accountability may begin to break that cycle of violence’ (Aman, 2001: 248). The conviction furthers the spirit of the SCSL’s Statute which in Article 1(1) endeavors to ‘punish those responsible for grave human rights violations’. Kashyap (2010: 222)

succinctly argued that `basic to human rights is the concept of non-discrimination`. He further notes that `there has been a perennial conflict between the elite`s perception of their individual liberties and the fundamental human rights of the common people` (ibid). In the same vein, this researcher argues that the rights of the victims of sexual atrocities committed under the indirect influence of Charles Taylor cannot be sacrificed at the altar of political expediency. The SCSL fits into the argument by Kashyap (ibid) that `in the actual realization of the rights of its members, each society has to evolve its own model of implementation and protection which may be best suited to its own circumstances and needs`. The Government of SL thus worked with the UN in establishing the SCSL.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

5.1 RECOMMENDATIONS

The major recommendation is that the SCSL should amend its Statute to include restorative justice. The punishment of the offender should not preclude the compensation of the victim. It has been held in the Kenyan case of *Kihara Kimani v AG HCCC No. 711 of 1968* that 'it is a vain thing to imagine a right without a remedy: for the want of right and want of remedy are reciprocal'. The view above fits into the human rights and IHL violations in SL because the victims' rights were violated and they should have a remedy to enforce their rights. As such there was no quasi-indifference from the international crimes in sexual crimes committed in SL.

The SCSL should also seek to sensitize the judges on the rigmarole of evidence in sexual crimes. Parasaran (2010: 198) notes that reason 'being the soul of the law, that law should be founded on sound reason applies to the legislature as well'. The reasoning by the judges of the Trial and Appeal Chambers should show that they exercise their discretions without deflecting from the path of rectitude. Kashyap (2010: 222) notes that 'the foundational norm governing the concept of human rights is that of the respect for human personality and its worth, regardless of color, race, sex, religion and other considerations'. Davies (2010: 7) notes that 'good ideas, not powerful actors, win arguments, and as such are the drivers of compliance'. It is argued that the SCSL should also work with the Human Right Council of the United Nations Council which is 'based on the belief that depoliticizing human rights discussions would enhance the effectiveness of the United Nations in the realm of human rights promotion' (ibid). Sierra Leone is a member of the Council which has a commitment to this need to depoliticize human rights issues.

This researcher also moots for a more active role of IHRL and IHL practitioners in the activities of the SCSL. They will act either as researchers for the judges or as sit-in counsel

during proceedings. Because of the unique hybrid status that the SCSL occupies in combating crimes of a sexual nature, it is in a far better position to identify these practitioners in the best interests of the victims in as far as the punishment of offenders is concerned. If these safeguard measures are implemented, this research argues that the operation of IHRL and IHL will improve the rights of victims of crimes of a sexual nature in Sierra Leone and the extent to which these principles are and have been applied by the SCSL, will not be underestimated. The recommendations follow a realization from this research that the victims of crimes of a sexual nature were abused of the civil and political rights by state and rebel soldiers.

There is need to have a clear definition of sexual war crimes for the purpose of avoiding a seemingly diluted check and balance between the Trial and Appeals Chambers of the SCSL. Although the two Chambers have grappled with the definitions in the Taylor, RUF, AFRC and CDF cases, a clear definition in the definition section of the SCSL's Statute will avoid a crisis of legalism in human rights. Gearty (2006: 70) writes of a crisis caused by 'a false division between human rights in its legal form on the one hand and, on the other, the political community from which these rights have come, and in which they operate'.

The SCSL also needs to initiate funding projects. This study has shown that the SCSL lacks the necessary financial autonomy for it to be independent from some P-5 members of the UNSC like the US, and UK. The two are huge financiers of the SCSL and the fact that their nationals are involved in the running of the SCSL makes it impossible to rule out that the nationals may have their impartiality compromised. While it is commendable that the SCSL is a hybrid tribunal with independent operation, there is also need for the government of Sierra Leone and UN to recruit staff from many African countries. This would improve the credibility of the SCSL.

Interaction with SL ministries such as education, justice and media is important to enable the SCSL to reach out to a wider population considering the fact that it has limited resources. The SCSL should utilize the print and electronic media and should have as its key result areas the promotion of public communication, dissemination of information and image building. The use of internet media is paramount in informing the outside world of its efforts in combating immunity in crimes against humanity. This is done from Sierra Leonean and UN viewpoints

and the credibility of the SCSL can easily be seen. This move has proved effective for international courts like the ICC which has managed to reach the world through social networks like tweeter in interventions in Ivory Coast, DRC and other countries. ECOWAS and the AU should craft sub-regional and regional guidelines that also include sexual war crimes to enable regional or hybrid courts such as the SCSL to improve the jurisprudence on these crimes. Hanzi (2011: 199) notes that:

‘Human rights instruments recognize the importance of participation in the affairs of a nation through voting by secret ballot or standing for election during free and regular elections. Additionally sub-regional guidelines have been developed to guide states to set up independent institutions that will facilitate the realization of these rights’.

The SCSL should strive to have a strong institutional capacity to deal with issues of lobbying, witness protection mechanisms, human rights campaigns and dissemination of information relating to the prosecution of sexual war crimes which are usually treated as sensitive. There should be synergy and cooperation with other organizations such as the TRC on surveys on sexual war crimes, which according to this research, were not done by the SCSL. Collaborative effort is important considering the argument that ‘without an accompanying social mobilization, the use of courts may deliver little more than pieces of paper, with a latent untapped potential’ (Heywood 2009: 22). Surveys have proved to be useful in some countries like Britain where ‘a majority of people respond positively to human rights values such as dignity, respect, and fairness’ (Kaur-Bellagan et al, 2009: 22). Surveys become important for the effectiveness of the SCSL since ‘there is a lack of detailed public understanding of human rights and legislation surrounding them’ (ibid: 8).

