

The Legacy of the Special Court for Sierra Leone (SCSL)

By

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I affirm that the work submitted is my original work. I also affirm that relevant and appropriate credit has been given within the framework of the thesis where citation has been made to the work of others.

Abstract

This research arises as a result of my personal experience of the 11 year civil war in Sierra Leone, and an interest in the Sierra Leone Government (SLG) and the International Community's (IC) commitment to render international standard of justice in post-conflict Sierra Leone. The aim of this research thesis is to investigate the extent to which the Special Court for Sierra Leone (SCSL) that was established in 2002, was successful in its application of justice during the period of its judicial practice, and how its jurisprudential process can be replicated.

International Criminal Law (ICL) is a relatively new discipline. Through the practice of ICL, individuals are held directly responsible for the perpetration of serious international crimes. By the time that the SCSL was established in June 2002, there was jurisprudence and practice, though rather limited in nature. The SCSL was therefore able to build on past experience but also innovate to meet the complex demands for justice and stability after the atrocities committed in the civil war. The SCSL model is particularly intriguing because of its unique hybrid nature, and it scored a number of unprecedented firsts during its operational period. It is the degree of hybrid administration, legal sources and judicial and prosecutorial teams – which, *inter alia*, allowed the court to draw on domestic expertise – that gives the SCSL its legitimacy and which may have contributed to its apparent legacy success in achieving justice and helping to build stability. Given its unique degree of hybridity, the SCSL is a potential model for future hybrid courts and tribunals to learn from. The SCSL trials and judgments also set precedents for prosecuting perpetrators of international crimes of child soldiering and forced marriage and those of a similar nature. The SCSL hybrid tribunal has already influenced the later practice of the International Criminal Court (ICC) and ICL.

In terms of research methodology, I am using both theories of justice and an interpretive community lens to answer the research question: How successful was the SCSL in delivering justice in Sierra Leone and what are the implications of its specific hybrid nature?

In summary, my research focuses on an evaluation and analysis of the success of the SCSL model, and its unusual degree of hybridity and legacy, and interrogates the

jurisprudence of the SCSL through an analytical framework including the incorporation of the theories of justice and interpretive community perspectives, thereby producing original independent research which will have a potential contribution to make to knowledge in the field of International Criminal Law scholarship.

‘This thesis states the law as of 30th September 2018.’

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List of Abbreviations

Additional Protocol (AP)
Armed Forces Revolutionary Council (AFRC)
African Charter on Human and Peoples' Rights (AFCHAR)
African Charter on the Rights and Welfare of the Child (ACRWC)
Cambridge University Press (CUP)
Civil Defence Forces (CDF)
Church Missionary Society (CMS)
Command Responsibility (CR)
Convention on the Rights of the Child (CRC)
Customary International Law (CIL)
Customary Law Courts (CLC)
Democratic Republic of Congo (DRC)
European Court of Human Rights (ECHR)
Extraordinary African Chambers (EAC)
Extraordinary Chambers of the Courts of Cambodia (ECCC)
Fourah Bay College (FBC)
Human Rights Law (HRL)
Inter-American Court of Human Rights (IACHR)
International Community (IC)
International Law (IL)
International Criminal Court (ICC)
International Criminal Justice (ICJ)
International Criminal Law (ICL)
International Criminal Tribunals (ICT)
International Criminal Tribunal for Rwanda (ICTR)
International Criminal Tribunal for the former Yugoslavia (ICTY)
International Humanitarian Law (IHL)
International Human Rights Law (IHRL)
International Military Tribunal (IMT)
International Military Tribunal for the Far East (IMTFE)
Joint Criminal Enterprise (JCE)
Office of the Prosecutor (OTP)

Oxford University Press (OUP)
Revolutionary United Front (RUF)
Sierra Leone Government (SLG)
Special Tribunal for Lebanon (STL)
Special Court for Sierra Leone (SCSL)
Special Panels for Serious Crimes in East Timor (SPSC)
Trial Chamber (TC)
Truth and Reconciliation Commission (TRC)
United Nations (UN)
United Nations Security Council (UNSC)
United Nations General Assembly (UNGA)
United Nations Human Rights Committee (HRC)
United Nations Transitional Administration (UNTAET)

Table of Cases

EAC (Senegal)

The EAC *Hissène Habré* case, Trial Judgment (May 2016)

ECCC (Cambodia)

Prosecutor v Chea et al, Case No. ECCC 002/19-09-2007-ECCC-OCIJ, (15 September 2010)

Prosecutor v Nuon Chea and Khieu Samphan, Case No. ECCC 002/02, (2010)

Prosecutor v Kaing Guek Eav (Duch), Case No. ECCC 001/18-07-2007-ECCC/SC, Judgment (3 February 2012)

Prosecutor v Khieu Samphan and Nuon Chea, Case No. ECCC 002/02, (April 2014)

Prosecutor v Im Chaem, Case No. ECCC 003/004 004/01, (30 March 2015)

Prosecutor v Khieu Samphan and Nuon Chea, Case No. ECCC 002/02, (2016)

ICC (The Hague, Netherlands)

Prosecutor v Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Sentencing Judgment (10 July 2006)

Prosecutor v Ntaganda and Lubanga Dyilo, Case No. ICC-01/04-169, (13 July 2006)

Prosecutor v Thomas Lubanga Dyilo, Case No. ICC601/04601/06, Pre-Trial Chamber I, Decision on confirmation of Charges (29 January 2007)

Prosecutor v Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-803-tEN PTC, Decision on the Confirmation of Charges (29 January 2007)

Prosecutor v Katanga and Ngudjolo Chui, Case No. ICC-01/04-01/07-T-43, (1 July 2008)

Prosecutor v Omar Hassan Ahmad al Bashir, Case No. ICC-02/05-01/09-95 Pre-Trial Chamber I (27 August 2010)

Prosecutor v Laurent Gbagbo at the ICC, (Arrest warrant issued 23 November 2011) (unsealed 30 November 2011)

Prosecutor v Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 Judgment Pursuant to Article 74 of the Statute, Trial Judgment (14 March 2012)

Prosecutor v Thomas Lubanga Dyilo, Judgment Pursuant to Article 74 of the Statute, Case No. ICC-01/04-01/06 Judge Odio Benito, Separate and Dissenting Opinion, (14 March 2012)

Prosecutor v Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Public Prosecution's Sentence Request (14 May 2012)

Prosecutor v Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, (July 2012)

Prosecutor v Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, (10 July 2014)

Prosecutor v Germain Katanga Case No. ICC-01/04-01/07, (May 2014)

Prosecutor v Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, (13 March 2015)

Prosecutor v Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Appeals Judgments (December 2014)

Prosecutor v Dominic Ongwen, Case No. ICC-02/04-01/15, (2017)

Prosecutor v Bosco Ntaganda, Case No. ICC-01/04-02/06 OA5, (15 June 2017)

ICTR (Rwanda)

Prosecutor v Jean Paul Akayesu, Case No. ICTR-96-4-T, Trial Chamber 1 (2 September 1998)

Prosecutor v Jean - Paul Akayesu, Case No. ICTR-96-4-T, Trial Chamber 1 (2 September 1998)

Prosecutor v Jean - Paul Akayesu, Case No. ICTR-96-4-T, Sentence (2 Octobre 1998)

SCSL (Sierra Leone)

Prosecutor v Charles Ghankay Taylor (aka) Charles Ghankay Macarthur Dapkpama Taylor: indictments, Case No. SCSL -3-01-T, (7 March 2003)

Prosecutor v Monina Fofana, Case No. SCSL-2003-11-PT, (6 January 2004)

Prosecutor v Sam Hinga Norma, Case No. SCSL 2004-14-AR72 (E), (13 March 2004)

Prosecutor v Morris Kallon and Brima Buzzy Kamara, Case No. SCSL-2004-15-AR72 (E) and SCSL-2004-16-AR72(E), Appeals Chamber (13 March 2004)

Prosecutor v Sam Hinga Norman, Case No. SCSL-2004-14-AR72 (E), (31 May 2004)

Prosecutor v Charles Ghankay Taylor, Case No. SCSL 03-01-T, (29 May 2007)

Prosecutor v Brima, Kamara, Kanu, Case No. SCSL-2004-16-T, (20 June 2007)

Prosecutor v Brima, Case No. SCSL-04-16-T, Judgment (20 July 2007)
Prosecutor v Fofana and Kondewa, Case No. SCSL-04-14-T, (9 October 2007)
Prosecutor v Fofana and Kondewa, Case No. SCSL-04-14-A, Appeals Judgment (28 May 2008)
Prosecutor v Sesay, Kallon and Gbao, Case No. SCSL-04-15-A, (26 October 2009)
Prosecutor v Charles Taylor, Case No. SCSL-03-01-T, Trial Chamber 11 (26 April 2012)
Prosecutor v Charles Taylor, Case No. SCSL 03-01-T 30, (May 2012)
Prosecutor v Charles Taylor, Case No. SCSL-03-01-T, Sentencing Judgment (20 May 2012)
Prosecutor v Charles Taylor, Case No. SCSL-03-01-A, Appeals Chamber Judgment (26 September 2013)

STL (Lebanon)

Prosecutor v Ayyash, Badreddine, Oneissi and Sabra; Ayyash et al, Case No. STL-11-01, (17 January 2011)
Prosecutor v Salim Jamil Ayyash, Mustafa Amine, Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra, Case No. STL-II-OI/I/TC, (1 February 2012)

SPSC (East Timore)

Prosecutor v Francisco Soares, Case No. SPSC14/2001, (12 September 2002)
Prosecutor v Augusto dos Santos, Case No. SPSC 6/2001, (3 April 2002)
Prosecutor v Lolotoe, Case No. SPSC4C/200, (5 April 2003)
Prosecutor v Damaio da Costa Nunes, Case No. SPSC 1/2003, (10 December 2003)
Prosecutor v Lino do Carvalho, Case No. SPSC 10/2001, (17 February 2004)
Prosecutor v Aprecio Guterres aka Mau Buti, Case No. SPSC 18A/2003, (14 February 2005)

ICTY (Yugoslavia)

Prosecutor v Tadic case, ICTY, (1995)
Prosecutor v Drazen Erdemovic, Case No. ICTY IT-96-22-T, (1996)
Prosecutor v Erdemovic, Case No. ICTY-IT-96-22-T, Sentencing Judgment (29 November 1996)

Prosecutor v Furundzija, Case No. ICTY -IT-95-17/1-T, Judgment (10 December 1998)

Prosecutor v Tadic, Case No. ICTY - IT-94- A, Appeals Chamber (15 July 1999)

Prosecutor v Kupreskic, Case No. ICTY- IT-95-16-T, Judgment (14 January 2000)

Prosecutor v Blaskic, Case No. ICTY- IT-95-14-T, Judgment (3 March 2000)

Prosecutor v Aleksovisk, Case No. ICTY- IT-95-14/1-A, Appeal Judgment (24 March 2000)

Prosecutor v Delalic et al, Case No. ICTY - IT-96-21-A, Judgment, Appeals Chamber (20 February 2001)

Prosecutor v Kunarac, Kovac and Vukovic, Case No. ICTY - IT-96-23-T and IT-96-23/1-T, Trial Judgment (22 February 2001)

Prosecutor v Krstic, Case No. ICTY - IT-98-33-T (TC I), (2 August 2001)

Prosecutor v Nikolic, Case No. ICTY - IT-02-60/1-S, Sentencing Judgment (2 December 2003)

Prosecutor v Martic, Case No. ICTY-95-11-T, Trial Judgment (12 June 2007)

Chapter 1

Introduction: Section 1

1.1 Scope of the research thesis

Up to the time of completing this thesis, Sierra Leone is still recovering from the devastating experience of the 11 year rebel war,¹ the scourge of the Ebola epidemic,² as well as the more recent mudslide which claimed hundreds of lives in the country.³ Sierra Leone has endured heart-wrenching development experiences since independence in 1962 and when the country became a republic in 1972,⁴ and suffered brutal civil conflict in the 1990s, informed by decades of bad political governance and endemic poverty, and leading to the death of more than 70,000 civilians.⁵ In a highly significant legal response the then Sierra Leone Government (SLG) and the International Community (IC) created the Special Court for Sierra Leone (SCSL) hybrid model in 2002 (through treaty agreement)⁶ that held perpetrators of serious crimes to account and helped to bring about fair justice for both victims and defendants, uphold the rule of law and contribute to sustainable peace and reconciliation.⁷ Sierra Leone continues to struggle with poverty, inequality, lack of social provision and political tension; and its future is far from certain.

Against this backdrop, the research is divided into seven chapters: Chapter 1 is structured in this way: Section 1 outlines the scope of the research thesis and the purpose of the research, its contribution to scholarship and relationship with existing

¹ The *Prosecutor v Issa Sesay, Morris Kallon, Augustine Gbo*, Case No. SCSL-04-15-A, Appeals Chamber (2009) paras 1-7 <<http://rscsl.org/RUF.html>> (Latest access 8 September 2018)

² See 'Ebola Virus: New case emerges in Sierra Leone' BBC News (15 January 2016) paras 1-6 <<https://tinyurl.com/ybw8fkaj>>, also see 'Sierra Leone: Ebola Situation Report' (30 March 2016) UNICEF paras 1-4 <<https://tinyurl.com/ycehmffk>> (Latest access 4 October 2018)

³ See 'Sierra Leone mudslide: president calls for urgent help as search continues' The Guardian (16 Wednesday 2017) paras 1-27 <<https://tinyurl.com/y75f5lus>> (Latest access 4 October 2018)

⁴ See for detailed commentary, see section 2

⁵ Ibid

⁶ See Statute of the Special Court for Sierra Leone, Article 1 (2002) <<http://www.sc-sl.org>> (Latest access 4 October 2018), see Special Court for Sierra Leone: Residual Special Court for Sierra Leone para 1 <<http://rscsl.org/>> (Latest access 4 October 2018), see UNS C S/RES/1400 (2002) <www.un.org/Docs/sc/> (Latest access 4 October 2018). For a complete overview of the SCSL, its establishment, structure, powers and organisation; see, A Smith, Sierra Leone: 'The Intersection of Law, Policy, and Practice' in C P R Romano, A Nollkaemper 'and J K Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004) 125-139. Also see P Mochochoko and G Tortora, 'Management Committee for the Special Court for Sierra Leone' in C P R Romano, *et al Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004) 141-156

⁷ See the Special Court for Sierra Leone: 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) Special Court for Sierra Leone and No Peace Without Justice 1, 25-27

research, and methodological approach, section 2) explores the historical background of Sierra Leone, section 3) describes the establishment of the Special Court for Sierra Leone in 2002, section 4) evaluates and analyse the success of the SCSL, section 5) discuss and analyse its limitations and or criticisms, then draw an overall conclusion, and lastly, section 6) discuss the emergence of International Criminal Justice (ICJ).

Chapter 2 presents the theoretical perspective of the research methodology, based on theories of justice and an interpretive community lens. Chapter 3 examines the special characteristics of the SCSL; Chapter 4 assesses the hybrid nature of the SCSL Court and its effectiveness. Chapters 5 and 6 examine, assess and analyse the implications of the SCSL for International Criminal Law (ICL) through exploration of its legal jurisprudential context and its institutional effects. Chapters 5 and 6 are particularly significant because of the major findings and determinations made on new case law: the recruitment and enlistment of child soldiers as a war crime and forced marriage (other inhumane acts) as crimes against humanity and varied reasoning of the judges.

Chapter 6, Section 2 discusses and analyse the procedural, retributive, corrective justice, the interpretative community principle as well as the jurisprudence (case law) relating to Charles Taylor within the SCSL. The chapter argues that the Taylor case and the evidential procedure used could be a model for potential replication in persecuting world leaders who may be found culpable for the perpetration of war crimes and crimes against humanity.

The SCSL judgments, within the theories of justice, should be welcomed as contributing to a broader interpretation and legal definition on child soldiering and forced marriage. There is every prospect that the legal landscape on child soldier and forced marriage, including definitions and jurisprudence legacy, will continue to develop in the future.

The concluding Chapter 7 draws together all the key findings used throughout this research thesis, vis-a-vis its central arguments, analysis and its contribution to knowledge. Finally, the concluding chapter also draws together the investigative research objectives to a conclusion on the central premise in the title: what has been the legacy of the SCSL? It is with this view that this thesis will argue that the SCSL judgments could be classed from procedural, retributive, corrective, transitional justice

and interpretive community perspectives and make a contribution to knowledge in the field of International Criminal Law scholarship.

1.1.1 The aim of the research

The aim of my research is to investigate the extent to which the Special Court of Sierra Leone has been effective in achieving justice in Sierra Leone through its establishment and judicial practice, and its potential for replication.

1.1.2 The research objectives are

- 1) To determine the novel hybrid features of the SCSL and how it develops beyond earlier non-hybrid tribunals,
- 2) To evaluate the success of the SCSL namely:
 - That it meets the standards of justice
 - That it is accepted by the people of Sierra Leone
 - That it creates a legacy, including capacity for better administration of justice in the future
 - That it achieves these ends speedily: its work can be completed and create a sense of closure for the people
- 3) To evaluate the extent to which the jurisprudence of the SCSL can serve as a hybrid model for effective administration of criminal justice nationally through the preservation of its legacy,
- 4) To identify the potential for replication of the hybrid model,
- 5) To show the implications of the SCSL for the wider field of International Criminal Law.

1.1.3 Contribution to scholarship and relationship with existing research

Although there has been some research, there has been very little published to date on the impact and legacy of the SCSL model - particularly with regards to academic analysis within the International Criminal Law literature - and no evaluation of the success of the SCSL and the implications of its hybrid nature. The concept of a hybrid court is still relatively new, with little attention so far paid to theoretical or academic frameworks. This thesis therefore attempts to apply established justice theory⁸ and an

⁸ The definition and approach of this theory is discussed and analysed in detailed in the mythology chapter 2. See J Rawls, *A theory of Justice* (Revised ed OUP, 1999) 10-15, 52-55 and 102-105

interpretive community lens⁹ in order to explore and deepen understanding of this SCSL hybrid model.

The research that has previously taken place has consisted of comparisons of International Criminal Tribunals (ICT) and some hybrid courts. For example, scholars and practitioners like Schabas,¹⁰ Williams,¹¹ Cohen,¹² Costi¹³ and McAuliffe¹⁴ described and analysed the advent of hybrid courts as a preferable option compared to purely domestic or purely international jurisdictions.¹⁵ Hobbs,¹⁶ McAuliffe¹⁷ and Williams¹⁸ defined the nature of hybrid courts. Milla¹⁹ described their hybridity as a 'mutual creation of the political, social, and cultural world and the melding of the 'international' with the 'local.' As such, allows Western scholars and practitioners equally claim to understand and interpret a hybrid reality.'²⁰ Higonnet²¹ advanced hybrid courts as 'blending the international and the local, existing hybrids are products of judicial accountability-sharing between the states in which they function and international entities, particularly the U.N.,'²² He furthered that they can 'harness the credibility of international law and the legitimacy of international institutions, which can lend hybrid courts a degree of authority as a fair mechanism for holding perpetrators accountable.'²³

⁹ C Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (Ashgate, UK, 2010) 22. Also see I Johnson, 'Treaty Interpretation: The Authority of Interpretive Communities' (1990-1991) Volume 12 Michigan Journal of International Law 371, 372

¹⁰ W A Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (CUP, 2006) 3-9

¹¹ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected jurisdictional Issues* (Hart, 2012) 189-252

¹² D Cohen, 'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia: 'Lessons Learned' and Prospects for the Future' (2007) Volume 43 Stanford Journal of International Law 1, 2-13

¹³ A Costi, 'Hybrid Tribunals as a viable Transitional Justice Mechanism to combat impunity in Post-Conflict Situation' (2006) Volume 22 New Zealand Universities Law Review 213, 213-214

¹⁴ P McAuliffe, 'Hybrid Tribunals at Ten How International Criminal Justice's Golden Child became an Orphan' (2011) Volume 7 Journal of International Law and International Relation 1, 23 and 51

¹⁵ Ibid 1, 51

¹⁶ H Hobbs 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy' (2016) Volume 16 Chicago Journal of International Law 484, 488-490 and 504

¹⁷ P McAuliffe, 'Hybrid Tribunals at Ten How International Criminal Justice's Golden Child became an Orphan' (2011) Volume 7 Journal of International Law and International Relation 1, 23

¹⁸ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected jurisdictional Issues* (Hart, 2012) 187-201

¹⁹ G Milla, Disaggregating hybridity: Why hybrid institutions do not produce predictable experiences of peace (2014) Volume 51 Journal of Peace Research 501

²⁰ Ibid 501, 502

²¹ E R Higonnet, 'Restructuring Hybrid courts: Local Empowerment and National Criminal Justice Reform' (2006) Volume 23 Arizona Journal of International and Comparative Law 347, 349

²² Ibid 347, 352

²³ Ibid 347, 349

Smith,²⁴ Jalloh (ed),²⁵ Schabas,²⁶ Dougherty²⁷ and Williams²⁸ gave an account of the establishment, legal and jurisdictional bases, policy and practice of the hybrid courts (including SCSL) and tribunals, as well as their *modus operandi*. Practitioners and scholars such as Ditttrich,²⁹ Bangura,³⁰ Smith,³¹ Kerr and Lincoln (ed),³² and Tolbert³³ have produced articles and audio podcasts on the impact, legacy and success of the SCSL.³⁴ For an overview on the SCSL's hybridity, voluntary funding contributions, impact, aspects of its legacy, accountability mechanisms and Truth and Reconciliation Commission, read further on legal and non-legal literature developed by the following: Dickinson,³⁵ Evenson,³⁶ Cruvellie,³⁷ Kaymar,³⁸ Bosir,³⁹ Mochochoko and Tortora

²⁴ A A Smith, Sierra Leone: 'The Intersection of Law, Policy, and Practice' in C P R Romano, A Nollkaemper and J K Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004) 123-156

²⁵ C C Jalloh (ed.), *Consolidated Legal Texts of the Special Court for Sierra Leone*. (Brill Academic Publishers, Boston, MA, USA, 2007) 41-45

²⁶ W A Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (CUP, 2006) 34-120

²⁷ B K Dougherty, 'Right-sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone' (2004) Volume 80 *International Affairs* 311, 311-319

²⁸ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected jurisdictional Issues* (Hart, 2012) 58-100

²⁹ V E Ditttrich, 'Legacies in the Making: Assessing the Institutional Legacy Endeavour of the Special Court for Sierra Leone' in C C Jalloh (ed), *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 663-690