The SCSL should also focus on male victims. Sivakumaran (2007: 268) notes that ‘male sexual violence empowers the masculinity of the perpetrator and disempowers the victim and his community’. HRW (2003b: 23) notes that ‘sexual violence was also committed by female combatants against men and boys. Due to the stigma attached to homosexuality, such incidents were only rarely reported’. This view shifts the conventional analysis ‘on wars and the role of women from feminist-essentials that sees women as naturally peaceful to a more rational level’ (Goldblatt and Meintjes, 1998: 43). It also corrects the stereotype that African

politics `constitutes exclusively male clubs, which are defined by hierarchy, authoritarian control, aggression and violence` (Sederis, 2001: 151). Studies have shown that by the end of the SL war `the number of girl combatants (was) at 12, 056 thousand` (Mckay and Mazurana, 2004: 92).

Independent organizations such as ICJT and TRC must target poor communities in networking with the SCSL. Epp (1998: 3-4) notes that `sustained judicial attention and approval for individual rights grew primarily out of pressure from below, not leadership from above. This pressure consisted of deliberate, strategic organizing by rights advocates`. It has also been argued that `the links between marginalized people and resourceful legal service organizations provide important tools for mobilization` (Gloppen 2005: 27). The SCSL should have community information centers victims are apprised the developments at the SCSL. This may lead to a national language policy that would encourage victims to support the SCSL.

5.2 CONCLUSION

The SCSL applied IHL and IHRL principles effectively. It has made the prosecution of crimes of a sexual nature realizable. This is so in spite of the arguments that the SCSL `legally has not been so strong in Sierra Leone itself` (Sriram 2005: 472). It has contributed to remarkable developments in the jurisprudence of international sexual war crimes because it has judges from different legal systems and had different view on the gravamen of sexual offences. The SCSL is classified under hybrid tribunals and the application of IHRL and IHL principles by the SCSL is playing a pivotal role in punishing criminal responsibility in crimes of a non-international nature.

The SCSL has contributed to regional security through the prosecution of Charles Taylor, a former head of State. The judgment clearly indicates the implication of command responsibility in crisis situations. It created a platform for lobbying, advocacy, litigation, and writing on IHRL and IHL in particular gender-based crimes. It has the potential to

significantly reduce political instability in the country and enhances smooth transition towards justice and reconciliation.

The structure of the SCSL and the application IHRL as well as IHL principles has contributed to its efficacy. Political will contributed to the effectiveness and efficiency of the SCSL since the SL government and the UN established it together. The SCSL's achievements so far have been remarkable. The SCSL has completed the trials of four major cases of individuals who ruthlessly committed sexual crimes. A broad consensus now exists that it is not practicable to prosecute each perpetrator and the SCSL's narrow focus was crucial in combating impunity. This development is landmark for West Africa in particular and the world at large. West Africa has protracted crises in Mali and Nigeria and efforts by the SCSL can be used in brokering peace. The SCSL's narrow focus is also important for the application of human rights principles. Andrews and Hines (1987: 7) state that 'human rights have to be interpreted with some degree of relativity to ensure fairness to all and to the interests of society as a whole'. The concept of relativity is based on the fact that 'the general principles which temper the impact of substantive human rights in their individual application are vitally important in determining the ultimate scope of human rights protection' (ibid).

Quite worrying is the handling of the CDF trials particularly in not criminalizing sexual crimes. Without casting aspersions, this researcher argues that the CDF case has not done much in promoting the rights of victims of crimes of a sexual nature. In terms of implementation of IHRL and IHL principles relating to crimes of a sexual nature, the SCSL has been found wanting on restorative justice but this was outside its mandate. Some judges in the Trial Chambers have not treated sexual issues as sensitive as but this as rectified by the Appeals Chambers in the AFRC and RUF cases. The inability of the judges to be sensitive is a clear affront to gains of feminism, human rights-centered conventions and women-centered conventions like CEDAW. Articles 2 and 3 of the ICCR are also important in this regard. Article 2 prohibits discrimination against sex while article 3 seeks to promote the enjoyment of human rights by all people. Article (2) Of CEDAW prohibits discrimination of women by both state and non-state actors.

In spite of the shortcomings of the SCSL, this research cautions against throwing away the baby together with the dirty bath water. It has been noted that the SCSL has two separate chambers have immensely contributed to the jurisprudence of crimes of a sexual nature by distinguishing the crimes. Uncertainty in investigation of sexual crimes was thus cleared. It has been noted that `the lack of capacity on the part of the judges is particularly consequential where the courts also have an investigative function or where marginalized litigants lack adequate legal representation` (Gloppen 2005: 19).

The challenges of the SCSL faced create a platform for formulating policies and strategies that enhance its efficiency. It will be crucial for the SCSL in its role as watchdog of IHRL for Sierra Leoneans to have the capacity to offer remedies to victims of human rights violations who in most cases are women and children as human rights are considered to be `an irreducible core of integrity and dignity` (Sinha, 2010: 66). Sinha (ibid) also notes that human rights `are held universally by all against all`. The decisions taken by the Appeal Chamber in AFRC and RUF cases must lead to the adoption of positional papers on ways of balancing between sensitive and prejudicial evidence in sexual matters. It is acknowledged that formulation of sexual charges has been difficult at the SCSL. Be that as it may, the SCSL demonstrated that gender and sexual crimes should not be tolerated and as such it has been very effective.

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Correspondence with Peter Andersen, Chief of Outreach and Public Affairs, Special Court for Sierra Leone, January 17 2013, 3:25 pm.

Telephone Interviews

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