³⁰ M A Bangura, 'Delivering International Criminal Justice at the Special Court for Sierra Leone: Home Much Is Enough?' in C C Jalloh (ed), *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 707-722

³¹ A A Smith and S Meli, 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) the Special Court for Sierra Leone and No Peace Without Justice 1, 35-48

³² R Kerr and J Lincoln, 'The Special Court for Sierra Leone Outreach, Legacy and Impact, Final Report' (2008) War Crimes Research Group Department of War Studies 1, 26-29

³³ D Tolbert, 'Exploring the Legacy of the Special Court for Sierra Leone' (2013) *International Criminal Transitional Justice* paras 1-17 <<https://tinyurl.com/y9wk4quz>> (Latest access 3 October 2018)

³⁴ Ibid, also see F Donlon, 'The Transition of Responsibilities from the Special Court to the Residual Special Court for Sierra Leone: Challenges and Lessons Learned for Other International Tribunals' (2013) Volume 11 *Journal of International Criminal Justice* 1, 4, see Special Court for Sierra Leone: Residual Special Court for Sierra Leone <<https://tinyurl.com/y9kuuasc>> (Latest access 27 September 2018)

³⁵ L A Dickinson, 'The Relationship Between Hybrid Courts and the International Courts: The Case of Kosovo' (2003) Volume 37 *New England Law Review* 1059

³⁶ E M Evenson, 'Truth and Justice in Sierra Leone: Coordination between commission and Court' (2004) Volume 104 *Columbia Law Review* 730

³⁷ T Cruvellie, 'From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test' (2009) *International Centre for Transitional Justice and Sierra Leone Court Monitoring Programme* 1

³⁸ S N Kaymar, 'A Model War Crimes Court: Sierra Leone' (2003) Volume 10 *ILSA Journal of International and Comparative Law* 117

³⁹ L K Bosire, 'Overpromised, underdelivered: transitional justice in Sub-Saharan Africa' (2006) *Sure-International Journal Human Rights* 70

(ed)⁴⁰ Jalloh,⁴¹ Schabas⁴² Matiangai,⁴³ Oosterveld,⁴⁴ Johnson,⁴⁵ Evenson,⁴⁶ Horovitz,⁴⁷ Howarth,⁴⁸ Carter,⁴⁹ Schabas,⁵⁰ Jalloh,⁵¹ Williams⁵² and UN report on SCSL.⁵³

Additionally, according to Milla, ‘there has been an increasing interest in the concept of hybridity...,’⁵⁴ but ‘hybridity itself is under-theorized and variably applied by scholars.’⁵⁵ This thesis therefore builds on this earlier research and further contributes to analysis and knowledge by applying established justice theories and an interpretive community lens in order to evaluate and increase the understanding of this SCSL hybrid nature. The research will also take the start of the art further by focusing on an evaluation of the success of the SCSL legacy, and its unusual degree of hybridity, within the framework of the theories of justice and interpretive community perspectives. The theoretical approach which consists of primary (doctrinal or case law) and secondary sources is reflected in the research arguments. This therefore

⁴⁰ P Mochochoko and G Tortora (ed), ‘Management Committee for the Special Court for Sierra Leone’ in Cesare P R Romano, *et al Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004) 142

⁴¹ C C Jalloh, ‘Special Court for Sierra Leone: Achieving Justice?’ (2011) Volume 32 Michigan Journal of International Law 395, C C Jalloh, ‘Prosecuting those bearing greatest responsibility’: The lessons of the Special Court for Sierra Leone’ (2017) Volume 96 Marquette Law Review 863

⁴² W A Schabas, ‘Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone’ (2004) Volume 15 TRC and Special Court for Sierra Leone Criminal Law Forum 3, W A Schabas, ‘The Internationalised Court and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone’ in C P R Romano, A Nollkaemper and J K Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004)

⁴³ S Matiangai, ‘Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth and Reconciliation Commission for Liberia’ (2009) Volume 21 Florida Journal of International Law 210

⁴⁴ V Oosterveld, ‘The Special Court for Sierra Leone’s Consideration of Gender-based Violence: Contributing to Transitional Justice?’ (2009) Volume 10 Human Rights Review 73

Perriello Tom and Wierda Marieke, ‘The Special Court for Sierra Leone Under Scrutiny’ (2006) The International Centre for Transitional Justice 1

⁴⁵ L Johnson, ‘UN-Based International Criminal Tribunal’ (2008) Volume 36 Denv Journal of International Law and Policy 275

⁴⁶ E M Evenson, ‘Truth and Justice in Sierra Leone: Coordination between commission and Court’ (2004) Volume 104 Columbia Law Review 730

⁴⁷ S Horovitz, ‘How can International Criminal Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone’ (2013) Volume 46 Israel Law Review 339

⁴⁸ K Howarth, ‘The Special Court for Sierra Leone - Fair Trials and Justice for the Accused and Victims’ (2008) Volume 8 International Criminal Law Review 399

⁴⁹ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected jurisdictional Issues* (Hart, 2012)

⁵⁰ W A Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (CUP, 2006)

⁵¹ C C Jalloh (ed), *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007), C C Jalloh, ‘The Contribution of the Special Court for Sierra Leone to the

Development of International Law’ (2017) Volume 15 African Journal of International and Comparative Law 17

⁵² L E Carter, ‘International Judicial Trials Commissions, and Gacaca: Developing a Framework for Transitional Justice from the Experiences in Sierra Leone and Rwanda’ in C C Jalloh (ed), *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 724-730

⁵³ See Office of the United Nations High Commissioner for Human Rights, ‘Rule-of-Law Tools for Post-Conflict States Maximizing the legacy of hybrid courts’ (2008) United Nations 1, 4, 15-15 and 37-39

⁵⁴ G Milla, Disaggregating hybridity: Why hybrid institutions do not produce predictable experiences of peace (2014) Volume 51 Journal of Peace Research 501, 503

⁵⁵ Ibid

provides a new insight into the impact, success and legacy of the SCSL, representing original independent research which will make a contribution to knowledge and to the field of International Criminal Law scholarship.

1.1.4 Research methodology

The research methodology which is mixed includes primary (doctrinal or case law) and secondary sources, and comparative analysis of various tribunals and criminal courts to prosecute the same kinds of crimes that involve mass violations of human rights. My research methodology has also incorporated aspects of socio-legal analysis (an approach that explores law in the context of broader social and political theories). In particular, I have used theories of justice such as: 1) procedural justice; 2) corrective justice; 3) retributive justice; and 4) transitional justice (with case studies as examples) and drawn conclusions. I have also adopted the approach of interpretive community in order to determine whether justice has been done, and to answer the question: How effective was the hybrid court in delivering justice? This tool has been used in the past by both Henderson and Johnson.⁵⁶ The aim is not to explore the strength of this tool, but rather to use it in order to help provide a useful analytical framework in relation to the SCSL establishment and judicial operation in Sierra Leone.

The interpretive community in this context will represent two community sets: primary (the 15 members of the UNSC) and secondary (civil society and NGOs, courts and judges). It is argued here that the theories of justice and interpretive community methodology discussed in detailed in Chapter 2 can help us better understand the contribution of the SCSL's model and its success, legacy, and the extent to which its judgments provided a helpful expansion of International Criminal Law's understanding of war crimes and crimes against humanity. The theories of justice and interpretive community methodology help to highlight the local perceptions of international criminal justice delivery. Additionally, the theories of justice significantly help assess and understand the success and unique nature of the SCSL model through the analysis of its case laws, the complex interplay of political influences, the global human rights movement and the SCSL's own internal operations. This is clearly examined and evidenced in detailed in Chapter 2, and the rest of the thesis chapters.

⁵⁶ C Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (Ashgate, UK, 2010) 22. Also see I Johnson, 'Treaty Interpretation: The Authority of Interpretive Communities' (1990-1991) Volume 12 Michigan Journal of International Law 371, 372

To conclude and as mentioned above, this research has applied aspects of primary (doctrinal or case law), secondary sources and socio-legal analysis, in particular theories of justice and the lens of interpretive community. Through the combined methodological approach and background research and data gathering already carried out, the research has developed an analytical framework and set of criteria through which to assess the success of the SCSL in serving various aspects of justice (that is: answers to my research questions); looked at its unique hybridity, legacy, wider implications, and considered the extent to which it is replicable in other contexts. The research had made a robust and consistent application of the analytical framework in all chapters, drawing on the theories of justice and interpretive community lens to evaluate all materials and data and its contribution to knowledge in the field of ICL.

Section 2

1.2 Historical background of Sierra Leone

The purpose of this section is to briefly outline the historical background of Sierra Leone. It includes a summary of relevant points regarding Sierra Leone's history and the origins of the 11 year civil war. The history of Sierra Leone is well documented.⁵⁷ This section will therefore give only a top-line overview, on the pre and post-independence periods.

1.2.1 Pre-independence period

Sierra Leone is located in West Africa and gained its independence from Britain on 27 April 1961.⁵⁸ The country gained its status as a republic on 19 April 1971.⁵⁹ Sierra Leone is a land of marked contradictions. Although the country has experienced horrific atrocities as a result of civil war, it remains remarkably religiously tolerant, with Muslims and Christians co-existing peacefully. The way in which Sierra Leoneans of varied faiths respectfully and mutually accommodate and accept one another acts as a 'model for the rest of the world at a time when in some places rigid religious identities are dividing people and creating conflict.'⁶⁰ The country is blessed with rich natural resources, but these – particularly in the form of 'blood diamonds' – have not led to widespread benefits for the people of the country, but rather to civil war, inequality and poverty. Children have not only been the victims of conflict, but have been coerced into the role of perpetrators.⁶¹

The country is composed of five regional areas: the Western Area, Northern, North West, Southern and the Eastern Provinces which are also divided into districts and chiefdoms.⁶² Sierra Leone was originally discovered as the 'Province of Freedom', in 1787 by British Philanthropists. ⁶³ The current capital city was later named Freetown, and became a British crown Colony in 1808.⁶⁴ It was used for resettling freed slaves

⁵⁷ See 'Report of the Sierra Leone Truth and Reconciliation Commission' (2004) Volume 3A Sierra Leone Web 1, 45

⁵⁸ The *Prosecutor v Issa Sesay, Morris Kallon, Augustine Gbo*, Case No. SCSL-04-15-A, Appeals Chamber (2009) para 7

⁵⁹ See 'Report of the Sierra Leone Truth and Reconciliation Commission (2004)' Volume 3A Sierra Leone Web 1, 3

⁶⁰ Ibid

⁶¹ H B Jørgensen, 'Child Soldiers and the Parameters of International Criminal Law (2012) Chinese Journal of International Law 657, 688. Also see the *Prosecutor v Issa Sesay, Morris Kallon, Augustine Gbo*, Case No. SCSL-04-15-A, Appeals Chamber (2009) para 75

⁶² S Levert, *Cultures of the world: Sierra Leone* (Marshall Cavendish Benchmark, 2006) 8. Also see 'Parliament of Sierra Leone' <<http://www.parliament.gov.sl/>> (Latest access 4 October 2018)

⁶³ See 'Report of the Sierra Leone Truth and Reconciliation Commission' (2004)' Volume 3A Sierra Leone Web 1, 6

⁶⁴ Ibid

from slaves from the Americas.⁶⁵ It was estimated that by 1792, 1,200 freed slaves from Nova Scotia had joined the original settlers, the Maroons.⁶⁶ In 1800, another set of slaves, who had waged a rebellion in Jamaica, also departed for Freetown.⁶⁷ In 1806, philanthropists including Thomas Clarkson, William Wilberforce, Granville Sharpe and Lord Mansfield established an administration that played a very significant role in the abolition of the transatlantic slave trade.⁶⁸ In addition, the Church Missionary Society (CMS) built Fourah Bay College (FBC)⁶⁹ through their philanthropic educational project. The British created a naval port in Freetown for surveillance against illegal slave ships. A penalty of £100 was then imposed for every slave discovered on a British ship.⁷⁰

Sierra Leone officially became a crown colony with the land possessions of the Sierra Leone Company (formerly known as St George's Bay Company) transferred to the crown. In 1833, British Parliament passed the Emancipation Act and slavery was finally abolished. By 1855, over 50,000 freed slaves had settled in Freetown. Known as the Krios, the repatriated settlers of Freetown live today in a multi-ethnic country. Though English is the official language, Krio is widely spoken throughout the country, allowing different ethnic groups a common language.⁷¹

In terms of justice delivery, Sierra Leone has a dual justice system consisting of Customary Law Courts and formal courts.⁷² Customary Law Courts (CLC) are based on traditional customs, while formal courts are based on statutory and English common law.⁷³ The formal judicial system of Sierra Leone is composed of the Supreme Court, Court of Appeals, High Court of Justice and magistrate courts. The judges are appointed by the President and approved by Parliament. The local chieftaincy courts administer customary law with lay judges; appeals from these lower

⁶⁵ S Levert, *Cultures of the world: Sierra Leone* (Marshall Cavendish Benchmark, 2006) 8. Also see 'Parliament of Sierra Leone' <<http://www.parliament.gov.sl/>> (Latest access 4 October 2018)

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ See 'Fourah Bay College 1827' <<https://tinyurl.com/yaywp5yh>> (Latest access 4 June 2018). Also see Anthony Karim Kamara, *A concise history of Fourah Bay College 1827-2003* (Published in Canada, 2017) <<http://standardtimespress.org/?p=95>> (Latest access 4 October 2018)

⁷⁰ For detailed commentary on slave trade, see Jerry Teale, *The Atlantic Slave Trade 1770- 1807* (Hodder Education, 2013) 1-112

⁷¹ See 'Report of the Sierra Leone Truth and Reconciliation Commission' (2004)' Volume 3A Sierra Leone Web 1, 3

⁷² S Levert, *Cultures of the world: Sierra Leone* (Marshall Cavendish Benchmark, 2006) 39

⁷³ See the Special Court for Sierra Leone: 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) Special Court for Sierra Leone and No Peace Without Justice 1, 24

courts are heard by the superior courts.⁷⁴ ‘Local courts have jurisdiction over all cases of a customary nature and over some minor criminal matters. All those residents in a local area are subject to its criminal jurisdiction.’⁷⁵ Notwithstanding, judicial presence outside the capital district still remain limited. There is no law published in these courts, so court chairmen base all their decisions and judgments on customs and cultural practice.⁷⁶ This has contributed to delays in the justice system, ‘although justices of the peace or customary law partially fill the gap. District courts and customary law bodies controlled by local chiefs are described as remaining corrupt and dysfunctional, effectively denying most citizens access to justice.’⁷⁷

1.2.2 Post-independence period

Since Sierra Leone gained independence, the country has experienced many challenges in the social, economic and political spheres. In particular, the civil war which raged for 11 years, from 1991 to 2002, was characterised by vigorous violence against civilians, recruitment of child soldiers and forced marriages, corruption, and bloody struggle for control of diamond mines.⁷⁸ During the war, the civilian population was targeted by all the fighting factions. Civilians were captured, abducted, and held as slaves used for forced labour.⁷⁹ To this day, Sierra Leone is still addressing the legacies of this conflict, which claimed tens of thousands of civilian lives, and led to many more civilians being raped, mutilated or tortured.

The civil war began in 1991, after a rebel group, the Revolutionary United Front (RUF) led by Corporal Foday Sankoh’s forces,⁸⁰ invaded in an attempt to overthrow the country’s Joseph Momoh Government. The civil conflict was characterised by acts of extreme brutality and resulted in over 50,000 deaths and the displacement of over 2 million people.⁸¹ The RUF wilfully ‘targeted the civilian population.’⁸² It was

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ S Levert, *Cultures of the world: Sierra Leone* (Marshall Cavendish Benchmark, 2006) 39

⁷⁷ See the Special Court for Sierra Leone: ‘Impact and Legacy Survey for the Special Court for Sierra Leone’ (2012) Special Court for Sierra Leone and No Peace Without Justice 1, 24

⁷⁸ *The Prosecutor v Issa Sesay, Morris Kallon, Augustine Gbo*, Case No. SCSL-04-15-A, Appeals Chamber (2009) para 75

⁷⁹ Ibid para 652

⁸⁰ See ‘Report of the Sierra Leone Truth and Reconciliation Commission’ (2004) Volume 3A Sierra Leone Web 1, 97-98. See J F Kamara, ‘Preserving the Legacy of the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone’ (2009) 22 *Leiden Journal of International Law* 761, 762

⁸¹ *The Prosecutor v Issa Sesay, Morris Kallon, Augustine Gbo*, Case No. SCSL-04-15-A, Appeals Chamber (2009) paras 75 -76

⁸² D Shrager, ‘The Second Generation UN- Based Tribunals: A Diversity of Mixed Jurisdiction’ in C P R Romano, A Nollkaemper and J K Kleffner, *Internationalized Criminal Courts* (OUP 2004) 127

estimated that about 100 guerrilla fighters invaded Sierra Leone from Liberia at Bomaru, Kailahun District. The rebels gained numbers and progressively took over the whole country. It was alleged that the majority (if not all) were National Patriotic Front of Liberia (NPFL) fighters controlled by former President of Liberia, Charles Taylor, who assisted Corporal Foday Sankoh's forces.⁸³ During the war, the civilian population was targeted by all the fighting factions. Tens of thousands of civilians were displaced, raped, mutilated, tortured, or murdered.⁸⁴ The widespread and systematic torture and amputation of legs, hands, and arms by rebel forces in the conflict attracted worldwide attention and empathy which led to the deployment of thousands of peacekeepers, who helped to enforce law and order, and led to the subsequent (Lomé Peace Agreement in 1999),⁸⁵ and later disarmament and demobilisation of combatants.⁸⁶

In addition, the smuggling of 'blood diamonds', and the recruitment and enlistment of child soldiers in the civil war also gained world attention, which brought about global condemnation and 'demands for some process of judicial accountability for those responsible.'⁸⁷ The creation and deployment of the largest peacekeeping force in the history of the United Nations (UN) further supported the commitment by the international community to secure sustainable peace and justice in Sierra Leone.⁸⁸

Arguably, the calls for accountability for the crimes committed during the conflict throughout the decade of brutal and barbaric civil war were amongst the factors that led to the establishment of the Special Court for Sierra Leone model. The Special Court for Sierra Leone⁸ was established by the government of Sierra Leone and the United Nations in 2002, (a hybrid structure) through Security Council Resolution 1315.⁹ The SCSL was a treaty-based court. Its mandate as to prosecute and punish those who 'bear the greatest responsibility' for the murders, rapes, mutilations, looting

⁸³ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected jurisdictional Issues* (Hart, 2012) 65 – 66. See Report of the Sierra Leone Truth and Reconciliation Commission' (2004) Volume 3A Sierra Leone Web 1, 97-98

⁸⁴ See 'The Sierra Leone Truth and Reconciliation Commission (2004) Volume 3A Sierra Leone Web 1, 97-98

⁸⁵ See The Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (25 May 1999 to 7 July 1999) <<https://tinyurl.com/y8tjos34>> (Latest access 4 October 2018)

⁸⁶ See 'Report of the Sierra Leone Truth and Reconciliation Commission' (2004) Volume 3A Sierra Leone Web 1, 97-98

⁸⁷ D Cohen, 'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia: 'Lessons Learned' and Prospects for the Future' (2007) Volume 43 Stanford Journal of International Law 1, 2-3. Also see J F Kamara, 'Preserving the Legacy of the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone' (2009) Volume 22 Leiden Journal of International Law 761, 762

⁸⁸ S Levert, *Cultures of the world: Sierra Leone (Marshall)* (Cavendish Benchmark, 2006) 30-31

and other crimes against humanity that took place since 30 November 1996.⁸⁹ Although the competence and independence of the SCSL judiciary and legal system came under scrutiny and attracted some criticism, in my view and within the theory of justice methodology used in this research thesis (discussed in detailed in Chapter 2), the SCSL model and judgments were not only unique but can be judged to have achieved some measure of success. For example, it is the first hybrid court that prosecuted and convicted perpetrators of war crimes of child soldier recruitment and enlistment and forced marriage under (Other Inhumane Acts) as crimes against humanity.⁹⁰ This has had significant impact in the field of International Criminal Law and the International Criminal Court (ICC) respectively.

Conclusion

In conclusion, the SCSL model is also the first to close and transform to a Residual Special Court for Sierra Leone (RSCSL) after the completion of the Charles Taylor appeal case in September 2013 in order to allow continuity.⁹¹ Within the context of the theories of justice, the SCSL judgments were not only successful in serving justice in Sierra Leone but also illustrated the significant developments made in case law for the prosecution and conviction of perpetrators (individual criminal responsibility) of both child soldier recruitment and forced marriage in International Criminal Law.⁹²

Section 3

1.3 The Special Court for Sierra Leone (2002)

Unlike the ICTY and ICTR, which were created under Chapter VII authority, the Statute of the Special Court for Sierra Leone⁹³ was created in pursuit of a cooperative bilateral treaty agreement between the Sierra Leone Government (SLG) and the United Nations, signed on 16 January 2002,⁹⁴ as envisaged by Resolution 1315 (2000) of 14 August (2000).⁹⁵ In accordance with Article 1 of the Statute of the SCSL, the

⁸⁹ *The Prosecutor v Issa Sesay, Morris Kallon, Augustine Gbo*, Case No. SCSL-04-15-A, Appeals Chamber 2009. Paras 1 and 2

⁹⁰ *Ibid* Also see *The Prosecutor v Issa Sesay, Morris Kallon, Augustine Gbo*, Case No. SCSL-04-15-A, Appeals Chamber 2009 paras 1-7

⁹¹ *Ibid* See the Special Court for Sierra Leone: Residual Special Court for Sierra Leone <<https://tinyurl.com/ybsm23uj>> (Latest access 30 June 2018)

⁹² *The Prosecutor v Issa Sesay, Morris Kallon, Augustine Gbo*, Case No. SCSL-04-15-A, Appeals Chamber 2009 paras 1-7

⁹³ Statute of the Special Court for Sierra Leone, Article 1 (2002) <<http://www.sc-sl.org>> (Latest access 2 October 2018)

⁹⁴ *Ibid*

⁹⁵ UNSC S/RES/1315 (2000) adopted (14 August 2000) <www.un.org/Docs/sc/> (Latest access 30 June 2018), also see UNSC S/RES/1400 (2002) adopted by Security Council at its 4500th meeting (28 March 2002). The

Court has powers to ‘prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and some criminal offences under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.’⁹⁶ The SCSL Statute also indicates that sentences are to be hinged on the gravity of the offense, the individual circumstances of the guilty party, and the sentencing practices of Sierra Leonean law. This ultimately helped the UN to avoid direct responsibility for the Court as it does not also necessarily need any mandatory cooperation from UN member states because it was not established under Chapter VII authority.⁹⁷ The SCSL Statute contained four provisions relating to its subject-matter temporal jurisdiction *ratione materiae*, namely: Article 2- Crimes against humanity, Article 3- Violations of Article 3 which is common to Geneva Conventions and Additional Protocol II, Article 4- Other serious violations of international humanitarian law, and Article 5- Crimes under Sierra Leonean law.⁹⁸

Furthermore, despite the fact that the Sierra Leonean civil war commenced in March 1991, the Court’s subject-matter temporal jurisdiction *ratione temporis* only started on 30 March 1996. Although objections and representations were made by the Sierra Leone government in order to extend the jurisdiction to the time when the conflict began in Sierra Leone, these objections were completely overruled by the international community and the Court was authorised to prosecute the crimes that occurred within the territory of Sierra Leone,⁹⁹ (this is discussed in detailed in the next section). As a result of the SCSL’s limited subject-matter, temporal and territorial jurisdiction, it is clear that the UN’s aim was to create a ‘hybrid’ court with limited, narrower and more focused powers and mandate compared to the International Criminal Tribunals for the former Yugoslavia and Rwanda which had been created by the UN under Chapter VII enforcement powers.¹⁰⁰ The Court consisted of two Trial Chambers plus an Appeals

Statute of the SCSL was annexed to the subsequent Secretary- General’s Report on the Establishment of a SCSL. See, UN Doc. S/2000/915 (4 October 2000) <www.un.org/Docs/sc/> (Latest access 2 October 2018)

⁹⁶ Statute of the Special Court for Sierra Leone, Article 1 (2002) <<http://www.sc-sl.org>> (Latest access 2 October 2018)

⁹⁷ P Knowles, ‘The Power to Prosecute: The Special Court for Sierra Leone from a Defence Perspective’ (2006) 6 International Criminal Law Review 387, 391

⁹⁸ Statute of the Special Court for Sierra Leone, Articles 2, 3, 4 and 5 (2002). See R Mutyaba, ‘An Analysis of the Cooperation Regime of the International Criminal Court and its Effectiveness in the Court’s Objective in Securing Suspects in its Ongoing Investigations and Prosecutions’ (2012) Volume 12 International Criminal Law Review 937, 938

⁹⁹ C C Jalloh, ‘Prosecuting those bearing greatest responsibility’: The lessons of the Special Court for Sierra Leone’ (2013) Marquette Law Review 864, 865. Also see P Knowles, ‘The Power to Prosecute: The Special Court for Sierra Leone from a Defence Perspective’ (2006) Volume 6 International Criminal Law Review 387, 390

¹⁰⁰ Ibid 864, 865

Chamber and each Trial Chamber consisted of three judges, two of whom were appointed by the international community through the Secretary General of the United Nations and the balance by the Sierra Leonean government. The Appeals Chambers consisted of five judges, two of whom were appointed by the Sierra Leonean government, three by the international community through the Secretary General of the United Nations.¹⁰¹

The SCSL is therefore classed as a 'hybrid' court because of the composition of both the international and domestic judicial system as already mentioned above. The Court also not only consisted of international judges and laws, but was also administered by a prosecutorial team composed of both international and domestic lawyers.¹⁰²

However, as the model of the SCSL was a complete departure from the ICTY and ICTR tribunals, it is significant for us to put hybrid tribunals into context by taking into account the institutional scale of the ICTY and the ICTR. This is due to the fact that the scale, time limit, and expenditure of the judicial institution was among the major reasons which motivated the international community to establish hybrid tribunals with a reduced budget and less costly in operation, as is evidenced with the SCSL.¹⁰³ Considering the fact that the ICTY and ICTR were long in timeframe and costly in expenditure, the SCSL was less costly in relation to budget operational costs and staffing. Additionally, the SCSL is among the first hybrid court that was established since the inception of the International Criminal Court, and the legal and policy framework is incorporated in the definition of international crimes including war crimes and crimes against humanity.¹⁰⁴ The SCSL was not funded by the UN, but it enjoyed its support and was the recipient of major financial donors, namely: the United Kingdom, United States, Canada, the Netherlands and Nigeria, amongst others.¹⁰⁵

¹⁰¹ J F Kamara, 'Preserving the Legacy of the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone' (2009) Volume 22 Leiden Journal of International Law 761, 762

¹⁰² The hybridity of the SCSL is discussed in detailed in both section 5 and chapter 4. See L A Barria and S D Roper, 'Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia' (2005) Human Rights Review 5, 6-8

¹⁰³ D Cohen, 'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia: 'Lessons Learned' and Prospects for the Future' (2007) Volume 43 Stanford Journal of International Law 1, 2-3. See L A Barria and S D Roper, 'Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia' (2005) Human Rights Review 5

¹⁰⁴ L A Barria and S D Roper, 'Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia' (2005) Human Rights Review 5, 6-8

¹⁰⁵ P Mochochoko and G Tortora, 'Management Committee for the Special Court for Sierra Leone' in Cesare P R Romano (ed), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (OUP, 2004) 142

There are many positive developmental links to the SCSL model, one of which could be described as not only a landmark in world history but a new innovation for both domestic law and international criminal law. Another is the SCSL's hybrid elements and its location in Sierra Leone itself which did allow a better 'interaction between the process of asserting justice and the Sierra Leonean people, the people for whom the process was instituted.'¹⁰⁶

Another function and success of the SCSL was its legitimacy and mandate to extradite leaders who were accused of war crimes and crimes against humanity and prosecute them in order to act as a deterrent. The SCSL also directly assisted Sierra Leoneans to be gainfully employed in all aspects of the Court with professional roles such as investigators and administrators.¹⁰⁷

More importantly, the establishment of the SCSL contributed significantly to 'Sierra Leone's jurisprudence through the interpretation and application of those provisions'¹⁰⁸, which provided very useful precedents, lessons for Sierra Leonean courts their practitioners and other tribunals and hybrid courts. The SCSL not only helped to render justice to victims of the war, but also to maintain political stability both regionally and internationally as the development of jurisprudence (Customary international law) formed a fundamental part of its legacy.¹⁰⁹ As such, the SCSL has played a very significant part in regard to the 'identification of customary international law, and the advancement of international rule of law.'¹¹⁰ The other advantage of the SCSL's creation is the involvement and full participation of the Sierra Leonean government which helped to incorporate national judges, prosecutors and some aspects of national laws in the form of criminal code.¹¹¹ For example, 'the provision of highly qualified legal officers and support staff in both the Trial and Appeals Chambers have 'resulted in a generally far higher professional and jurisprudential standard in written decisions.'¹¹² This has inevitably contributed largely to the capacity building of the judicial and the legal system as well as incorporating

¹⁰⁶ Ibid

¹⁰⁷ A Smith, 'Sierra Leone: The Intersection of Law, Policy, Practice' in C P R Romano, A Nollkaemper and J K Kleffner (ed), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (OUP, 2004) 127

¹⁰⁸ Ibid

¹⁰⁹ Ibid 128

¹¹⁰ A Smith, 'Sierra Leone: The Intersection of Law, Policy, and Practice' in C P R Romano, A Nollkaemper and J K Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004) 125

¹¹¹ L A Barria and Steven D. Roper, 'Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia' (2005) *Human Rights Review* 5, 14

¹¹² Ibid

international laws, norms and personnel.¹¹³ The SCSL was also unique in the sense that it had a concurrent jurisdiction with primacy over the courts of Sierra Leone, meaning that the domestic courts were required to hand over cases to it as and when it deemed necessary. Nonetheless, an exception was made where ‘crimes are alleged to have been committed by peacekeepers and related personnel, in which case the State sending the personnel will have primary jurisdiction’¹¹⁴

However, despite the success of the SCSL, it also experienced some constraints and criticisms in its attempt to incorporate different types of law, different levels of expertise and different models of management and funding, namely: a) the legality of the agreement, b) its mandate, c) the extension of the temporal jurisdiction, d) the absence of Chapter VII powers in its creation, and e) its physical structure.¹¹⁵

In conclusion and in respect of the above assertions and criticisms levied against the SCSL above, this research can categorically argue that the SCSL was the ‘first international court to consider a number of so called ‘new’ international crimes;’¹¹⁶ and has also illustrated in its trial cases that the ‘rules of international humanitarian law and the rules on crimes against humanity entailing individual criminal responsibility are able to evolve and adapt’.¹¹⁷ In addition, the trials in the SCSL hybrid or mixed tribunal, which may be similar to those in international and domestic judicial institutions, are fundamentally innovative instruments that can redress, halt and resolve almost all the relevant needs of countries coming out of post-conflict situations. The SCSL has therefore offered the best paradigm in relation to international and national justice and peace building mechanisms. It would have been practically impossible for the domestic judicial legal system, destabilised both humanly and physically during the civil war, to have tried or prosecuted the three powerful warring factions, their leaders and accompanying ‘war lords’, (RUF, NPFL and CDF) alike, because it lacked the expertise, knowledge, personnel, technology and resources to execute this.

¹¹³ A Smith, ‘The Expectations and Role of International and National Civil Society and the SCSL’ in Charles Jalloh (eds), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013) 125

¹¹⁴ C L Sriram, ‘Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone’ (2006) Volume 29 Fordham International Law Journal 472, 474

¹¹⁵ See section 5 of this chapter and chapter 4 for detailed critique on the SCSL

¹¹⁶ S Wharton, ‘The Evolution of International Criminal Law: Prosecuting ‘New’ Crimes before the Special Court for Sierra Leone’ (2011) Volume 11 International Criminal Law Review 217, 225-227

¹¹⁷ Ibid 217, 239

Conclusion

Finally, and within justice theories and interpretively community frameworks, the lessons learned from the experiences of the SCSL trials and judgments may prove to be very useful and of vital significance for any future prosecutions in other tribunals and hybrid courts; and at the same time affirm the doctrine of jurisprudential development in International Criminal Law. Judging from the above premise and the accompanying relevant successes already enjoyed by the SCSL trials, this research can argue that the SCSL hybrid court is not only classified as a landmark and lessons learnt in the history of International Criminal Law and the ICC, but should be considered a model to emulate.

Section 4

1.4 Evaluation and analysis of the success and legacy of the SCSL

This section evaluates and analyse the success and legacy of the SCSL, as well as its limitations and or criticisms. Any post-conflict building states would like to turn over to a new page and look to the future, and not the past. Sierra Leone therefore was no exception. In order to evaluate and analyse SCSL's success, effectiveness, impact, implications, limitations and or criticisms, the research will apply a measure of criteria for this purpose.

For the purpose of this research and in order to evaluate the effectiveness, impact and implications of the SCSL, the research will use the following to gauge and analyse the success and legacy of the SCSL:

That it meets the standards of justice (the 'justice' criterion): Within the framework of the theories of justice (procedural, retributive, corrective and transitional justice),¹¹⁸ this thesis would suggest that, although it has not been an easy process, the standard of justice has been effective. Viewed through a justice theory lens, each country navigates its own way, crafting its unique response to perpetrators of international crimes. Clearly, this was evident in the Sierra Leone government when it created the Special Court for Sierra Leone in 2002.¹¹⁹ The mandate of the SCSL was to prosecute those 'bearing the greatest responsibility' for human rights violations

¹¹⁸ For detailed discussion and analysis on the theories of justice, please see chapter 2

¹¹⁹ See Statute of the Special Court for Sierra Leone, Article 1 (2002) < <http://www.sc-sl.org> > Latest access 2 October 2018), See Special Court for Sierra Leone: Residual Special Court for Sierra Leone para 1 <<http://rscsl.org>> (Latest access 2 October 2018)

in International Humanitarian Law (IHL) and for unleashing the 11 year civil war that claimed the lives of many Sierra Leoneans and destroyed valuable properties in the country.¹²⁰

This thesis shows that the SCSL judgments met the standards of justice required for both victims and defendants.¹²¹ The SCSL had made significant standard of justice because its success had impacted, reflected and has had positive implications on its legacy.¹²² In summary, these success legacies include: completing investigations; indicting suspects from all warring factions; charging all indictees with child recruitment and most indictees with gender based crimes, in addition to other substantive crimes; establishing a defence office to represent issues of common interest relating to defence and to ensure protection of the rights of the accused; issuing precedent-setting decisions on international jurisprudence.¹²³

This thesis will show that the AFRC, RUF, CDF, and *Taylor* judgments¹²⁴ were based on the norm that prosecution, convictions and sentencing are necessary and beneficial elements in response to wrongdoing (that is; retributive justice). The judgments were highly significant in demonstrating how justice could help prevent future atrocities and heal a wounded country. The sentences handed down by the SCSL were mainly considered to be fair by majority of the Sierra Leonean people and even beyond.¹²⁵ The SCSL judgments also illustrated that it is feasible to convict perpetrators of grave atrocities.¹²⁶

Overall and in terms of success, legacy, and impact, the SCSL stands as one of the most important hybrid models, delivering justice to those whom it was created to serve, as well as reshaping aspects of international justice and generating there are many valuable lessons with direct significance for future hybrid courts.¹²⁷ Within the

¹²⁰ See 'Report of the Sierra Leone Truth and Reconciliation Commission' (2004) Volume 3A Sierra Leone Web 1, 98-100

¹²¹ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone paras 14-15 <<http://rscsl.org/>> (Latest access 2 October 2018)

¹²² See the Special Court for Sierra Leone: 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) Special Court for Sierra Leone and No Peace Without Justice 1, 35-40

¹²³ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone paras 14-15 <<http://rscsl.org/>> (Latest access 2 October 2018)

¹²⁴ See the Special Court for Sierra Leone: 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) Special Court for Sierra Leone and No Peace Without Justice 1, 9-10

¹²⁵ See next section on the discourse relating to acceptability of the SCSL by the people of Sierra Leone

¹²⁶ See the Special Court for Sierra Leone: 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) Special Court for Sierra Leone and No Peace Without Justice 1, 9-10

¹²⁷ C C Jalloh, *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 772

context of procedural and retributive justice, this research thesis can argue that the key legal developments that occurred at the SCSL model were mostly focused on issues of child soldiering and forced marriage. The SCSL judgments and jurisprudence also proved that individuals responsible for serious international crimes perpetrated during the civil war will be prosecuted and sentenced.

This thesis can therefore conclude that the SCSL prosecutions and judgments which created new case law met standards of justice by prosecuting and convicting those responsible for grave international crimes, all of which were significant for the people of Sierra Leone and the international community. Lastly, the SCSL judgments, which reflect procedural, retributive and corrective as well as transitional justice theories, had scored a number of firsts,¹²⁸ and also achieved a measure of potential success in contributing to international criminal justice standards.¹²⁹ For example, this thesis will prove that the principal legacy of the SCSL model, its fundamental contribution to procedural, retributive, corrective, transitional justice and interpretive community perspectives in Sierra Leone and its primary success, is that it rendered justice, peace and reconciliation,¹³⁰ and has fulfilled its mandate in prosecuting those individuals responsible for the perpetration of core international crimes of both child soldiering and forced marriage. And based on research others have carried out, this will create an impact on International Criminal Law and the International Criminal Court in future.¹³¹

That it is accepted by the people of SL: The SCSL model was unique among international criminal tribunals and other hybrid courts because it was located in the capital city, Freetown, making it the first hybrid court to be situated in the country where the crimes were committed. This is in contrast to the ICTY and ICTR international tribunals which were based in Arusha, Tanzania and The Hague,

¹²⁸ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone paras 2, 3 and 4 <<http://rscsl.org/>> (Latest access 2 October 2018)

¹²⁹ A A Smith, Sierra Leone: 'The Intersection of Law, Policy, and Practice' in C P R Romano, A Nollkaemper and J K Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004) 123-156, see D Tolbert, 'Exploring the Legacy of the Special Court for Sierra Leone (2013) International Criminal Transitional Justice paras 1-15 <<https://tinyurl.com/y9wk4quz>> (Latest access 3 October 2018)

¹³⁰ See the Special Court for Sierra Leone: 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) Special Court for Sierra Leone and No Peace Without Justice 1, 25-27

¹³¹ C C Jalloh, *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 772

Netherlands as well as the STL tribunal¹³² which was also located near The Hague. One of the great benefits of having the SCSL located in its sovereign territory was that information about the proceedings was made known and accessible to the local population – thus reinforcing its very special characteristic hybrid legacy features and acceptability by the people.¹³³ Majority of Sierra Leoneans have had faith in the SCSL as a mechanism for bringing perpetrators of crimes to justice.¹³⁴ The way to achieve justice, according to the majority of the population in Sierra Leone, is through SCSL.¹³⁵ However, it must be stated that similar hybrid courts such as the Special Tribunal for Lebanon (STL) in Lebanon, the Extraordinary Chambers in the Courts of Cambodia (ECCC) in Cambodia followed the mode of establishment of the SCSL model.¹³⁶

There is an overall positive attitude to and acceptability of the SCSL judgments and its contribution towards stability, peace and development.¹³⁷ Given the relatively small number of trials and conviction, it is perhaps inevitable that some felt that not all those who committed crimes were brought to justice.¹³⁸ Nonetheless, this research thesis will illustrate that the SCSL judgments and the outreach components that enhanced knowledge and acceptability¹³⁹ were considered to be just, fair, appropriate and acceptable by majority of the Sierra Leonean populace.¹⁴⁰ For instance, according to Kerr and Lincoln ‘people were heard to say ‘if you slap me I’ll take you to the Special Court’, which certainly indicates a degree of awareness and familiarity’¹⁴¹ with the SCSL and its acceptance.

¹³² Due to security reasons, the STL hybrid tribunal has its seat outside Beirut, Lebanon where the crimes were committed. See Jan Erik Wetzel and Yvonne Mitri, ‘The Special Tribunal for Lebanon: A Court “Off the Shelf” for a Divided Country’ (2008) 7 *The Law and Practice of International Courts and Tribunals* 87, 109

¹³³ Ibid

¹³⁴ M A Bangura, Delivering International Criminal Justice at the Special Court for Sierra Leone: Home Much Is Enough?’ in C C Jalloh (ed), *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 707-722, see D Tolbert, ‘Exploring the Legacy of the Special Court for Sierra Leone (2013) International Criminal Transitional Justice paras 1-17 <<https://tinyurl.com/y9wk4quz>> (Latest access 3 October 2018)

¹³⁵ Ibid

¹³⁶ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected jurisdictional Issues* (Hart, 2012) 73-77 and 120-128

¹³⁷ D Tolbert, ‘Exploring the Legacy of the Special Court for Sierra Leone (2013) International Criminal Transitional Justice paras 1-17 <<https://tinyurl.com/y9wk4quz>> (Latest access 3 October 2018)

¹³⁸ Ibid

¹³⁹ See the Special Court for Sierra Leone: ‘Impact and Legacy Survey for the Special Court for Sierra Leone’ (2012) Special Court for Sierra Leone and No Peace Without Justice 1, 16

¹⁴⁰ R Kerr and J Lincoln, ‘The Special Court for Sierra Leone Outreach, Legacy and Impact, Final Report’ (2008) War Crimes Research Group Department of War Studies 1, 11 and 22

¹⁴¹ Ibid 1, 22

Much of the strength of international tribunals is in their perceived impartiality and their ability to adhere to objective standards reflecting ‘universal norms.’¹⁴² On the other hand, such ‘international objectivity’ has been criticised as promoting a western liberal system of justice which may not reflect the values of the community it is intending to serve.¹⁴³ The hybrid model, in theory, allows for international standards to be upheld by international staff, while retaining local relevance by locating it within the national system with local participants.¹⁴⁴ The hybrid model enhanced the levels of acceptance within Sierra Leone. This thesis will argue that the overall understanding of the concept and acceptance of SCSL justice judgments was good, not least because the ordinary Sierra Leonean understood what the term ‘justice’ stands for and its implications.¹⁴⁵

That it creates a legacy, including capacity for better administration of justice in the future: This thesis cannot definitively pinpoint any particular aspect as the most significant legacy of the SCSL. Both domestically and internationally, the undermentioned can be discerned as the legacy success of the SCSL:

Capacity building: During the SCSL’s lifespan, it provided capacity building support for many organisations and groups in the country in an effort to promote accountability, transparency and rebuilding capacity in the domestic judicial system.¹⁴⁶ The SCSL assisted Sierra Leoneans to be employed in the court and have now acquired experiences in matters that are within the mandate of the SCSL with professional roles such as investigators and administrators.¹⁴⁷ The SCSL trained and built the expertise of a number of people, including judges, lawyers and investigators, and local staff.¹⁴⁸ The SCSL created a programme that provided exchange of knowledge, skills and experiences by the SCSL with national staff working in Sierra Leonean institutions; implementation of a strategic professional development program which ensured that domestic counterparts would benefit from this. Also, international experts learnt about local laws and realities from their Sierra Leonean counterparts

¹⁴² A Ryan, ‘Special Panels for Serious Crimes of Timor-Leste: Lesson for the Region’ (2007) Asia Advocacy Officer for Progression (formerly the Catholic Institute for International relations 95, 115

¹⁴³ Ibid

¹⁴⁴ Ibid

¹⁴⁵ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone <<http://rscsl.org/>> (Latest access 1 September 2018)

¹⁴⁶ Ibid

¹⁴⁷ D Shraga, ‘The Second Generation UN- Based Tribunals: A Diversity of Mixed Jurisdiction’ in C P R Romano, A Nollkaemper and J K Kleffner, *Internationalized Criminal Courts* (OUP 2004) 127

¹⁴⁸ Ibid

about an effective outreach campaign that engaged with the population in a wide-ranging discourse relating upholding the rule of law, and targeted legal reform.¹⁴⁹ In fact, a good number of Sierra Leoneans are already working in all most all sections and organs of the SCSL and revived confidence in the rule of law.¹⁵⁰

Judicial reform: In terms of judicial reform, it is significant to note that judicial reform was not explicitly a part of the SCSL mandate but it's part of the Court's legacy success now. This due to the fact it has contributed to the process through training programs aimed at police, military, lay magistrates, and prison officers and activities aimed at fostering community rehabilitation and self-reliance.¹⁵¹ 'In the areas of expertise, it has done a lot - some of the prosecution and defence lawyers are Sierra Leonean and two of the judges are Sierra Leonean. By these people working at the Special Court, it has instilled confidence in our own judiciary...' ¹⁵² The SCSL was also able to capacitate the national judicial system in matters of International Criminal Justice.¹⁵³ This had resulted to a higher standard of justice becoming available to the ordinary Sierra Leonean; all contributed to a successful legal legacy, including capacity for better administration of justice in the future.

The Archivers of the court: These are vital materials that would be used by research students, professors, scholars and practitioners to enhance their knowledge and know more about the SCSL.¹⁵⁴ From the Appeal Chambers to the SCSL staff, everyone was involved in all aspects of the work of the Court. In addition to its important judicial record and the measure of justice it brought for victims and affected communities, the SCSL has had a broad impact on Sierra Leone as a post-conflict society.¹⁵⁵ Over all, the SCSL has assisted to create an 'authoritative record of the nature of the crimes that took place during the Civil War -who was responsible for them, what groups were targeted, and why.'¹⁵⁶ Also, the archivers will act as 'educational tool, where anybody

¹⁴⁹ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone <<http://rscsl.org/>> (Latest access 1 September 2018)

¹⁵⁰ Justice in motion: The Trial Phase of the Special Court for Sierra Leone <<https://tinyurl.com/y7vz6euy>> (Latest access 2 October 2018)

¹⁵¹ R Kerr and J Lincoln, 'The Special Court for Sierra Leone Outreach, Legacy and Impact, Final Report' (2008) War Crimes Research Group Department of War Studies 1, 29

¹⁵² Ibid

¹⁵³ A Smith, 'The Expectations and Role of International and National Civil Society and the SCSL' in Charles Jalloh (eds), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013) 125

¹⁵⁴ Special Court for Sierra Leone: Residual Special Court for Sierra Leone paras 1-3 <<http://rscsl.org/residual.html>> (Latest access 2 October 2018)

¹⁵⁵ D Tolbert, 'ICTJ: SCSL Holds Valuable lessons for International Justice' (2012) ICTJ para 4 <<https://tinyurl.com/y7otwqbq>> (Latest access 2 October 2108)

¹⁵⁶ Ibid

who is interested in the SCSL will be able to find compelling and engaging resources on its groundbreaking work and lasting legacy.’¹⁵⁷

Location: Another significant national legacy is the site of the court, where the court is located.¹⁵⁸ Located in Sierra Leone where the ‘crimes were committed has other positive influence on the country’s attitude toward compliance with its legal obligations under international instruments that it enters into.’¹⁵⁹ The SCSL has been handed over to the SLG and turned to Residual Special Court for Sierra Leone in 2013, and it will be used for other purpose.¹⁶⁰

Outreach component: One of the national and international legacy of the SCSL is its Outreach section. Outreach was responsible to disseminate information about the legal work of the SCSL to the people.¹⁶¹ This tremendously helped the people of Sierra Leone to cooperate with the SCSL because they knew what the SCSL was all about through its outreach components.¹⁶² The Outreach Programme made a significant difference in relation to information dissemination and raising awareness about the SCSL’s investigations and trials.¹⁶³ The Outreach Programme strengthened civil society organisations as well as sensitising local communities on the operations of the SCSL hybrid court in Freetown,¹⁶⁴ which laid a strong structural foundation for sustainable peace and national healing and reconciliation in post-conflict Sierra Leone.

The Outreach Programme was created in 2003 under the office and control of the Registrar of Public Affairs Office.¹⁶⁵ The Outreach Programme employed approximately 17 officers, almost all of whom were Sierra Leonean, together with

¹⁵⁷ Ibid para 9

¹⁵⁸ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone para 2 <<http://rscsl.org/>> (Latest access 2 October 2018)

¹⁵⁹ M A Bangura, ‘Delivering International Criminal Justice at the Special Court for Sierra Leone: Home Much Is Enough?’ in C C Jalloh (ed), *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 718

¹⁶⁰ Special Court for Sierra Leone: Residual Special Court for Sierra Leone paras 1-3 <<http://rscsl.org/residual.html>> (Latest access 2 October 2018)

¹⁶¹ Ibid paras 1-14

¹⁶² Ibid

¹⁶³ Ibid

¹⁶⁴ Ibid Also see D Tolbert, ‘ICTJ: SCSL Holds Valuable Lessons for International Justice’ (Feb 2013) paras 1- 4 <<https://tinyurl.com/ybhajmv5>> (Latest access 2 October 2018)

¹⁶⁵ Through the untiring efforts of the Registrar and Public Affairs Office, the Outreach Programmes did help to educate Sierra Leoneans, but the world at large was also given the chance to see the SCSL at work and ‘to ensure that impunity will not be allowed to go unpunished and that the rule of law prevails at all times.’ See Eleventh and Final Annual Report of the President of the Special Court for Sierra Leone (December 2003) <<https://tinyurl.com/y8a6x4wn>> (Latest access 1 September 2018)

networking and civil society groups reaching into the provinces and their districts.¹⁶⁶ It created awareness and helped to educate the public about the existence and functions of the SCSL.¹⁶⁷ The programmes included ‘town hall meetings’ that were attended by the Prosecutor and Registrar; production of information booklets in Krio; ‘Training the Trainer’ workshops; workshops with target groups such as the army; radio and television programmes; video screenings; formation of Human Rights and Peace Clubs; quizzes and debating competitions; as well as accountability sessions in the University of Sierra Leone (USL).¹⁶⁸ The SCSL’s Outreach Programme contributed greatly in raising awareness amongst many Sierra Leoneans about its work and impact. As commented by Cassese, the ‘direct impact of the Special Court on civil society in Sierra Leone has been strengthened by an exceedingly effective Outreach Programme, which has proved to be exemplary and should constitute a model for future international courts.’¹⁶⁹ The Outreach Programme also demonstrated the efforts of the SCSL to rebuild the national judiciary and promote the value and restoration of the rule of law in the country.¹⁷⁰

Further, through its Outreach Programme, the SCSL managed to ‘link the people of Sierra Leone with the Special Court.’¹⁷¹ This proved more successful as compared to what the ICTY and ICTR did to the former Yugoslavia and Rwanda, respectively.¹⁷² The Outreach Programme also contributed ‘to building the capacity and legal literacy of local media,’¹⁷³ including NGOs which gave the people of Sierra Leone a sense of both ownership and belonging, as a result. The SCSL Outreach Programme fulfilled the goals set out in terms of communication of SCSL’s work, sharing of values relating

¹⁶⁶ See Second Annual Report of the President of the Special Court for Sierra Leone, for the Period 1 January 2004- 17 January 2005 < <https://tinyurl.com/yc64xow> > (Latest access 1 September 2018)

¹⁶⁷ See the Special Court for Sierra Leone: ‘Impact and Legacy Survey for the Special Court for Sierra Leone’ (2012) Special Court for Sierra Leone and No Peace Without Justice 1, 16

¹⁶⁸ See Press Release, Special Court for Sierra Leone Office of the Prosecutor: ‘The Prosecutor Launches “Accountability Now Club” at Fourah Bay College’ (Freetown, 1 July 2004) < <https://tinyurl.com/y94glyf9> > (Latest access 1 September 2018). Also see J Lincoln, ‘The Special Court for Sierra Leone: Outreach, Legacy and Impact’ (2008) United States Institute of Peace Programme on the Rule of Law in African Countries Emerging from Violent Conflict < <https://tinyurl.com/ydadz3a> > (Latest access 1 September 2018)

¹⁶⁹ A Cassese’s ‘Independent Expert Report on the Special Court for Sierra Leone’ (12 December 2006) 1, 59 < <https://tinyurl.com/yaqtqq4z> > (Latest access 3 September 2018)

¹⁷⁰ See Office of the United Nations High Commissioner for Human Rights- ‘Rule-of-Law Tools for Post-Conflicts States Maximizing the legacy of the hybrid court United Nations (New York and Geneva, 2008) < <https://tinyurl.com/yaan4t9m> > (Latest access 3 September 2018)

¹⁷¹ R Kerr and J Lincoln, ‘The Special Court for Sierra Leone Outreach, Legacy and Impact’ (February 2008) War Crimes Research Group Department of War Studies 1, 11 < <https://tinyurl.com/yd2a6bzf> > (Latest access 3 September 2018)

¹⁷² Ibid

¹⁷³ See Eleventh and Final Annual Report of the President of the Special Court for Sierra Leone (December 2003) < <https://tinyurl.com/ycye4z5l> > (Latest access 3 September 2018)

to the rule of law. The SCSL, through outreach, particularly outside of Freetown, demonstrated to Sierra Leoneans how an independent, effective, and fair court functions. No Peace Without Justice (a non-governmental organisation)¹⁷⁴ as sponsored short dramatic pieces, performed at town markets, that described the legal work of SCSL. This initiative had obviously helped to reach many hundreds of people in the country. Finally, various radio programs, especially on the station ‘Talking Drums,’ broadcast court proceedings over the radio in local languages and provided a forum to discuss the legal work of the SCSL.¹⁷⁵

The lessons learned from the SCSL is that the outreach was central component in dispensing justice for grave crimes of such international nature, and ‘Sierra Leoneans tend to have more faith in the SCSL as a mechanism for bringing perpetrators of crimes to justice.’¹⁷⁶ Post-conflict building countries could learn from the SCSL model. The SCSL has already been followed by another hybrid court and international tribunals.¹⁷⁷

The jurisprudence (case law). Both nationally and internationally, the SCSL judgments impacted on its legacy success. Primarily, and as already indicated above, SCSL approach to the following contributed to its legacy: 1) there is reconciliation and sustainable peace at all levels.¹⁷⁸ Through the TRC, it was acknowledged that crimes were committed, and the perpetrators were identified,¹⁷⁹ 2) Amnesty and immunity issues. The SCSL treatment and non-application of amnesty to the RUF leader and his combatants, as well as immunity to Charles Taylor as head of state were glaring examples,¹⁸⁰ 3) through its subject matter jurisdiction, the SCSL made but limited legacy contribution to ‘legal and social accountability.’ This was done by affirming that the crimes took place and ‘condemning their commission and punishing those responsible’ for such crimes,¹⁸¹ and 4) through its convictions, the SCSL

¹⁷⁴ See No Peace Without Justice, ‘Making Justice Work: Assessing the impact and legacy of the Special Court for Sierra Leone in Sierra Leone and Liberia’ (September 2012) International criminal justice paras 1-12 <<http://www.npwj.org/node/5599>> (Latest access 3 September 2018)

¹⁷⁵ R Kerr and J Lincoln, ‘The Special Court for Sierra Leone Outreach, Legacy and Impact, Final Report’ (2008) War Crimes Research Group Department of War Studies 1, 11

¹⁷⁶ See the Special Court for Sierra Leone: ‘Impact and Legacy Survey for the Special Court for Sierra Leone’ (2012) Special Court for Sierra Leone and No Peace Without Justice 1, 26

¹⁷⁷ C C Jalloh (ed), *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 707-722

¹⁷⁸ See the Special Court for Sierra Leone: ‘Impact and Legacy Survey for the Special Court for Sierra Leone’ (2012) Special Court for Sierra Leone and No Peace Without Justice 1, 26-27

¹⁷⁹ T Clark, ‘Assessing the Special Court’s Contribution to Achieving Transitional Justice’ in Charles Jalloh, *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 766-767

¹⁸⁰ Ibid

¹⁸¹ Ibid 768

contributed to social reparations, although this was limited¹⁸², 5) aspects of the SCSL case law is also a significant legacy success.¹⁸³ The SCSL judgments represent the first legal jurisprudence made by a hybrid court on war crimes including crimes against humanity and other inhumane acts such as child soldier enlistment and forced marriage as well as aiding and abetting. (For instance: child soldier and forced marriage have been followed by other hybrid courts) and are now part of ICC, ICL¹⁸⁴ and International Criminal Justice.¹⁸⁵ As such, the SCSL has played a very significant part in regard to the ‘identification of customary international law, and the advancement of international rule of law,’¹⁸⁶ 7) as part of the SCSL legacy and success, the SCSL created the first national witness protection unit in the country, which is one of only a few witness protection systems in Africa.¹⁸⁷ The legacy impact of the SCSL will ‘extend well beyond the borders of Sierra Leone. Its judgments have reaffirmed important international legal norms, such as the prohibition on the conscription of child soldiers, condemnation of the crime of forced marriage, and the denial of immunity to sitting heads of state.’¹⁸⁸

Lastly, this thesis also illustrates that, one amongst the best legacy of the SCSL is creating an existing law website called Sierra Leone Legal Information Institute (‘Sierra LII’).¹⁸⁹ This website contains most recent legislations or acts dating back from 1960 to date. This website can now be used for academic, legal and general research purposes. Even though Internet access is limited in Sierra Leone, this is an excellent initiative, and will continue to be so as long as it is regularly updated.

In conclusion, and within framework of the theories of justice, it is this degree of hybrid administration, legal sources and judicial and prosecutorial teams - which allowed the court to draw on domestic expertise - that gives the SCSL its legitimacy

¹⁸² Ibid

¹⁸³ C C Jalloh, *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 772. See Special Court for Sierra Leone: Residual Special Court for Sierra Leone paras 13-15 <<https://tinyurl.com/y9kuuasc>> (Latest access 2 October 2018)

¹⁸⁴ Ibid 772

¹⁸⁵ D Shraga, ‘The Second Generation UN- Based Tribunals: A Diversity of Mixed Jurisdiction’ in C P R Romano, A Nollkaemper and J K Kleffner, *Internationalized Criminal Courts* (OUP 2004) 127

¹⁸⁶ A Smith, ‘Sierra Leone: The Intersection of Law, Policy, and Practice’ in C P R Romano, A Nollkaemper and J K Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004) 125

¹⁸⁷ N K Stafford, ‘A Model War Crimes Court: Sierra Leone’ (2003) 10 ILSA Journal of International and Comparative Law 117

¹⁸⁸ Ibid para 7

¹⁸⁹ See ‘Sierra Leone Legal Information Institute (Sierra LII)’ (2018) Sierra Leone <<https://tinyurl.com/ya2c92f9>> (Latest access 2 October 2018)

and which may have contributed to its apparent success in achieving justice and jurisprudential legacy.

Based on the above, this thesis can affirm that the SCSL has had a tremendous impact which has contributed to its legacy not only for SCSL but for the ICC, ICL and International justice system.¹⁹⁰ And based on the theories of justice and interpretive community lens, the SCSL could be described as a new innovation for both domestic law and International Criminal Law.

That it achieves these ends speedily: its work can be completed and create a sense of closure for the people: Firstly, based upon the SCSL's self-assessment, this thesis can posit that one of the great achievements of the SCSL was the speedy conclusion of its trials, convictions and judgments (faster than other tribunals and hybrid courts.)¹⁹¹ The SCSL begun operations in July 2002.¹⁹² The SCSL completed its primary judicial mandate in September 2013 after the *Taylor* trial.¹⁹³ It therefore became the first hybrid court to close its business quickly after its completion.¹⁹⁴ Within justice theories framework, this thesis can argue that as a result of its limited mandate,¹⁹⁵ the SCSL would therefore be measured as successful because it allowed for speedy resolution of the business of the court.

Secondly, that the completion of trials and transfer of the SCSL to a Residual Special Court for Sierra Leone (RSCSL) demonstrated a sense of closure for the Sierra Leone people. The SCSL completed its core judicial mandate in September 2013 after the *Taylor* trial¹⁹⁶ - and became the first hybrid court to close its operations immediately

¹⁹⁰ D Tolbert, 'Exploring the Legacy of the Special Court for Sierra Leone (2013) International Criminal Transitional Justice paras 3-5 <<https://www.ictj.org/sites/default/files/subsites/scsl-legacy/>> (Latest access 2 October 2018)

¹⁹¹ Ibid

¹⁹² Ibid

¹⁹³ *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Appeals Chamber Judgment (5 September 2013), see Special Court for Sierra Leone: Residual Special Court for Sierra Leone <<http://rscsl.org/>> (Latest access 5 September 2018)

G Bigi, 'The Decision of the Special Court for Sierra Leone to Conduct the Charles Taylor Trial in The Hague' (2007) 6 *The Law and Practice of International Courts and Tribunals* 303, 315-316, see Kamari Maxine Clarke, 'The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord' (2011) Volume 18 *Indiana Journal of Global Legal Studies* 7, 9-12

¹⁹⁴ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone <<http://rscsl.org/>> (Latest access 5 September 2018)

¹⁹⁵ See the Statute of the Special Court for Sierra Leone, Article 1 <<https://tinyurl.com/y8qoj7vw>> (Latest access 5 September 2018)

¹⁹⁶ For an over view of Charles Taylor's procedural and factual background, trial and judgment, see C Jalloh C, 'The Trial of President Charles Taylor' (2014) Research Paper No. 14-28 FIU Legal Studies Research Paper Series 1, 15-37 <<https://tinyurl.com/ybon7nxj>> (Latest access 3 September 2018), see the *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Appeals Chamber Judgment (26 September 2013) <<https://tinyurl.com/ya6pglys>> (Latest access 1 September 2018), see G Bigi, 'The Decision of the Special Court for Sierra Leone to Conduct the Charles Taylor Trial in The Hague' (2007) Volume 6 *The Law and Practice of*

after that.¹⁹⁷ Other hybrid courts – initiated after the SCSL began - were suspended rather than formally concluded, for example the SPSC. The SCSL agreement stated that ‘upon completion of the judicial activities of the Special Court’¹⁹⁸ the agreement should be terminated. The SCSL was then converted to a Residual Special Court for Sierra Leone (RSCSL) which is now under the operation and supervision of the Government of Sierra Leone. The RSCSL was created ‘to sustain the legacies and other activities of the closed Special Court’¹⁹⁹ following an agreement signed between the Government of Sierra Leone and the UN in 2010.²⁰⁰ The phrase ‘residual functions’ is used to describe the standard requirement enshrined in the Statute of the SCSL that is to continue to manage its judicial proceedings after its closure.²⁰¹ The RSCSL has offices both in Freetown and in the Netherlands. Individuals convicted by the SCSL are serving their sentences in Mpanga Prison in Rwanda, and the RSCSL has been mandated to continue to work with Rwanda Prison Services in order to ensure that international standards are maintained.²⁰²

Conclusion

Concluding, combined with the speed, successful conclusion of trials, the formal closure and transfer of responsibility to the RSCSL helped to showcase an impressive and lasting legacy and to also send a message of closure and ensure continuity. Also, handing over the court to the SLG to be used as a Residual Mechanism, the selection and application of the SCSL hybrid model by the International Community has proved

International Courts and Tribunals 303, 315-316, see K M Clarke, ‘The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord’ (2011) Volume 18 *Indiana Journal of Global Legal Studies* 7, 9-12

¹⁹⁷ See the Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Residual Special Court for Sierra Leone (2010) < <http://rscsl.org/>> (Latest access 3 September 2018). Also see F Donlon, ‘The Transition of Responsibilities from the Special Court to the Residual Special Court for Sierra Leone: Challenges and Lessons Learned for Other International Tribunals’ (2013) *Journal of International Criminal Justice* 1, 4-18

¹⁹⁸ See the SCSL Agreement, Article 23 of (16 January 20002) < <https://tinyurl.com/y8538sl2>> (Latest access 3 September 2018)

¹⁹⁹ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone <<http://rscsl.org/>> (Latest access 3 September 2018)

²⁰⁰ See the Special Court for Sierra Leone: Residual SCSL Agreement, Article 1.1 (2010) <<http://www.rscsl.org/>> (Latest access 3 September 2018)

²⁰¹ UN Doc. S/2009/258 (21 May 2009). See the Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism (s) for the Tribunals <<https://tinyurl.com/y75byh6s>> (Latest access 3 September 2018)

²⁰² F Donlon, ‘The Transition of Responsibilities from the Special Court to the Residual Special Court for Sierra Leone: Challenges and Lessons Learned for Other International Tribunals’ (2013) *Journal of International Criminal Justice* 1, 4-18 (Latest access 13 September 2018)

the most appropriate judicial mechanism for the prosecution of war crimes and crimes against humanity.²⁰³

Finally, having the SCSL continue to RSCL after its formal closure has assisted many Sierra Leoneans take great pride in the facilities of the Court because it is classed as part of the SCSL legacy success. This thesis will argue that countries facing the same issues as Sierra Leone could learn much from the special characteristics of the SCSL model.²⁰⁴

Below will discuss the perspectives and criticisms of the SCSL.

Section 5

1.5 Limitations, perspectives and or criticisms of the SCSL

The above section outlined the significant strengths that this thesis argues exist in the working and legacy of the SCSL. In order to assess the overall impact of the SCSL, it is also important to recognise and consider the criticisms that have been levied against the SCSL. Sriram²⁰⁵ an eminent Scholar, for example, argued that the court has proved inadequate in a number of ways, including limits to its scope, authority and budget; limits in time frame; the suspicion with which many regarded the SCSL and its purpose; insufficient priority given to outreach and more.²⁰⁶ She concluded by stating that: ‘the Court has significant shortcomings that may limit its ability to operate effectively or contribute to the needs of that post-conflict country...the expectations placed upon the Court in particular to provide capacity building and a broader legacy for the country’s judiciary may be unrealistic.’²⁰⁷

In addition, Cassese²⁰⁸, Cheng²⁰⁹ and Falk²¹⁰, prominent International Scholars have criticised the SCSL trials and judgments. According to Cassese, ‘the Court has operated in a very difficult milieu’...and its major failings were: insufficient

²⁰³ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone paras 1-15 <<http://rscsl.org/>> (Latest access 1 September 2018)

²⁰⁴ See chapter 4 for detailed discourse relating to the special characteristics of the SCSL

²⁰⁵ C L Sriram, ‘Wrong sizing-international justice? The hybrid tribunal in Sierra Leone’ (2006) Volume 29 Fordham International Law Journal 1

²⁰⁶ Ibid 1, 1-28

²⁰⁷ Ibid 1, 28

²⁰⁸ A Cassese, ‘Report on the Special Court for Sierra Leone’ (2006) Independent Expert 1 <<https://tinyurl.com/yaqtqq4z>> (Latest access 17 October 2018)

²⁰⁹ C Cheng, ‘Charles Taylor trial highlights ICC concerns’ (27 April 2012) Opinion Al Jazeera English paras 1-16 <<https://tinyurl.com/yb8xay2r>> (Latest access 17 October 2018)

²¹⁰ R Falk, ‘Opening the other eye: Charles Taylor and selective accountability’ (1 May 2012) Opinion Al Jazeera English paras 1-14 <<https://tinyurl.com/y7kc4rba>> (Latest access 17 October 2018)

contribution to the Defence Office,²¹¹ ‘shoestring justice’, lack of a strong judicial leadership from the outset, insufficient reliance on the existing ‘know-how’ and other failings.²¹² Falk argued that Western powers chose to prosecute only war criminals who criticise Western interests.²¹³ Whilst Cheng maintained that, Western countries had perceived the SCSL as ‘upholding human rights and bringing justice to bear on a brutal dictator. Yet even though these claims undoubtedly have merit, it would be naïve to think that international justice is being pursued purely for its own sake.’²¹⁴ This thesis will argue that all of these are serious and important criticisms made against the SCSL. This section therefore examines and analyses the principle criticisms, primarily from the academic literature, of the SCSL. It considers how far these criticisms are justified and, crucially, how they need to inform our understanding of the SCSL as a model for future courts.

Only a small number of people were prosecuted: From an interpretive community perspective, the SCSL has been criticised by some Sierra Leonean commentators and Civil Society groups for the prosecution and conviction of only a small number of people who committed international crimes, while also having a negative impact on the domestic courts’ legal response to mass atrocities cases. As observed by Shany, the establishment of the SCSL and ‘the limited measure of accountability it offered shielded the amnesty from significant criticism and challenges by national and international constituencies. As a result, local courts had almost completely refrained from addressing civil war-related atrocities,’²¹⁵ and hardly tried any of the war time commissioners of heinous crimes.²¹⁶

Human Rights Watch argued that the mandate should have been interpreted to also include ‘other perpetrators who, while not at the top of the chain of command, were regional or mid-level commanders who stood out above similarly ranking colleagues

²¹¹ A Cassese, ‘Report on the Special Court for Sierra Leone’ (2006) Independent Expert 1, 14 <<https://tinyurl.com/yaqtqq4z>> (Latest access 17 October 2018)

²¹² Ibid 1, 65-67

²¹³ R Falk, ‘Opening the other eye: Charles Taylor and selective accountability’ (1 May 2012) Opinion Al Jazeera English para 9 <<https://tinyurl.com/y7kc4rba>> (Latest access 17 October 2018)

²¹⁴ C Cheng, ‘Charles Taylor trial highlights ICC concerns’ (27 April 2012) Opinion Al Jazeera English para 3 <<https://tinyurl.com/yb8xay2r>> (Latest access 17 October 2018)

²¹⁵ Y Shany, ‘How can International Criminal Courts have a Greater Impact on National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation’ (2013) Volume 46 Israel Law Review 431, 439

²¹⁶ S Horowitz, ‘How can International Criminal Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone’ (2013) Volume 46 Israel Law Review 339, 360

for the exceedingly brutal nature of the crimes they committed.’²¹⁷ This claim was supported by members of civil society groups interviewed by Human Rights Watch, ‘who expressed frustration that a limited number of regional or mid-level commanders known for their notorious behaviour, some of whom physically carried out the crimes,’²¹⁸ have escaped indictment and conviction by the SCSL.²¹⁹

Moreover, jurisdiction of the SCSL was limited to the territory of Sierra Leone.²²⁰ This created a problem since the first attacks of the RUF begun from neighbouring Liberia. As a result, Sierra Leonean perpetrators who violated international or national law outside Sierra Leone could not be tried by the SCSL. For example, rape and killing widely occurred in the refugee camp in Liberia, carried out by Sierra Leone rebels.²²¹ This is evidenced by testimony collected by Human Rights Watch from a Sierra Leonean witness who was a refugee in Liberia during the civil war.²²²

There are, however, notable exceptions to this, which are; the ‘two multi-accused trials held in 2005 and 2006 before the High Court in Freetown in which a total of 88 rebels who were not covered by the Lomé Amnesty were adjudicated and convicted for war-related crimes committed in 2000.’²²³

Only crimes committed after 1996 were subject to scrutiny: The SCSL received another serious criticism because only crimes committed after 30 November 1996 were subject to scrutiny. People who committed crimes from the beginning of the war, 23 March 1991, were not held to account or brought to justice. Some argue that this restriction undermined the primary objective of the SCSL ‘. . . to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law . . .’²²⁴ The 1996 date was determined after careful consideration of

²¹⁷ Human Rights Watch, ‘Bringing Justice: the Special Court for Sierra Leone, Accomplishment. Shortcomings, and Needed Support’ (September 2004) para 19 <<https://tinyurl.com/y79cw7mz>> (Latest access 10 September 2018)

²¹⁸ Ibid para 20

²¹⁹ Ibid

²²⁰ See Statute of the Special Court for Sierra Leone, article 1(2002) <<https://tinyurl.com/y8qoj7vw>> (Latest access 10 September 2018)

²²¹ Human Rights Watch, ‘Shocking War Crimes in Sierra Leone: New Testimonies on Mutilation, Rape of Civilians’ (June 1999) paras 1-7 <<https://tinyurl.com/y87s4eew>> (Latest access 10 September 2018)

²²² Ibid

²²³ S Horowitz, ‘How can International Criminal Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone’ (2013) Volume 46 Israel Law Review 339, 356

²²⁴ See Statute of the Special Court for Sierra Leone, article 1 (2002) <<https://tinyurl.com/y8qoj7vw>> (Latest access 10 September 2018)

three possible dates by the Secretary General: 30 November 1996, 25 May 1997, and 6 January 1999.

However, it was reported the worst atrocities and crimes were committed before January 1999, there were even reports of extra-judicial executions, deliberate and arbitrary killing, torture, rape and mutilation dating back to the beginning of the war. In order to 'ensure the prosecutions encompassed the many crimes that were committed in the rural areas and countryside, the January 9, 1999 date was also not deemed appropriate.' As the SCSL temporal jurisdiction is limited to violations that were committed in Sierra Leone after 30 November 1996, crimes perpetrated to the beginning of the civil war were ignored.²²⁵ This decision met with grave concerns and scrutiny within and outside Sierra Leone as being unfair, unjust dispense of justice, regardless of any justification and rationale advanced by the architects and drafters of the SCSL Statute.

The lack of transparency within SCSL: The SCSL became operational in late 2002, issued its first indictments in March 2003 and completed its proceedings in September 2013.²²⁶ Lack of transparency in its daily operation, case law and practices within the SCSL was amongst the serious criticisms levied against it, and this was attributed to the manner in which the Court was controlled and managed. This includes: '(i) lack of communication amongst the various organs of the Court; (ii) insufficient communication within the Registry; (iii) insufficient sensitivity of the Judges to the exigencies of court management; (iv) inadequate provision of resources to the defence.'²²⁷

Lack of interaction between the SCSL and the Truth and Reconciliation Commission (TRC): Lack of interaction and misunderstanding between the SCSL and the TRC caused tensions between these two post-conflicts building institutions. Pursuant to Lomé Peace Agreement (LPA) in July 1999 at Lomé in Togo, the SLG and the RUF rebel group signed this peace agreement.²²⁸ They agreed to establish a TRC which

²²⁵ See Statue of the Special Court for Sierra Leone, Article 8 (2002) <<https://tinyurl.com/y8qoj7vw>> (Latest access 10 September 2018)

²²⁶ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone <<http://rscsl.org/>> (Latest access 10 September 2018)

²²⁷ A Cassese, 'Independent Expert Report on the Special Court for Sierra Leone' (12 December 2006) 1, 67 <<https://tinyurl.com/yaqtqq4z>> Latest access 10 September 2018)

²²⁸ See full text of 'Lomé Peace Accord, UN Peacemaker' <<https://tinyurl.com/yao9l9gz>> (Latest access 10 September 2018)

began work in late 2002 and operated until October 2004 when it submitted its final report.²²⁹ The agreement granted an unconditional blanket amnesty for all parties. This comprehensive agreement reaffirmed the cessation of hostilities of 18 May 1997 and provided for power-sharing arrangements between the elected government and the RUF.²³⁰ Article IX of the Lomé Agreement made this broad concession.²³¹ It also provided provisions on DDR and the transformation of the RUF into a political party.²³²

In addition, the TRC was created as a forum to address impunity, stop the violence, assist both the victims and perpetrators of human rights violations to tell their story and get a clear picture of the past.²³³ This way, it aimed to bring about genuine healing, peace and reconciliation in post conflict Sierra Leone. A few months after the TRC was entered into law, the SCSL was created to prosecute those responsible for human rights violations during the conflict.²³⁴ It should be noted that the United Nations signed as a witness to the agreement with an explicit reservation stating that the United Nations does not accept immunity for war crimes and crimes against humanity.²³⁵

The SCSL begun operations in July 2002,²³⁶ but the TRC was already established before the SCSL then. This created tension, lack of interaction, and misunderstanding between the SCSL and the TRC from its inception. Significant issues, such as ‘information sharing, their respective powers to compel the appearance of witnesses and accused, and the submission of evidentiary material’²³⁷ which were not regulated

²²⁹ M Wierda, P Hayner and P van Zyl (ed), ‘Exploring the Relationship between the Special Court for Sierra Leone and Truth and Reconciliation Commission of Sierra Leone’ (2002) The International Center for Transitional Justice 1, 1- 4 <<https://tinyurl.com/ycjb5zjn>> (Latest access 12 September 2018), see World Peace Foundation ‘Mass Atrocity Endings’ (2015) Sierra Leone <<https://tinyurl.com/ydabeshe>> (Latest access 10 September 2018). Also see ‘Lomé Peace Accord, UN Peacemaker’ <<https://tinyurl.com/yao9l9gz>> (Latest access 10 September 2018), Lord Richard, ‘Introduction: the struggle for power and peace in Sierra Leone’ in *Paying the Price the Sierra Leone peace process* (London: Conciliation Recourses, 2000) <<https://tinyurl.com/yc45qtwv>> (Latest access 10 September 2018)

²³⁰ See full text of ‘Lomé Peace Accord, UN Peacemaker’ <<https://tinyurl.com/yao9l9gz>> (Latest access 10 September 2018)

²³¹ Ibid

²³² Ibid

²³³ E Evenson, ‘Truth and Justice in Sierra Leone: Coordination between Commission and Court’ (2004) Volume 104 Columbia Law Review 730, 744

²³⁴ See chapter 2 for detailed discussion on this

²³⁵ See full text of ‘Lomé Peace Accord, UN Peacemaker’ <<https://tinyurl.com/ybfekp6g>> (Latest access 12 September 2018)

²³⁶ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone (2010). It was ratified by Parliament on 15 December 2011 and signed into law on 1 February 2012 <<http://www.rscsl.org/>> (Latest access 12 September 2018)

²³⁷ E Evenson, ‘Truth and Justice in Sierra Leone: Coordination between Commission and Court’ (2004) Volume 104 Columbia Law Review 730, 744, also see I Cohn, ‘The Protection of Children and the Quest for Truth and Justice in Sierra Leone’ (2001) Volume 55 Journal of International Affairs 1-34, L Gberie, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone* (Bloomington, IN: Indiana University Press, 2005), see, O Ojielo, ‘Beyond the TRC: Governance in Sierra Leone’ in L Gberie (ed.), *Rescuing a Fragile State* (Waterloo Wilfrid Laurier University Press, 2009)

had adverse effects on the functions and mandate of the two institutions, as well as on the rights of the accused at the time.²³⁸ For instance, the SCSL has had cause to force the TRC to share information, thus making vulnerable any protection of confidentiality the TRC extends.²³⁹

As a result of Article 8 of the SCSL Statute,²⁴⁰ the Court held in the case *Prosecutor v Hinga Norman*²⁴¹ that the SCSL has primacy over all national courts and national institutions, including the TRC.²⁴² This ruling was made due to an agreement establishing the SCSL that reflected more careful consideration of these issues of interaction. Meaning, the TRC must comply with the orders and orders given by the SCSL. This impacted on the TRC, undermining its operation and functions in conducting public hearings involving some of the key leaders of the conflict, including Sam Hinga Norman.²⁴³ Ultimately, confessions of these ring leaders would have been critical to the full understanding of the nature and course of the civil war and thus important to the completion of the TRC's primary mandate.²⁴⁴ One can state that the primacy of the SCSL over the TRC had a significant effect on the TRC in its operation, practice and open to breach of confidentiality of vulnerable clients.

Additionally, the decision by the then government to grant amnesty for Sankoh and all combatants came under intense criticism which created another tension between them. This was as a result of the fact that Resolution 1315 of 14 of August 2000 was in sharp contrast with the resolution on Sierra Leone passed by the council a year earlier. The establishment of the SCSL contravened the LPA in the sense that the SCSL has personal jurisdiction (*Ratione Personae*) over persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since 30th November 1996.²⁴⁵ This was the time when the

²³⁸ E Evenson, 'Truth and Justice in Sierra Leone: Coordination between Commission and Court' (2004) Volume 104 Columbia Law Review 730, 744

²³⁹ M Wierda, P Hayner and P van Zyl (ed), 'Exploring the Relationship between the Special Court for Sierra Leone and Truth and Reconciliation Commission of Sierra Leone' (2002) The International Center for Transitional Justice 1, 5 - 6 <<https://tinyurl.com/ycjb5zjn>> (Latest access 12 September 2018)

²⁴⁰ See article 8 of the Statute of the Special Court for Sierra Leone <<https://tinyurl.com/y8qoj7vw>> (Latest access 12 September 2018)

²⁴¹ *Prosecutor v Norman*, Case No. SCSL-2003-08-PT, (17 April 2003) para 4 <<https://tinyurl.com/ycaoykua>> (Latest access 13 September 2018), also see N Boister, 'Failing to get to the heart of the matter in Sierra Leone: The Truth Commission is Denied Un restricted Access to Chief Hinga Norman' (2004) volume 2 Journal of International Criminal Justice 1102

²⁴² *Prosecutor v Norman*, Case No. SCSL-2003-08-PT, (17 April 2003) para 4 (Latest access 12 September 2018)

²⁴³ *Ibid* para 20 - 25

²⁴⁴ *Ibid* para 20

²⁴⁵ See Statute of the Special Court for Sierra Leone, article 1, 2 and 3 (2002) <<https://tinyurl.com/y8qoj7vw>> (Latest access 12 September 2018)

first peace treaty between the SLG and RUF was signed in the Abidjan Agreement.²⁴⁶ It must be mentioned that the amnesty granted by that Agreement was only in respect of violations of Sierra Leone domestic law before the 7th of July 1999, and not after that date. The amnesty was only valid as from the beginning of the war up to 7th July 1999. There was no amnesty for the violation of Sierra Leonean law committed after 7th July 1999.²⁴⁷

Furthermore, the applicability of the Lomé amnesty provision in relation to serious crimes was removed by article 10 of the Statute of the SCSL. Article 10 stipulated that amnesty does not bar the prosecution of crimes contained in articles 2 and 4 of the Statute.²⁴⁸ The issue of amnesty was considered by the SCSL in the *Prosecutor v Morris Kallon, Brima Bazzy Kamara*.²⁴⁹ The Appeals Chamber relied on Article 10 of the Statute of the SCSL, to say that the amnesty granted under Article IX of the Lomé Peace Agreement signed by the SLG did not bar the prosecution of an accused for international crimes committed before July 1999.²⁵⁰ The situation was compounded as the RUF leadership had since the signing of the Accord violated that Agreement.²⁵¹ The RUF then commenced the atrocities, which have always had as their targets mainly civilians, including women and children.²⁵² They also abducted over 500 United Nations peacekeepers and seized arms, weapons and uniforms, and even killed some of the peacekeepers.²⁵³ All this took place in spite of both sides' commitment to adhere to the Agreement.²⁵⁴ This was a grave violation of the Agreement, which makes the amnesty provisions invalid and no longer applicable, thus created a heightened tension between the SCSL and the TRC.

²⁴⁶ M Wierda, P Hayner and P van Zyl (ed), 'Exploring the Relationship between the Special Court for Sierra Leone and Truth and Reconciliation Commission of Sierra Leone' (2002) The International Center for Transitional Justice 1, 3 <<https://tinyurl.com/ycjb5zjn>> (Latest access 12 September 2018)

²⁴⁷ For detailed commentary on the causes of the civil war in Sierra Leone, see L Gberie, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone* (Bloomington, IN: Indiana University Press, 2005), B Nowrojee, 'Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims' (2005) Volume 18 Harvard Human Rights Journal 103

²⁴⁸ See article 2, 3, 4 and 10 of the Statute of the Special Court for Sierra Leone <<https://tinyurl.com/y8qoj7vw>> (Latest access 12 September 2018)

²⁴⁹ *Prosecutor v Morris Kallon, Brima Bazzy Kamara*, Case No. SCSL-2004-15-PT, Case No. SCSL-2004-16 PT (13 March 2004)

²⁵⁰ Ibid

²⁵¹ Human Rights Watch, 'Shocking War Crimes in Sierra Leone: New Testimonies on Mutilation, Rape of Civilians' (June 1999) paras 1-7 <<https://tinyurl.com/y87s4eew>> (Latest access 12 September 2018)

²⁵² Ibid

²⁵³ For detailed commentary on the causes of the civil war in Sierra Leone, see L Gberie, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone* (Bloomington, IN: Indiana University Press, 2005), B Nowrojee, 'Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims' (2005) Volume 18 Harvard Human Rights Journal 103

²⁵⁴ Ibid

Another tension between the SCSL and TRC was that people have compared the resources available to the SCSL to those available to the TRC and are of the opinion that the latter should have been better funded than it has been.²⁵⁵

In conclusion, the lack of interaction between the SCSL and the TRC created tensions between these two post-conflicts building institutions. Lessons to be learnt include that: a) future judicial and non-judicial agreements should respect, uphold and implement to the letter their individual primary remit and or goals agreed upon and b) there was a need to reconcile and co-ordinate the interaction between the judiciary and non-judiciary institutions. This was because there were instances when the time of their mandate, operation and practice overlapped and compromised, and during which some events, perpetrators, victims, witnesses and evidence were necessary; relevant and useful to both institutions. 'Some have suggested that it would have been preferable to sequence the Commission and the Special Court, implementing one before the other in order to avoid problems stemming from overlap.'²⁵⁶ In my view, a better coordination would have helped to reduce tensions, avoid undermining their operation and practice, and enhance confidence, and preserve the legality, legitimacy and legacy of the respective institutions.

The statute contained some Sierra Leonean crimes, but they were not charged; and provision for young people 15-17 to be charged but they never were: Another criticism of the SCSL was that, although the statute contained some Sierra Leonean crimes, they were not charged; and that although there were provisions for young people aged 15-17 to be charged, they never were. The crimes covered under Sierra Leonean law included offences relating to the abuse of girls, and the wanton destruction of property.²⁵⁷ Nonetheless, no individuals have been charged with crimes under Sierra Leonean law²⁵⁸ because the Sierra Leonean domestic law did not contain elements of war crimes, crimes against humanity and other violations of International Humanitarian Law.

²⁵⁵ See UNDP, 'The "Legacy" the Special Court for Sierra Leone' (2003) International Centre for Transitional Justice para 8

²⁵⁶ M Wierda, P Hayner and P van Zyl (ed), 'Exploring the Relationship between the Special Court for Sierra Leone and Truth and Reconciliation Commission of Sierra Leone' (2002) The International Center for Transitional Justice 1, 3 <<https://tinyurl.com/ycjb5zjn>> (Latest access 12 September 2018)

²⁵⁷ See Statute of the Special Court for Sierra Leone, Article 5 (2002), see C C Jalloh, *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 21

²⁵⁸ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone (2010). It was ratified by Parliament on 15 December 2011 and signed into law on 1 February 2012 <<http://www.rscsl.org/>> (Latest access 15 September 2018)

The SCSL had superiority over any court of Sierra Leone and could take precedence in cases of possible conflicting jurisdiction. In practice, however, it is understood that the Prosecutor did not include Sierra Leonean crimes in the SCSL subject-matter jurisdiction in any of its 14 indictments served. The SCSL Statute also stipulated different types of crimes with which the Court could charge individuals. However, the SCSL had no jurisdiction over those under the age of 15.²⁵⁹ The Trial Chamber was entitled to impose on a convicted person (other than a juvenile offender) imprisonment for a specified number of years, the term of imprisonment to depend on the gravity of the offence, and the individual circumstances of the convicted person. Penalties could also include the seizure of property. For instance, the SCSL ‘shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court...’²⁶⁰

The SCSL was therefore dependent upon the ‘imposition of international law, through the inclusion of international crimes’²⁶¹ in the SCSL Statute. This is in contrast to the ECCC Law, the IHT Statute in Cambodia and the United Nations Transitional Administration (UNTAET) in East Timor (both of which will be discussed in detail below), where the two hybrid Statutes ‘introduced into domestic law various international crimes for the purpose of the ECCC, the IHT and the SPSC respectively.’²⁶²

The fact that in the CDF case, sexual violence was not proven, and the judges decided not to hear evidence of sexual crimes: As sexual violence was not proven in the CDF case,²⁶³ the judges then decided not to hear evidence of sexual crimes. In the CDF indictment of Kondewa on child soldiering crimes, the Prosecutor did not present a proper legal argument in relation to women and girls. Instead, he presented the alleged use of ‘mystical powers’ by Kondewa as a way of proving the guilt and liability of the defendant.²⁶⁴

²⁵⁹ See Statute of the Special Court for Sierra Leone, Article 7 (2002)

²⁶⁰ Ibid

²⁶¹ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictions Issues* (Hart, 2012) 200

²⁶² Ibid 200

²⁶³ See *Prosecutor v Fofana, Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber Judgment (28 May 2008) Paras 141 and 146 <<https://tinyurl.com/yaarmq9b>> (Latest access 13 September 2018)

²⁶⁴ M Staggs, ‘Second Interim Report on The Special Court for Sierra Leone: ‘Bringing Justice and Ensuring Lasting Peace’-Some Reflections on the Trial Phase at the Special Court for Sierra Leone.’ (2006) California U C Berkeley War Crimes Studies Centre 1, 12 <<https://tinyurl.com/y8ocqm7g>> (Latest access 13 September 2018)

On appeal, the majority of the judges of SCSL Appeals Chamber²⁶⁵, based on the Rome Statute of the ICC that contained the elements of crimes²⁶⁶ of enlistment, conscription and use of children in armed conflict, determined that there was sufficient evidence to convict both Fofana and Kondewa for crimes against humanity. However, the SCSL Appeals Chamber overturned the convictions for both accused ‘for the offense of collective punishment due to the absence of specific intent.’²⁶⁷ Kondewa’s conviction for the conscription of child soldiers in armed conflict was also overturned. This thesis demonstrates that the decision by the SCSL Appeal court judges not to listen to or adjudicate on the merit of the case could be deemed to be biased and a measure of unfair justice on the affected victims.²⁶⁸ Judges should exercise their functions without fear, favour or prejudice. The rule of law requires that trials on behalf of the state or International Community be conducted reasonably and in fair way. The decision to adjudicate cases must not be motivated by improper and political considerations, but by the public interest and the need for justice.

In terms of procedural and fair justice, one can argue that failure by the SCSL judges to convict Kondewa (a CDF government militia)²⁶⁹ for the conscription of child soldiers could raise serious doubt about independence and neutrality of the SCSL Appeal judges. This, in my view could be due to lack of experience, thus limiting the legitimacy, legacy and standard administrative justice of the SCSL hybridity.

The fact that Charles Taylor was tried in the Netherlands: Charles Taylor was tried and convicted by the UN backed SCSL. Prior to that, Taylor was arrested and transferred to the SCSL in Sierra Leone and charged with 11 counts of crimes against humanity, war crimes and other serious violations of international humanitarian law, including murder, rape, acts of terrorism and enlisting child soldiers, alleged crimes committed against the people of Sierra Leone through his support for the rebels of the Revolutionary United Front (RUF) during the civil war.²⁷⁰ Due to security related

²⁶⁵ *Prosecutor v Fofana, Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber Judgment (28 May 2008) <<https://tinyurl.com/yaarmq9b>> (Latest access 10 September 2018)

²⁶⁶ See Rome Statute of the International Criminal Court, Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) (1999 -2002) <<https://tinyurl.com/k4slofk>> (Latest access 15 September 2018)

²⁶⁷ *Prosecutor v Fofana, Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber Judgment (28 May 2008) Paras 141 and 146 <<https://tinyurl.com/yaarmq9b>> (Latest access 13 September 2018)

²⁶⁸ *Prosecutor v Fofana, Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber Judgment (28 May 2008) paras 141 and 146 <<https://tinyurl.com/yaarmq9b>> (Latest access 13 September 2018)

²⁶⁹ Ibid

²⁷⁰ See ‘The Trial of former Liberian president Charles Taylor resumes at the Special Court for Sierra Leone in The Hague’ (2010) The Hague Justice Portal para 2 <<https://tinyurl.com/y78rw99f>> (Latest access 13 September 2018)

concerns expressed by West African regional leaders, Charles Taylor was transferred to the Hague in Netherlands.²⁷¹ Taylor's trial which commenced in the Hague on January 2009 was initially held in an ICC court room but presided over by SCSL judges and under the status and rules of procedures of the SCSL.²⁷²

They later moved Taylor to the STL courtroom, and it finally ended at the ICTY court premises.²⁷³ The transfer and trial of Charles Taylor in the in The Hague on January 2009 received very serious criticisms from some Sierra Leoneans and civil society groups.²⁷⁴ This was evidenced in a statement made in the *Prosecutor v Charles Ghankay Taylor* case, that 'the decision by the President to move the trial from the seat of the Court in Freetown has had serious implications.'²⁷⁵ Also the 'civil society organisations represent people from all walks of life throughout Sierra Leone. These people lived through the conflict and want to be part of the process of bringing to book the alleged perpetrators of those who bear the greatest responsibility of war crimes and crimes against humanity.'²⁷⁶ Additionally and according to one Sierra Leonean diplomat, 'transferring the trial of the most notorious defendant to far away Netherlands would render worthless the little that has been learned so far.'²⁷⁷

In contrast to both the ICTY and ICTR this thesis demonstrates that, amongst the unique features of the SCSL were its hybridity in nature: 1) It was the first court to be located in the country where the crimes took place,²⁷⁸ 2) the first to have a mixture of both national and international staff (including prosecutors and judges),²⁷⁹ 3) the first court that was mandated to prosecute people 'bearing the greatest responsibility' for crimes committed in Sierra Leone after 30 November 1996, the date of the failed Abidjan Peace Accord,²⁸⁰ 4) the first to have an effective and efficient outreach section, and to view it as legacy success as 'core elements of its work from a very early

²⁷¹ *Prosecutor v Charles Ghankay Taylor*, Case No SCSL-2003-01-P, (7 March 2007) Application for Civil Society Amicus Curiae Brief Regarding Change of Venue of Taylor Trial Back to Freetown para 4

²⁷² The Rules of Procedure and Evidence are loosely based on those of another ad hoc tribunal, the International Criminal Tribunal for Rwanda. They were amended on 1 August 2003. See UNDP, 'The "Legacy" the Special Court for Sierra Leone' (2003) International Centre for Transitional Justice 1, 4

²⁷³ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone paras 6-8 <<http://www.rscsl.org/Taylor.html>> (Latest access 13 September 2018)

²⁷⁴ *Prosecutor v Charles Ghankay Taylor*, Case No SCSL-2003-01-P, (7 March 2007) Application for Civil Society Amicus Curiae Brief Regarding Change of Venue of Taylor Trial Back to Freetown para 4

²⁷⁵ Ibid

²⁷⁶ Ibid para 4

²⁷⁷ J Leigh, 'Charles Taylor should be tried in Sierra Leone' Cocorioko' The Voice of the People (Online Newspaper, 12 September 2018) para 8 <<https://tinyurl.com/y7w7f7at>> (Latest access 13 September 2018)

²⁷⁸ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone para 2 <<http://rscsl.org/>> (Latest access 2 October 2018)

²⁷⁹ Ibid

²⁸⁰ Ibid

stage’,²⁸¹ 5) the first to have court to be funded through voluntary contributions support by interested UN member states,²⁸² 6) the first court to prosecute and convict persons for the use of child soldiers (AFRC trial), for forced marriage (another inhumane act) as a crime against humanity (RUF trial), and for attacks directed against United Nations peacekeepers (RUF trial),²⁸³ 7) the first hybrid court (and the first court since Nuremberg) to indict, prosecute and convict a sitting head of state (Taylor trial),²⁸⁴ and 8) it was also the first court to complete its ‘mandate and transition to a residual mechanism.’²⁸⁵

Within procedural, substantive, retributive, transitional justice and interpretive community perspectives, one of the primary objectives in establishing the SCSL was not only to persecute those responsible for war crimes and crimes against humanity in Sierra Leone, but also to drive home the fundamental democratic principle that no one is above the law.

The SCSL was also established to benefit the affected victims, judicial administrative standard of justice, and the people of Sierra Leone and even the sub region. The SCSL location (its physical presence in Freetown), the mixed nature of the court that included both international and Sierra Leonean staff, the voluntary funding and its jurisprudence (case law) provided increased opportunities for making the court accessible to the people of Sierra Leone and leaving a lasting legacy of the court’s work.²⁸⁶ So ‘for Charles Taylor to be taken away and tried in The Hague did dissipate the hybrid nature’²⁸⁷ of the SCSL as well as underpinning the primary reason for which it created, thus reducing the impact of the legacy and success of the SCSL. The hybridity of the SCSL had been discussed in detailed in chapter 4).

The limitation of the SCSL jurisdiction: The limitation of the SCSL jurisdiction illustrated another weakness of the Court where the defendant or evidence is outside

²⁸¹ See the Special Court for Sierra Leone: ‘Impact and Legacy Survey for the Special Court for Sierra Leone’ (2012) Special Court for Sierra Leone and No Peace Without Justice 1. Also see P Mochochoko and G Tortora, ‘Management Committee for the Special Court for Sierra Leone’ in Cesare P R Romano, *et al Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004) 142

²⁸² See Special Court for Sierra Leone: Residual Special Court for Sierra Leone para 2 <<http://rscsl.org/>> (Latest access 2 October 2018)

²⁸³ Ibid para 14

²⁸⁴ Ibid para 15

²⁸⁵ Ibid para 3

²⁸⁶ See ‘Bringing Justice: The Special Court for Sierra Leone Accomplishments, Shortcomings, and Needed Support’ (2004) Volume 16 Human Rights Watch 1, 32

²⁸⁷ See First Annual Report of the President of the Special Court for Sierra Leone, for the Period (2 December 2002- 1 December 2003) 31

of Sierra Leone.²⁸⁸ The SCSL did not have the power to request for an extradition from a third country. This was in contrast to the ICTY and the ICTR²⁸⁹, or the ICC²⁹⁰, which had the power to demand extradition from third states. For instance, Charles Taylor was indicted by the SCSL for supporting and financing the RUF rebels but remained in Nigeria for about three years after his indictment by the SCSL in 2003.²⁹¹ Also, the SCSL missed its timeline. ‘Three years proved to be far too ambitious a timetable and by 2006 none of the trials were finished. Eight accused were on trial, three were dead, one was on the run,’²⁹² and Taylor had his trial and conviction completed in September 2013.

Concluding, and reflecting on justice theories and interpretive community lens, although SCSL was successful to hold to account those who committed grave international crimes, and had significant impact and legacy, it did have some limitations as set out above. There is an argument that ‘disproportionate attention and resources are given to the Special Court, which has a very limited role and mandate, in comparison with the domestic legal system, which is in dire need of resources itself, and the breakdown of which is sometimes identified as a root cause of the conflict.’²⁹³ With the resources at its disposal, the SCSL could have undertaken more prosecutions, done more for the victims of the civil war, and done even more to deliver justice and contribute to lasting peace and stability. Nonetheless, the SCSL judgments proved that it has had a legacy impact and demonstrated that is possible to have criminal trials of people who have committed serious crimes irrespective of their status.

Conclusion

In conclusion, the research thesis has attempted to evaluate and analyse the success of the SCSL and critique its weaknesses as well. As already indicated above, the vitally important strengths that this thesis posits exist in the working and legacy of the SCSL. The SCSL is not without its critics however, and it sustained some of these criticisms

²⁸⁸ See statute of the Special Court for Sierra Leone Article 1 (1) (July 2002)

²⁸⁹ See ICTR Statute article 8 (2) (1994) <<https://tinyurl.com/y8q9x2y5>> (Latest access 15 September 2018), and ICTY Statute article 9 (1993), amended in (1998) <<https://tinyurl.com/yaglfqcp>> (Latest access 15 September 2018)

²⁹⁰ See Rome Statute of the International Criminal Court, article 13 (1999 -2002) <<https://tinyurl.com/k4slofk>> (Latest access 15 September 2018)

²⁹¹ Human Rights Watch, ‘Nigeria: Detain Taylor Immediately Liberia’s Ex-Leader Must Be Found and Sent to Trial’ (2006) paras 1-10 <<https://tinyurl.com/ycze6y9v>> (Latest access 2 October 2018)

²⁹² C Stephen, ‘The Taylor Trial: A Model for International Justice’ (August 2010) Global Policy Forum para 45 <<https://tinyurl.com/yd7fxeh9>> (Latest access 15 September 2018)

²⁹³ See UNDP, ‘The “Legacy” the Special Court for Sierra Leone’ (2003) International Centre for Transitional Justice 1, 8

would need to be set against these strengths, as outlined above. Notwithstanding the SCSL limitations and the criticisms levied against the SCSL, this thesis would argue that it scored a number of firsts as alluded to above, and also achieved a measure of potential success in contributing to international criminal justice standards, including within ICL and ICC.²⁹⁴ Based on its outreach project, many people from affected communities were aware of and engaged in the work of the SCSL, and have reflected on its significance.²⁹⁵

Additionally, the SCSL indicted and convicted a total of 13 perpetrators of international crimes from the different warring factions, including Taylor.²⁹⁶ The SCSL carried out its trials at a 'fraction of the cost of the other UN tribunals. It was found also that the combination of trials for the leaders and truth and reconciliation for everyone else produced a bonus for prosecutors as the subordinates of many of those on trial, having been forgiven their own crimes...²⁹⁷' It is also vital to argue that the SCSL judgments represent the first legal jurisprudence made by a hybrid court on war crimes including recruitment of crimes against humanity and other inhumane acts such as child soldier enlistment and forced marriage,²⁹⁸ as well as aiding and abetting.²⁹⁹ It is helpful to review the case law through the framework of theories of justice exploring the various judgments in terms of procedural, retributive, corrective, and transitional justice theories.³⁰⁰ An interpretative community lens³⁰¹ therefore highlights how the collective will of the Sierra Leone Government and the Sierra Leonean people, civil society and the International Community not only stayed their course in the transition of Sierra Leone from conflict to the restoration of the rule of law, but fundamentally contributed to justice in Sierra Leone.³⁰²

²⁹⁴ C C Jalloh, *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 772. Also see chapter 7 for detailed analysis

²⁹⁵ See the Special Court for Sierra Leone 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) Special Court for Sierra Leone and No Peace Without Justice 1, 16

²⁹⁶ See the Special Court for Sierra Leone: 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) Special Court for Sierra Leone and No Peace Without Justice 1, 1 and 9-10

²⁹⁷ C Stephen, 'The Taylor Trial: A Model for International Justice' (August 2010) Global Policy Forum para 43 <<https://tinyurl.com/yd7fxeh9>> (Latest access 13 September 2018)

²⁹⁸ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone para 13-15 <<http://rscsl.org/>> (Latest access 2 October 2018). Also see chapters 5 and 6 for detailed analysis

²⁹⁹ *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Trial Chamber II, Judgement (30 May 2012) para 13 <<https://tinyurl.com/yadjdkgg>> (Latest access 20 August 2018). See chapter 6 part 2 for detailed analysis

³⁰⁰ See for detailed discussion and analysis on the justice theory, see chapter 2

³⁰¹ See for detailed discussion and analysis on this, see chapter 2

³⁰² Taegin Reisman, 'Charles Taylor found guilty' (2012) International Justice Monitor paras 1- 4 <<https://tinyurl.com/yanklga7>> (Latest access 22 August 2018)

Despite the lack of clear definition relating to child soldier enlistment and forced marriage, this thesis will argue that the SCSL, AFRC, RUF, CDF, *Taylor* trials and judgments represent some of the world's most successful legal jurisprudence (case law) within International Criminal Law and justice.³⁰³ The SCSL judgments were innovative³⁰⁴ and filled a lacuna in the law. Lessons learnt from the SCSL judgments are that Sierra Leoneans will be gainfully employed in their 'national justice system, including in the formulation of new laws and standards and the interpretation of existing laws.'³⁰⁵ Also, the other 'indirect beneficiaries' of the SCSL legacy are the 'international community at large and international law' specifically.³⁰⁶ This is because charges of child soldier enlistment and forced marriage can be replicated and emulated by the ICC and other tribunals, and we can build upon and improve these case laws. For example, the SCSL judgments have now been followed by the ICC through the *Lubanga case*,³⁰⁷ and its outreach work as well.³⁰⁸ Similarly, other hybrid courts like STL followed the work of the SCSL. For example, 'the institutional defense innovation from the SCSL served as inspiration for the first such autonomous office in the history of international criminal law at the Special Tribunal for Lebanon.'³⁰⁹

Moreover, the judgments also demonstrated the SCSL's ability to refine the law, for instance in its finding that child soldier abduction and recruitment constitute conscription, and in recognising forced marriage as a separate distinct crime, described as an 'important milestone on the road to justice for all victims of the conflict.'³¹⁰ The AFRC, RUF, CDF, and *Taylor* judgments, which reflect procedural, retributive and corrective as well as transitional justice theories, hinged on the principle that prosecution, convictions and sentencing are necessary and beneficial elements in response to wrongdoing. The SCSL judgments and its developed international

³⁰³ A Smith, 'Sierra Leone: The Intersection of Law, Policy, Practice' in C P R Romano, A Nollkaemper and J K Kleffner (ed), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (OUP, 2004) 128

³⁰⁴ D Cohen, 'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia: 'Lessons Learned' and Prospects for the Future' (2007) Volume 43 Stanford Journal of International Law 1, 19

³⁰⁵ A Smith, 'Sierra Leone: The Intersection of Law, Policy, Practice' in C P R Romano, A Nollkaemper and J K Kleffner (ed), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (OUP, 2004) 128

³⁰⁶ Ibid

³⁰⁷ C C Jalloh, *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 772

³⁰⁸ Ibid

³⁰⁹ Ibid

³¹⁰ See Press Release: International Centre for Transitional Justice (22 June 2007) < <https://www.ictj.org/> > (Latest access 22 August 2018)

jurisprudence can now be considered a success legacy and an expression of International Criminal Law, because it applied Customary International Law, and also referred to general principles of law.

This thesis will also illustrate that judgments were highly significant in demonstrating how justice could help prevent future atrocities and heal a wounded country. Retributive justice theory, in particular, provides valuable insight into one of the research questions: How effective was the hybrid court in serving justice? Can this model be replicated in other countries? The theory of retribution was clearly at work in the SCSL Appeals Chamber sentencing statement, that with regards to legitimacy ‘the primary objectives must be retribution and deterrence.’³¹¹ The SCSL Appeals Chamber made reference to the ICTY Appeals Chamber which stipulated that, ‘it is well established that at the ICTY and ICTR, retribution and deterrence are the main objectives in sentencing.’³¹² In all of the jurisprudence, it can be presumed that the AFRC, RUF, CDF and *Taylor* judgments cases would have both specific and general deterrent effects relating to child soldier recruitment, forced marriage and aiding and abetting on war crimes, crimes against humanity and other inhumane acts. International Criminal Law, as expressed and developed by the SCSL jurisprudence, can now be relied upon by the ICC. The SCSL judgments were not only vital for demonstrating the apparent dispensation of justice within post-conflict Sierra Leone, but also for future criminal trials dealing with similar charges.

Additionally, this thesis took into account how far these criticisms are justified and, crucially, the extent to which that needs to inform our understanding of the SCSL as a model for future courts. Also, this thesis illustrates, however, that at a critical crossroads in the country’s history, the SCSL contributed to the country’s attempts to come to terms with what had happened and take tentative steps towards a more secure future; and in doing so provided significant jurisprudence and case law success legacy with potential for replication and implications for the future administration of justice within Sierra Leone and beyond.

Finally, this research is carried out specifically for audiences such as the Sierra Leone Government, the International Community, and the Sierra Leonean populace and the

³¹¹ *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Trial Chamber II, Judgement (30 May 2012) para13 <<https://tinyurl.com/yadjdkgg>> (Latest access 20 August 2018)

³¹² Ibid

ICC.³¹³ Already mentioned above, these layers wanted to ensure that those who committed serious international crimes were held to account for their actions through fair trial and justice. In examining the SCSL's success legacy through the lens of theories of justice and interpretative community, this research thesis makes a modest but unique contribution to the development of knowledge in the field of International Criminal Law scholarship which will make a contribution to knowledge. Within this context, this research would improve both ICL and ICCs' policies and practices on the prosecution of the recruitment of child soldier as war crime and forced marriage (another inhumane act) as crime against humanity.³¹⁴

Section 6

1.6 The emergence of International Criminal Justice

The concept of International Criminal Justice emerged as a response to atrocities committed during the First and Second World Wars, which led to the birth of International Criminal Law. The first trials attempting to hold individuals responsible for actions that could be deemed international crimes, and 'most importantly, to document those atrocities so that a permanent historical record would be created'³¹⁵ were held after the Second World War in 1945 to 1949 in Nuremberg, Germany. The indictments were crimes against peace, war crimes and crimes against humanity.³¹⁶

A number of permanent and *ad hoc* International Criminal Tribunals and courts have been established by the UN to address war crimes, crimes against humanity and genocide, resulting in the emergence of the International Criminal Justice system. For example, the United Nations Security Council (UNSC) created an *ad hoc* court, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, which was then followed by the International Criminal Tribunal for Rwanda (ICTR) in 1994, and

³¹³ A Smith, 'Sierra Leone: The Intersection of Law, Policy, Practice' in C P R Romano, A Nollkaemper and J K Kleffner (ed), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (OUP, 2004) 128

³¹⁴ C C Jalloh, *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 772. See Special Court for Sierra Leone: Residual Special Court for Sierra Leone paras 13-15

³¹⁵ See 'New Exhibition: Remembering the Nuremberg Trials: 70 Years Later' (September 2016) Legal Research advice, Law Library resources and collections paras 1-2 <<https://tinyurl.com/ydyukfk8>> (Latest access 17 September 2018)

³¹⁶ Ibid Also see 'Special Focus - The Nuremberg Trials Their Legacy' (2018) The United States Holocaust Memorial Museum paras 1-3 <<https://tinyurl.com/y9vrys8b>> (Latest access 6 June 2018)

then hybrid courts for Sierra Leone, Cambodia, East Timor, and Lebanon respectively.³¹⁷

Additionally, the International Criminal Court that was established by Treaty and not by the UN, traces its origins from the International Military Tribunal at Nuremberg, is a court that also has jurisdiction in addressing the most heinous crimes committed in armed conflict. 'On 17 July 1998, the Rome Statute of the ICC was adopted by a vote of 120 to 7, with 21 countries abstaining.'³¹⁸ The aim of this permanent court was to prosecute individuals who perpetrated serious international crimes such as: war crimes, crimes against humanity, and genocide in order to bring about International Criminal Justice.³¹⁹

Prior to that, there was a very clear distinction in International Law (IL) between the state and the individual, with only the former having direct obligations put upon it through International Law. The creation of these tribunals and hybrid courts has fundamentally assisted the international community to address the issue of International Criminal Justice globally.

However, the International Military Tribunal (IMT) in Nuremberg, Germany that tried individual Nazi officers responsible for war crimes and crimes against humanity had its 70th Anniversary on 30 September 2016 which also saw its final closure.³²⁰

Conclusion

In conclusion, there has been a fundamental change in the concept of International Criminal Justice emerging as a response to atrocities that have been perpetrated during the World Wars I and II, which led to the prosecutions and judgments made at the IMT of Nuremberg and Tokyo. Since 1993, a number of permanent and *ad hoc* International Criminal Tribunals and the International Criminal Court have been established to address war crimes, crimes against humanity and genocide, resulting in the emergence

³¹⁷ L A Barria and S D Roper, 'Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia' (2005) Human Rights Review 1, 2 - 6

³¹⁸ D Hoilie, *Justice denied: The reality of the International Criminal Court* (The Africa Research Centre, London 2004)12

³¹⁹ Ibid

³²⁰ See 'New Exhibition: Remembering the Nuremberg Trials: 70 Years Later' (September 2016) Legal Research advice, Law Library resources and collections paras 1-2 <<https://tinyurl.com/ydyukfk8>> (Latest access 17 September 2018)

of the International Criminal Justice system. Within the creation of tribunals and hybrid courts, the SCSL model judgments have a specific contribution to make to International Criminal Justice and the continued development of International Criminal Law.

Chapters 2 will account in detail the historical perspectives and analysis of the SCSL justice and its theories as well as an interpretive community lens.

Chapter 2: The historical context and theories of justice

In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.³²¹

Introduction

The purpose of this chapter is to examine the historical context of justice and its theories as well as an interpretive community lens. There are other theoretical frameworks that could be used, however, this research thesis has selected these approaches because the research believes they offer a new insight into the impact, success and legacy of the SCSL model. As already stated in chapter 1 section 1, through the theories of justice and interpretive community perspectives, the research will also take the start of the art further by focusing on an evaluation and analysis of the success of the SCSL legacy. Clearly, the theoretical frameworks here mirror the research arguments.

Post-conflict state building represents a major challenge in political, economic, cultural and social spheres.³²² One particular challenge in Sierra Leone was the task of addressing the human right abuses³²³ committed during the war as this was necessary in order to achieve justice. The Special Court for Sierra Leone (SCSL), established in 2002, had a mandate to prosecute and convict people who bore the greatest responsibility for serious crimes and human rights abuses committed since 30 November 1996.³²⁴ Post-conflict state building is critical to the political stability, justice system, and democratic good governance of any post-conflict state.

This chapter will examine the enforcement of International Criminal Justice within the SCSL's judicial practice, which has contributed to the concepts of fair justice today. An examination, analysis and evaluation of the theories of justice will enable us to understand the legitimacy of the SCSL, and help in assessing how effective it has been

³²¹ See the Establishment of an International Criminal Court - *overview* <<http://legal.un.org/icc/general/overview.htm>> (Latest access 30 June 2018)

³²² T M Clark, 'Assessing the Special Court's Contribution to Achieving Transitional Justice' in C Jalloh (eds), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2013) 748

³²³ C Byron, D Turns, C Warbrick and D McGoldrick (ed), 'The preparatory Commission for the International Criminal Court' (2001) Volume 50 *The International and Comparative Law Quarterly* 420, 430

³²⁴ See Statute of the Special Court for Sierra Leone (2000) established by an agreement between the United Nations and the Government of Sierra Leone pursuant to SC Res. 1315, 14 August 2000 (enacted on 16 January 2002) Article 1(1)

in serving justice in Sierra Leone. Also, the chapter will cite examples from other initiatives and countries, including those in transition which made significant efforts to pursue both national and international justice, such as: the Nuremberg and Tokyo Military Tribunal trials after World War II, Yugoslavia, Rwanda, Cambodia, East Timor, Lebanon, the Democratic Republic of Congo (DRC), Uganda, Senegal, South Africa, Yemen, Iraq, Libya, Sudan, Tunisia, Morocco, Egypt, Iraq, Bahrain, Gaza, and Yemen. The selection of these examples is deliberate because most of them are not only seen to be serving justice, but also fostered political stability and promoted lasting peace and reconciliation in post-conflict state building communities. In summary, the notion of ‘theory of justice as a whole, the ideal part presents a conception of a just society that we are to achieve if we can.’³²⁵ The common-sense belief is that ‘justice is the first virtue of social institutions.’³²⁶

The research also reviews the definitions, historical context and theories of justice, and focuses on four areas: a) procedural justice; b) corrective justice; c) retributive justice; and d) transitional justice (with case studies as examples) and draw conclusions.

In relation to the theoretical framework, I would like to adopt the use of the approach of ‘interpretive community’³²⁷ in order to determine whether justice has been done, and to answer these questions: How effective was the hybrid court in delivering justice? Can this model be replicated in other countries? This tool has been used in the past by both Henderson³²⁸ and Johnson.³²⁹ The aim is not to explore the strength of this tool, but rather to use it in order to help provide a useful analytical framework in relation to the SCSL establishment and judicial operation in Sierra Leone. According to Johnson, ‘lawmakers mediate the relation between States through the activities of Interpretive Communities. The strength of the mediating influence turns on the extent to which the relevant communities are unified.’³³⁰ For example, in Sierra Leone, civil society groups and NGOs played a significant role in the establishment of the SCSL that helped to bring about fair justice, peace and reconciliation in the country. The

³²⁵ J Rawls, *A Theory of Justice* (Revised edn, OUP, 1999) 216

³²⁶ Ibid 513

³²⁷ C Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (Ashgate, UK, 2010) 22. Also see N Goswami, ‘The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era’ by Christian Henderson, *Strategic Analysis* (2011) Volume 35 *Journal of Conflict Security Law* 175

³²⁸ Ibid 22-25

³²⁹ I Johnson, ‘Treaty Interpretation: The Authority of Interpretive Communities’ (1990-1991) Volume 12 *Michigan Journal of International Law* 371, 372

³³⁰ Ibid 371, 375

interpretive community in this context³³¹ will represent two sets: primary (concerned with the 15 members of the UNSC) and secondary (relates to a community that consists of civil society and Non-Governmental Organisations (NGOs), courts and judges). It is vital to state that civil society and NGOs in Sierra Leone played a fundamental role in the establishment and implementation of both the Truth and Reconciliation Commission (TRC) and the SCSL as mechanisms to end violence and restore lasting peace, reconciliation and political stability.³³² The use of this theoretical framework will thus help in assessing and evaluating the effectiveness of the SCSL in serving justice; its hybridity; and also whether it can be a model for others to emulate.

2.1 Definitions, historical context and principles of justice

In considering the significance of justice and its principles, it is necessary to understand both its meaning and historical context. The word ‘justice’ is used on a daily basis and is contained in many states’ constitutions and other relevant documents. The word ‘justice’ is obtained from the Latin word *jus*, which means right or law.³³³ The concept of justice is extraordinarily wide in scope and has been widely contested.³³⁴ Although there is no universal definition of justice, there is an overwhelmingly held belief that justice is fundamentally significant both in political and moral terms and achieving it is paramount and non-negotiable.

Justice in a post-conflict state building situation addresses four layers: procedural justice which makes reference to national rule of law and ways of legal redress in a community; corrective justice, which makes reference to structural and ‘systematic injustices’ for instance, political and economic discrimination and inequality; retributive justice, which helps to deter those who might be inclined to perpetrate such heinous international crimes in the future; and transitional justice, which makes reference to the issue of addressing injustice with regards to ‘gross violations of human

³³¹ C Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (Ashgate, UK, 2010) 22 - 26

³³² A Smith, ‘The Expectations and Role of International and National Civil Society and the SCSL’ in Charles Jalloh (eds), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013) 46

³³³ K Knight, *Aristotelian Philosophy: Ethics and Politics from Aristotle to MacIntyre* (Polity Press, 2007) 4 - 40. See J Barnes (ed), *The Complete Works of Aristotle: The Revised Oxford Translation* (Vol. 2 Princeton University Press, 1991). Also see ‘Western Theories of Justice’ in the Internet Encyclopaedia of Philosophy- IEP. A Peer-Review Academic Resource. <<http://www.iep.utm.edu/justwest/>> (Latest access 1 August 2014)

³³⁴ C Brants, ‘Universal crimes, universal justice? The Legitimacy of the international response to genocide, crimes, against humanity and war crimes’ in Adam Crawford (ed), *International Comparative Criminal Justice and Urban Governance: Convergence and Divergence in Global, National and Local Settings* (Cambridge University Press, 2011) 86. Also see Adam Crawford (ed), *International Comparative Criminal Justice and Urban Governance: Convergence and Divergence in Global, National and Local Settings* (CUP, 2011) 18

rights, international criminal law, and international humanitarian law suffered by the people during the conflict'.³³⁵

According to Brants, 'justice is not only a matter of law. It is a process of making sense of the past and accepting the possibility of a shared future together; although perpetrators, victims and bystanders may have very different memories and perceptions, experiences and expectations.'³³⁶ Justice, in the lens of both theoretical and practical perspectives consists of procedures such as trials, reparations, and truth as well as reconciliation commissions.

Justice *per se* is part of what Sierra Leone has needed in order to rebuild the community after the conflict in order to establish the rule of law, democracy and achieve long-term peace and stability.

The concept of justice has been developed throughout history, from ancient Greece, in the era of Aristotle³³⁷, to modern thoughts. The concept of justice employed by Aristotle applied to critical social issues such as 'civil disobedience, punishment, equal opportunity for women, slavery, war, property rights, and international relations'.³³⁸ Aristotle also argued that justice draws from what is lawful and fair, with fairness consisting of 'equitable distributions and the correction of what is inequitable.'³³⁹ Centuries later, Hobbes³⁴⁰ maintained that justice is an artificial virtue, a prerequisite for civil society, 'a function of the voluntary agreements of the social contract.'³⁴¹ Rawls defines justice as the 'first virtue of social institutions, as truth is of systems of thought.'³⁴² Justice is commonly associated with the word 'fairness', and with the view that everybody merits equal and impartial treatment.³⁴³ Justice also requires that people not be judged or treated unfairly because of skin colour,

³³⁵ T M Clark, 'Assessing the Special Court's Contribution to Achieving Transitional Justice' in C Jalloh (eds), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013) 748

³³⁶ C Brants, A Hol and D Siegel, (eds), *Images and Memories* (Ashgate, 2013) Abstract <<http://www.ashgate.com/isbn/9781409438854>> (Latest access 4 June 2018)

³³⁷ See 'Western Theories of Justice' in the Internet Encyclopaedia of Philosophy- IEP. A Per Review Academic Resource <<http://www.iep.utm.edu/justwest/>> (Latest access 4 June 2018)

³³⁸ Ibid

³³⁹ Ibid

³⁴⁰ J Cottingham (ed), *Western Philosophy: An Anthropology* (Blackwell Publishers, 1996) 221-221 & 227

³⁴¹ J Olsthoorn, 'Hobbes's Account of Distributive Justice as Equity' (2013) *British Journal for the History of Philosophy* 13, 15-16 < <http://dx.doi.org/10.1080/09608788.2012.689749>> (Latest access 5 June 2018)

³⁴² J Rawls, *A Theory of Justice* (Revised edn, OUP, 1999) 3

³⁴³ Ibid

religion³⁴⁴, race, sex, attire and appearance³⁴⁵ (for instance, *Sahin v. Turkey* case was a major transitional reference point where the relationship between international and national justice legal systems were cited within the European Court of Human Rights (ECHR) jurisprudential context).

Justice means that everyone should be equal before the law whether in the workplace, local bar or courtroom. For instance, women should not be paid less than men because of their sex. Indeed, the social development of women is an important aspect of social justice³⁴⁶, and part of human rights in general. Sen made an added valuable insight into the notion and origins of rights. He associated his notion with what Rawls called public reasoning.³⁴⁷ Ramcharan proffered that, ‘human rights thus perform aspirational roles in the contemporary world community and help provide a policy framework for international cooperation’³⁴⁸ as a result.

2.1.1 Procedural Justice

Procedural justice is defined as the ‘perceived fairness of procedures that are used to obtain a given outcome,’³⁴⁹ and by which decisions are made. Procedural justice also concerns the due process of the law. Procedural justice, the Western formal legal justice system of accountability for crimes which fosters a prosecutorial, adversarial, retributive model, has been found to influence satisfaction for victims of crime.³⁵⁰ This is because instead of concentrating only on punishment and compensation, procedural justice analyses and evaluates whether justice has been seen to be done. It is based on

³⁴⁴ For a detailed analysis on religious freedom, see L Vickers, ‘Religious Freedom: Expressing Religion, Attire, and Public Spaces’ in David Giller and Florence Z Mao (ed), (2013-2014) Vol. XX11 Journal of Law and Policy 483, 591-611

³⁴⁵ See *Sahin v Turkey*, Application no. 44774/98, Council of Europe: European Court of Human Rights (10 November 2005) <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956#{"itemid":\["001-70956"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956#{)> (Latest access 4 June 2018)

³⁴⁶ Powers and Faden maintained that Social justice ‘is concerned with securing and maintaining the social conditions necessary for a sufficient level of well-being in all of its essential dimensions for everyone.’ See D S Silva, ‘Powers and Faden’s Concept of Self-Determination and What It Means to ‘Achieve’ Well-Being in Their Theory of Social Justice’ (2013) Volume 6 Public Health Ethics 35

³⁴⁷ The view of ‘human rights in terms of social ethics and public reasoning contrasts with seeing human rights in primary legal terms, either as consequences of humane legislation, or as precursors of legal rights. Human rights may well be reflected in legislation, and may also inspire legislation, but this is further fact, rather than a defining characteristic of human rights themselves’. See A Sen, ‘Human Rights and Developments’ in Bard Andreassen and S Marks (eds), *Development as a Human Rights* (Cambridge, Mass: Harvard University Press, 2006) 3

³⁴⁸ B G Ramcharan, *Cotemporary Human Rights Ideas* (Routledge, 2008) 25

³⁴⁹ Malini Laxminarayan, ‘Procedural Justice and Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type’ (2012) 25 Soc Just Res 390, 391

³⁵⁰ W Lambourne, ‘Transformative justice, reconciliation and peace building’ in K M Clark (eds), *Transitional Justice Theories* (CUP, 2009) 20

the belief that ‘if people feel they are treated fairly by authorities with procedural justice, they will be more accepting of, and satisfied with an authority’s decision.’³⁵¹ Criminal justice procedures and judicial decisions are therefore perceived to have not only a positive impact on satisfaction and overall well-being³⁵² of affected victims, but to help build trusting relationships, peace, stability and reconciliation within the community.³⁵³ In order for a war-torn state or community like Sierra Leone to have peace and stability, it is always the case that victims of crime would like to see that justice has been correctly served. The application of the criminal justice procedure model in this case may lead to greater satisfaction and positive experiences for the affected community.

In his book *A Theory of Justice*, Rawls explored the principles of procedural justice by using words such as ‘pure’, ‘perfect’ and ‘imperfect’. Rawls stated that the principles of procedural justice can only be interpreted by differentiating between ‘perfect’ and ‘imperfect’ procedural justice and contrasted these with ‘pure procedural justice’.³⁵⁴ In order to illustrate this, Rawls used the first set of examples in the ‘case of fair division;’³⁵⁵ such as:

A number of men are to divide a cake: assuming that the fair division is an equal one, which procedure, if any, will give this outcome? Technicalities aside, the obvious solution is to have one man divide the cake and the last piece, the others being allowed their pick before him. He will divide the cake equally, since in this way he assures for himself the largest share possible. This example illustrates the two characteristic features of perfect procedural justice. First, there is an independent criterion for what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed. And second, it is possible to devise a procedure that is sure to give the desired outcome.³⁵⁶

Rawls alluded above to the fact that ‘there is an independent standard for deciding which outcome is just and a procedure guaranteed to lead to it’.³⁵⁷ In contrast to this, Rawls used his second set of examples to show how ‘imperfect procedural justice’ works through criminal trial, for instance:

The desired outcome is that the defendant should be declared guilty if and only if he has committed the offence with which he is charged. The trial procedure is framed to search for and to establish the truth in this regard.

³⁵¹ M K Mahoney, ‘Procedural justice and the judge-probationer relationship in a co-occurring disorders court’ (2014) *International Journal of Law and Psychiatry* 260, 261

³⁵² M Laxminarayan, ‘Procedural Justice and Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type’ (2012) 25 *Soc Just Res* 390, 391

³⁵³ *Ibid*

³⁵⁴ J B Rawls (21 February 1921 - 24 November 2002). See J Rawls, *A Theory of Justice* (Revised edn. OUP, 1999) 74

³⁵⁵ *Ibid*

³⁵⁶ *Ibid*

³⁵⁷ M Laxminarayan, ‘Procedural Justice and Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type’ (2012) 25 *Soc Just Res* 390, 391

But it seems impossible to design the legal rules so that they always lead to the correct result.³⁵⁸

The commonality between perfect and imperfect procedural justice is that, in both scenarios, it is clear that there are ‘necessary and sufficient’ requirements for the correctness of the outcome. This is different in his third set of examples of ‘pure procedural justice’. Here, Rawls maintained that:

By contrast, pure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed. This situation is illustrated by gambling. If a number of persons engage in a series of fair bets, distribution of cash after the last bet is fair, or at least not unfair, whatever this distribution is.³⁵⁹

This example illustrates that no one has more or less of a right to win than others, as there are no necessary and sufficient requirements other than procedural ones that the end result has to satisfy to be just. Therefore, ‘the just outcome can only be the one factually obtained after carrying out the procedure. If the procedure is just, the outcome *is* just, whatever it may be. Thus, *pure procedural justice cannot be imperfect*: its outcomes are either guaranteed just or downright unjust.’³⁶⁰

Key examples of the implementation of justice after the Second World War include the enforcement of international criminal justice in the Nuremberg and Tokyo trials and judgments of 1945 and 1946.³⁶¹ These trials and judgements apparently provided the first example of procedural justice in International Criminal Law. However, the application of procedural justice by states stalled for about fifty years before the international community established the International Criminal Tribunals, for example the International Criminal Tribunal for the Yugoslavia³⁶² and the International

³⁵⁸ See J Rawls, *A Theory of Justice* (Revised edn. OUP, 1999) 74-75

³⁵⁹ Ibid 75

³⁶⁰ C Lafont, ‘Procedural justice? Implications of the Rawls-Habermas debate for discourse ethics’ (2003) Volume 29 Philosophy and Social Criticism 163, 165

³⁶¹ The Nuremberg and Tokyo Military Tribunals were set up by the Allied forces (‘victors’). See Charter of the International Military Tribunal (IMT) for the Far East, Article 1 (1946), T I A S No. 1589, 4 Bevans 20 (as amended 4 Bevans 27 April 26, 1946) reprinted in Neil Boister and Robert Cryer (ed), *Documents on the Tokyo International Military Charter, Indictment and Judgements* (OUP, 2008) 7-11 and 71-84. See S Glueck, ‘The Nuremberg Trial and Aggressive War’ in Guenael Mettraux (ed), *Perspectives on the Nuremberg Trial* (OUP, 2008) 72-80. See W Maser, *Nuremberg* (The Chancer Press, 1979) 13-291, see Z D Kaufman, ‘Transitional Justice for TÖJÖ’S JAPAN: The United States Role in the establishment of the International Military Tribunal for the Far East and other Transitional Justice Mechanisms for Japan after World War 11’ (2013) Volume 27 The Emory International Law Review 755, 755-766

³⁶² K L King and J D Meernik, ‘Assessing the Impact of the International Criminal Tribunal of the former Yugoslavia: Balancing International and Local Interests While Doing Justice’ in B Swart, A Zahar and G Sluiter (ed), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP, 2011)7-14. Also see, A Boyle and M Andenas (ed), *International and Comparative Law Quarterly* (Vol.52 Part 2, OUP, 2003) 447-449

Criminal Tribunal of Rwanda.³⁶³ Other examples include the SCSL's Appeal Chamber's conviction of the former Liberian President, Charles Taylor – *Prosecutor v Charles Ghankay Taylor* in September 2013³⁶⁴ – and the creation of the permanent International Criminal Court which deals with prosecutions of individual accountability,³⁶⁵ such as the Military commanders of the Democratic Republic of Congo (DRC), namely: the *Prosecutor v Thomas Lubanga Dyilo* in July 2012³⁶⁶ and the *Prosecutor v Germain Katanga* in May 2014.³⁶⁷ These all represent significant milestones.³⁶⁸ Commentators on international justice have labelled the ICC the 'product of the evolution of international criminal law since Nuremberg, drawing upon the lessons of previous international legal institutions to create a robust court with global reach.'³⁶⁹

2.1.2 Corrective Justice

Corrective justice is concerned with the repair or correction of wrongs or wrongful losses through compensatory terms. Gardner argues that the principle of corrective justice concerns allocating 'back from one party to the other, reversing a transaction that took place between them.'³⁷⁰ Gander further asserted that the principle of normative justice regulates the conduct of the 'person from whom the transfer back is

³⁶³ The ICTY and ICTR were established by the Security Council alone. See M Guenael, *International Crimes and the AD HOC Tribunals* (OUP, 2006) 10

³⁶⁴ *Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-A, Appeals Chamber Judgment (26 September 2013) <<http://www.internationalcrimesdatabase.org/Case/1107>> (Latest access 4 July 2018), see C C Jalloh, 'The Trial of President Charles Taylor' (2014) Research Paper No. 14-28 Florida International University Legal Studies Research Paper Series 1, 1-38 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524366> (Latest access 4 July 2018), see M Milanovic, 'SCSL Appeals Chamber Affirms Charles Taylor's Conviction' (2013) European Journal of International Law <<http://www.ejiltalk.org/scsl-appeals-chamber-affirms-charles-taylors-conviction/>> (Latest access 4 July 2018). See S Meisenberg, 'The Final Judgement in the trial of Charles Taylor' *Peace Palace Library* (2013) <<http://www.peacepalacelibrary.nl/2013/09/the-final-judgement-in-the-trial-of-charels-taylor/>> (Latest access 4 July 2018)

³⁶⁵ K Sikkink, *The Justice Cascade: Human Rights Prosecutions are changing the World Politics* (W W Norton and Company Ltd., 2011) 96. Also see M Benedicte-Demboir and T Kelly (ed), *Paths to International Justice Social and Legal Perspectives* (CUP, 2007) 134

³⁶⁶ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 (July 2012) <<https://tinyurl.com/ybcap3ou>> (Latest access 4 July 2018)

³⁶⁷ *Prosecutor v Germain Katanga*, ICC-01/04-01/07 (May 2014) <<https://www.icc-cpi.int/drc/katanga>> (Latest access 4 July 2018)

³⁶⁸ M Burgis-Kasthala, 'Defining Justice during Transition? International and Domestic Contestations over the Special Tribunal for Lebanon' (2013) Volume 7 The International Journal of Transitional Justice 497, 497-500. Also see S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected jurisdictional Issues* (Hart, 2012) 340-343

³⁶⁹ P Clark, 'Grappling in the Great Lakes: The challenges of international justice in Rwanda, the Democratic Republic of Congo and Uganda' in Hilary Charlesworth, J Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict Great Expectations* (CUP, 2014) 245 <<http://ebooks.cambridge.org/ebook.jsf?bid=CBO9780511576478>> (Latest access 4 July 2018)

³⁷⁰ J Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2010) University of Oxford Legal Research Paper Series 1, 11 <<http://www.ssrn.com/link/oxford-legal-studies.html>> (Latest access 4 July 2018)

to be made or another person acting on behalf of that person.’³⁷¹ That is to say, the corrective justice principle is the reversal of transactions, rather than the addressing of allocations in general, which makes it stand in contrast to distributive justice. On the conventional legal principle, corrective justice aims to restore the status *quo ante culpum*, which is to rectify the wrong by rectifying the harm either through payment in monetary terms or an apology.³⁷² Compensating for the harm done to a victim can be realistically possible because money and sometimes an apology, for instance, act as a ‘mediator between the damaged interest and other interests’.³⁷³ For example, reform, repudiation, and reparations can be defined as a good faith effort to address harm to the victim. Normative justice principles deal with three key areas which are: the presence of non-subjective standards in the law; the place of liability insurance; and the relationship between law and politics.³⁷⁴

Furthermore, the roots of normative justice principles can also be found in Aristotle’s philosophical theory where he examined two types of justice. The first is called ‘distributive justice’. By this he means the distribution of common goods which include property, political office, honour and military service among members of the community. The second kind of justice is called ‘retributive justice’, that is, normative (corrective) justice.³⁷⁵ This refers to the correction of unjust actions by compensation of victims. Gander, in his argument on normative justice, relates his principle to Aristotle’s famous description which deals with a mathematical formula.³⁷⁶ For instance, if client X has wrongly taken five oranges from client Y, normative justice would state that X should provide Y with five oranges, or with their equivalent in value.³⁷⁷

The principles and practices contained in the reforms of Northern Ireland’s youth justice system and introduced after the peace process, show that justice principles can be successfully integrated into criminal justice reforms as part of a process of transitional justice. Corrective justice within criminal justice can also assist civil

³⁷¹ Ibid 1, 13. Also see A S Gold, ‘Theory of Regressive Justice’ (2014) Volume 64 University of Toronto Law Journal 159, 160

³⁷² S R M Lazar, ‘Corrective Justice and the Possibility of Rectification’ (2008) Volume 11 Ethic Theory Moral Practice 355

³⁷³ Ibid

³⁷⁴ A Beever, ‘Corrective Justice and Personal Responsibility in Tort Law’ (2008) 28 issue 3 Oxford Journal Legal of legal studies 475 <<http://ojls.oxfordjournals.org/content/28/3/475.abstract>> (Latest access 4 July 2018)

³⁷⁵ Aristotle (364 -322 BC). See ‘Western Theories of Justice’ in the Internet Encyclopaedia of Philosophy- IEP. A Peer-Review Academic Resource

³⁷⁶ M Doyle, ‘Corrective Justice and Unjust Enrichment’ (2012) Volume 62 University of Toronto Law Journal 299, 234 -235

³⁷⁷ D J O’ Connor, *A Critical History of Western Philosophy* (The Free Press, New York, 1985) 40-4

society to take part in the ‘administration and delivery of criminal justice, it can help break down hostility and animosity towards criminal justice and contribute to the development of social justice and civic agency, so enabling civil society to move forward in a transitional environment’.³⁷⁸ It can be argued that corrective justice principles, when enshrined within criminal justice, can contribute to the wider process of transitional justice.

Appropriate and sustainable formations of corrective justice are integral to addressing conflict. What is just and expedient in any given context must fit the injustice it is supposed to redress in the pragmatic realities of the situation.

2.1.3 Retributive Justice

In relation to retributive justice, punishment is warranted as a response to a past event, crime or wrongdoing, that is: commissioners of crimes should face criminal trials and be punished once adjudged or found guilty. Retributive justice also infers the value of legality or rule of law thereby bringing a full closure to the matter between or amongst groups. Retributive justice also helps to deter those who might be inclined to perpetrate such heinous international crimes in the future.

When an offender breaks the law, justice requires that they forgo something in return.³⁷⁹ The criminal justice system of many countries is ‘symbolized by a lady justice wearing a blindfold’³⁸⁰, meaning that when ‘evaluating transgression, the justice system should be blind to the offender’s ethnicity, gender, sexual orientation, political affiliation, and other social categorizations that are irrelevant to the nature of the transgression.’³⁸¹ As a consequence, the criminal justice system aims to bring about punishment of criminal offenders through procedures that are applicable to as well as inclusive of everyone. The reason for this type of justice system is to ‘satisfy lay people’s desire for retributive justice’³⁸² as per the definition alluded to above. This is evidenced in the trials, convictions and judgments made in the SCSL in Sierra

³⁷⁸ D O’Mahony, ‘Criminal Justice Reform in a Transitional Context: Restorative Youth Conferencing in Northern Ireland’ (2012) Volume 12 International Criminal Law Review 549

³⁷⁹ J van Prooijen, J Coffeng and Vermeer (eds), ‘Power and retributive justice: How trait information influences the fairness of punishment among power holders’ (2014) Volume 50 Journal of Experimental Social Psychology 190

³⁸⁰ J van Prooijen and J Coffeng (eds), ‘What is Fair Punishment for Alex or Ahmed? Perspective Taking Increases Racial Bias in Retributive Justice Judgments’ (2013) 26 Social Justice Research 383, 384

³⁸¹ Ibid

³⁸² Ibid

Leone, the ICTY in Yugoslavia, the ICTR in Rwanda,³⁸³ the ECCC in Cambodia, the SPSC in East Timor, the STL in Lebanon, the Democratic Republic of Congo (DRC), the Hissene Habre trial which commenced in July 2015 and ended in 2016³⁸⁴ at the Extraordinary African Chambers (EAC) in Senegal³⁸⁵, as well as the ongoing Uganda case, Dominic Ongwen's trial at the ICC that started in January 2017.³⁸⁶

2.1. 4 Transitional Justice

Transitional justice is concerned specifically with countries in transition from conflict and/or human rights abuses to peace and reconciliation. The need for truth-seeking, prosecutions, reparations, and institutional reform mechanisms is increasingly common in post-conflict countries wanting to deal with past violations of human rights as 'dictated by universal human rights norms.'³⁸⁷ Transitional justice is defined as a set of legal and non-legal approaches or fields of inquiry carried out by different countries in an effort to address the legacies of systematic and widespread human right abuses as 'they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights.'³⁸⁸ As a field of inquiry, transitional justice focuses on a number of approaches to dealing with the past which include trials and truth-seeking mechanisms. Transitional justice is not a 'special' type of justice, 'but an approach to achieving justice in times of transition

³⁸³ N Schimmel, 'The Moral Case for Restorative Justice as a Corollary of the Responsibility to Protect: A Rwandan Case Study of the Insufficiency of Impact of Retributive Justice on the Rights and Well-Being of Genocide Survivors' (2012) Volume 11 Journal of Human Rights 161, 161-188

³⁸⁴ Maclean R, 'Chad's Hissène Habré found guilty of crimes against humanity' the Guardian (London, May 2016) <<https://tinyurl.com/howl3v3>> (Latest access 5 July 2018)

³⁸⁵ 'The opening of the case at the Palais de Justice in Dakar represents a historic step for African justice: it is the first time that the courts of one country on the continent have prosecuted the former ruler of another for alleged human rights crimes. It is also the first universal jurisdiction case to proceed to trial in Africa.' See C Hicks, 'Former Chad dictator's war crimes trial opens in Senegal' Guardian (Wednesday 5 July 2018) <<http://www.theguardian.com/world/2015/jul/20/former-chad-dictator-hissene-habre-war-crimes-trial>> (Latest access 5 July 2018), also see M Bronner, 'Former Chad leader Hissène Habré charged with crimes against humanity' the Guardian (Wednesday 4 July 2015) <<http://www.theguardian.com/world/2013/jul/03/chad-hissene-habre-charged>> (Latest access 5 July 2018)

³⁸⁶ S van den Berg, 'Defence tactics exposed in Ongwen case at ICC' (December 2016) International Justice Tribune <<https://www.justicetribune.com/blog/defence-tactics-exposed-ongwen-case-icc>> (Latest access 5 July 2018). Also see 'Situation in Uganda: The Prosecutor v Dominic Ongwen ICC-02/04-01/15' (2017) International Criminal Court <<https://www.icc-cpi.int/uganda/ongwen/Documents/OngwenEng.pdf>> (Latest access 5 July 2018)

³⁸⁷ A Ahmed An-Na'im, 'Editorial Note: From the Neocolonial 'Transitional' to Indigenous Formations of Justice' (2013) Volume 7 The International Journal of Transitional Justice 197, 198. Also see S Buckley-Zistel, T K Beck, C Braun and F Mieth (eds), *Transitional Justices Theories* (Routledge, 2010) 1

³⁸⁸ See The International Centre for Transitional Justice (ICTJ), 'What is Transitional Justice?' <<http://ictj.org/about/transitional-justice>> (Latest access 4 July 2018). Also see N Kritz (ed), *Transitional Justice: General Considerations* (Volume 11, US Institute of Peace Press, 1995) 1-602, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Volume 11 US Institute of Peace Press, 1995) 1-777, *Transitional Justice: Law, Rulings and Report* (Volume 11 US Institute of Peace Press, 1995) 1-825

from conflict and or state repression'.³⁸⁹ In the event of widespread human rights violations, victims have well-established rights to see that those who committed grave crimes be made criminally accountable, and to get to know the truth and receive reparation. A history of unaddressed widespread human rights abuses breeds social division and exclusion, creates mistrust between groups and in the institutions of the state, and stalls the achievement of security and the drive towards development.³⁹⁰ In most countries where systematic and grave human rights violations were committed, 'the claims of justice refuse to 'go away.''³⁹¹ As a consequence, transitional justice mechanisms remain a key demand of victims. When conducted in ways that reflect victims' needs and expectations, they can play an important role in the restoration of their dignity.

This approach started in the 1980s and 1990s³⁹², in response to political changes in Latin America, Eastern Europe, the former Soviet Union and conflicts in Africa, and the demands in these regions for justice³⁹³ (though could be seen to draw on much earlier trials, such as that of King Charles I in the English Revolution, King Louis XVI in the French Revolution, and the Nuremberg and Tokyo trials after the Second World War).³⁹⁴ From Sierra Leone to South Africa, transitional justice mechanisms are seen as vehicles of ensuring accountability, serving justice, and providing sustainable peace and reconciliation for countries emerging from conflicts.³⁹⁵ New regimes such as Sudan (Darfur), Tunisia, Egypt, Morocco, Iraq, Libya, Bahrain, and Yemen³⁹⁶ are now using post-conflict transitional justice mechanisms such as peaceful mediation, truth-seeking initiatives, repatriation programmes and institutional reforms in order to address the difficulties of the past and create the way for the future.³⁹⁷

³⁸⁹ Ibid Other frequently stated objectives of transitional justice include advancing 'accountability' (not just criminal accountability) and ending 'impunity.'

³⁹⁰ L K Bosire, 'Overpromised, underdelivered: transitional justice in Sub-Saharan Africa' (2006) *Sure-International Journal Human Rights* 70, 71 -73 <<https://tinyurl.com/y843bkv6>> (Latest access 5 July 2018)

³⁹¹ Ibid

³⁹² I Jens, 'Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics' (2013) Volume 7 *The International Journal of Transitional Justice* 413, 415-416
Also see L McGregor, 'Transitional Justice and the Prevention of Torture' (2013) Volume 7 *The International Journal of Transitional Justice* 29

³⁹³ R G Teitel, *Transitional Justice* (OUP, 2002) 3, also see International Centre for Transitional Justice, 'What is Transitional Justice' (2009) ICTJ Justice Truth and Dignity <https://www.ictj.org/about/transitional-justice_> (Latest access 5 July 2018)

³⁹⁴ Ibid 27

³⁹⁵ I Bueno and A Diaz Rozas, 'Which Approach to Justice in Colombia under the Era of the ICC' (2013) 13 *International Criminal Law Review* 211, 215

³⁹⁶ M C Bassiouni, 'Editorial' (2014) Volume 8 *The International Journal of Transitional Justice* 325, 326

³⁹⁷ L K Bosire, 'Overpromised, underdelivered: transitional justice in Sub-Saharan Africa' (2006) *Sure-International Journal Human Rights* 70, 73 -74 <<https://tinyurl.com/y843bkv6>> (Latest access 5 July 2018)

As already mentioned in Chapter 1, the Sierra Leonean people during the brutal 11 year war suffered grave human rights violations. The judicial operations of the SCSL both in Sierra Leone and in The Hague over the years have not only helped to strengthen justice and held accountable those who committed serious international crimes, but also helped to document its proceedings which now act as parts of its legacy. Also, with regards to human rights violations, transitional justice is now seen as an essential mechanism for delivering justice and ensuring lasting peace and political stability in the country.

Transitional justice now includes the following legal frameworks: the International Tribunals, hybrid courts and the International Criminal Court; the development of a 'Right to Truth' and 'Right to Reparation' under International Human Rights Law (IHRL); and the Truth and Reconciliation Commissions.³⁹⁸ The mechanisms for transitional justice include criminal prosecutions, non-criminal sanctions, reparations, amnesties and commissions of inquiry. Such modalities are embedded within the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in 2005.³⁹⁹ Overall, the main focus and understanding of transitional justice is designed to deal with past difficulties and recognise the accountability of those conducting mass atrocities.

As noted above, the legal concept of transitional justice stemmed from the international legal frameworks which have their origins in the ICTY and ICTR; although the concept could be seen to be drawn from the previous trials and judgements of both the Nuremberg and Tokyo Military Tribunals.⁴⁰⁰ The investigation and prosecution of international crimes that includes war crimes, crimes against humanity and genocide⁴⁰¹ remains a significant approach to transitional justice today.

³⁹⁸ R Nagy, 'Transitional Justice as Global Project: critical reflections' (2008) Volume 29 Third World Quarterly 275

³⁹⁹ See General Assembly Resolution 60/147 United Nations (2008) <http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf> (Latest access 5 July 2018), also see M C Bassiouni, 'International Recognition of Victims' Rights,' (2006) 6 Human Rights Law Review abstract <<http://hrilr.oxfordjournals.org/content/6/2/203.abstract>> (Latest access 5 July 2018)

⁴⁰⁰ See Charter of the Imitational Military Tribunal (IMT) for the Far East, Article 1 (1946), T I A S No. 1589, 4 Bevans 20 (as amended 4 Bevans 27 April 26, 1946) reprinted in N Boister and R Cryer (ed), *Documents on the Tokyo International Military Charter, Indictment and Judgements* (OUP, 2008) 7-11 and 71-84. See S Glueck, 'The Nuremberg Trial and Aggressive War' in Guenael Mettraux (ed), *Perspectives on the Nuremberg Trial* (OUP, 2008) 72 -80. See W Maser, *Nuremberg* (The Chancer Press, 1979) 13-291, see Z D Kaufman, 'Transitional Justice for Tojo's Japan: The United States Role in the establishment of the International Military Tribunal for the Far East and other Transitional Justice Mechanisms for Japan after World War 11' (2013) Volume 27 The Emory International Law Review 755, 766

⁴⁰¹ D Luban, JR O'Sullivan and D P Stewart, *International and Transitional Criminal Law* (Aspen Publishers, USA, 2010) 74 and 955 - 985

This thesis will argue that the prosecutions of international crimes can be potentially effective when they are administered in the domestic courts of the countries where the mass atrocities were committed. This is because the investigations and trials of most powerful leaders (be they political or military) help the restoration of the rule of law and send a strong message that such crimes will not be accepted in respectable civic society.

However, countries just recovering from conflict situations or in transition may lack the capacity and political will to effectively address such heinous crimes, because their judicial system may have been destroyed during the civil war.⁴⁰² For example, in the DRC, the judiciary in the entire post-colonial phase has been beset with problems due to 'lack of independence, integrity, and infrastructure. This is compounded by the fact that Congolese law does not proscribe genocide, war crimes, and crimes against humanity: these violations are addressed only in military courts, where their definitions do not conform to international standards.'⁴⁰³ In Sierra Leone, immediately after the civil war, the 'domestic judiciary was very weak and partisan.'⁴⁰⁴ The judiciary had 'collapsed and institutions for the administration of justice, both civil and criminal, were barely functional,'⁴⁰⁵ hence the creation of the Special Court for Sierra Leone which aimed as a response to the disintegration of the domestic judicial system. The degree of such crimes means that they often cannot be administered through the ordinary criminal justice system, creating an 'impunity gap.'⁴⁰⁶ As a result, international assistance may be needed in order to help address such a problem: for example, through the creation and practice of hybrid tribunals (which draw from both international and national laws, judges and prosecutors). Such tribunals have been established in Sierra Leone SCSL⁴⁰⁷; the Cambodia ECCC⁴⁰⁸; the East Timor SPSC⁴⁰⁹, the STL in Lebanon and the trial and conviction of *Habré case through the*

⁴⁰² L K Bosire, 'Overpromised, underdelivered: transitional justice in Sub-Saharan Africa' (2006) *Sure-International Journal Human Rights* 70, 73

⁴⁰³ *Ibid* 70, 77

⁴⁰⁴ *Ibid*

⁴⁰⁵ *Ibid*

⁴⁰⁶ D Luban, Julie R O'Sullivan and D P Stewart, *International and Transitional Criminal Law* (Aspen Publishers, USA, 2010) 74 and 955-985

⁴⁰⁷ For details of SCSL historical background and establishment, see International Centre for Transitional Justice (ICTJ) (November 2010). Sierra Leone's submission to the Universal Periodic Review of the UN Human Rights Council 11th Session: (May 2011) 1-5. Also see K Howarth, 'The Special Court for Sierra Leone – Fair Trials and Justice for the Accused and Victims' (2008) Volume 8 *International Criminal Law Review* 399, 399-405

⁴⁰⁸ For details of ECCC historical background and establishment see J D Ciorciari, 'Who Should Stand Trial in Cambodia' (2008) *Oxford Transitional Justice Research Working Paper Series* 1, 1-3

⁴⁰⁹ R G Teitel, *Transitional Justice* (OUP, 2002) 6

Extraordinary African Chambers (EAC) in Senegal.⁴¹⁰ Other useful post-conflict state building and transitional justice mechanisms created in Sudan (Darfur), Tunisia, Morocco, Libya, Egypt, Iraq, Bahrain, Gaza and Yemen have been *ad hoc* and were triggered by various players, such as the United Nations (UN) (with referrals made to the ICC in Sudan and Libya and the creation of commissions of inquiry in Sudan, Libya, Syria and Gaza).

More specifically, we can refer to the creation of ‘national bodies (in Morocco, Tunisia, Libya, Egypt and Yemen, where some fact-finding bodies were established, though with few outcomes); ...and nationally established but internationally composed bodies (with the establishment of the BICI in Bahrain).’⁴¹¹

Similarly, truth-seeking approaches with Truth Commissions and trials play complementary roles in transitional justice, because they are now operating concurrently as mechanisms for justice. By this approach, they help in providing an opportunity for society to gain a broader understanding of past human rights abuses. For example, from 2008 to 2013, Kenya, with the help of civil society groups and NGOs, attempted to achieve ‘truth’ and ‘justice’ through a Truth, Justice and Reconciliation Commission (TJRC).⁴¹² In the case of Sierra Leone⁴¹³ and Liberia, Truth and Reconciliation Commissions in transitional justice mechanisms were created to account for mass atrocities and human rights abuses, and promote reconciliation as well as sustainable peace in their respective communities.⁴¹⁴ Whilst

⁴¹⁰ See Statute of the Extraordinary African Chambers (2 September 2013). The Statute of the Extraordinary African Chambers within the courts of Senegal was established to prosecute international crimes committed by *Habré* in Chad between 7 June 1982 and 1 December 1990. ‘<<http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>> (Latest access 30 September 2018). Also see ‘African Rights Groups Back Habre Court’ Human Rights Watch (2 November 2014) <<http://www.hrw.org/habre-case>> (Latest access 5 July 2018), see Human Rights Watch, ‘The Trial of Hissène Habré’ (April 2017) Hissène Habré para 1 <<https://www.hrw.org/tag/hissene-habre>> (Latest access 8 July 2018). Also see Human Rights Watch, ‘Senegal/Chad: Court Upholds Habré Conviction’ (April 2017) para 1 <<https://tinyurl.com/ycmgjko2>> (Latest access 8 July 2018)

⁴¹¹ M C Bassiouni, ‘Editorial’ (2014) Volume 8 The International Journal of Transitional Justice 325, 326

⁴¹² M Sirleaf, ‘Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth and Reconciliation Commission for Liberia’ (2009) Volume 21 Florida Journal of International Law 210, 210-211. Also see M Everson, ‘Truth and Justice in Sierra Leone: Coordination between commission’ (2004) Volume 104 Columbia Law Review 730, 732-733

⁴¹³ See Truth and Reconciliation Commission Act of 2000 (2000) <<http://www.sierra-leone.org/Laws/2000-4.pdf>> (Latest access 4 July 2018). Also see W A Schabas, ‘Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone’ (2004) TRC and Special Court for Sierra Leone Criminal Law Forum 3, 3-5

⁴¹⁴ L K Bosire and G Lynch, ‘Kenya’s Search for Truth and Justice: The Role of Civil Society’ (2014) Volume 8 The International Journal of Transitional Justice 256. Also see E M Everson, ‘Truth and Justice in Sierra Leone: Coordination between commission’ (2004) Volume 104 Columbia Law Review 730, 732 - 733. C C Jalloh (eds), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013) 724 -744

the courts prosecute and convict major perpetrators of international crimes, the Truth Commissions provide a more complete record of past atrocities.

South Africa's Truth and Reconciliation Commission (TRC) was based on the concept that truth helps lead to reconciliation and that 'revealing is healing...the acceptance, the affirmation, the acknowledgement that they had indeed suffered was cathartic for them'.⁴¹⁵ It is a commonly-held belief that telling one's testimony and 'sharing one's pain can bring relief, catharsis, and closure.'⁴¹⁶ It was however, reported that 'the victims and survivors responded differently to the truth hearings.'⁴¹⁷ Some found comfort and catharsis whilst 'others felt their wounds were reopened and left unattended.'⁴¹⁸

One can argue that the 'relationships between transitional justice, political ideologies and historical narratives are still contested and vague.'⁴¹⁹ However, new practical challenges have forced the theory or principles of transitional justice to innovate, as settings have moved from Argentina to Chile,⁴²⁰ where authoritarianism was brought to an end; to countries like Sierra Leone, Liberia⁴²¹, and the Democratic Republic of Congo,⁴²² where the major discourse is peace building and stability; and to the ICTY and ICTR, where 'human rights practitioners have advocated for prosecution as a normative response to rights abuses.'⁴²³ All transitional justice principles hinge on the important point that all transitional countries must address the issues of the past and provide sustainable peace and reconciliation for the future.⁴²⁴ The transitional justice concept has therefore now become a significant innovative instrument in not only addressing sustainable peace and reconciliation in affected communities, but also recognising and addressing the 'multiple justice needs of the local population in a way

⁴¹⁵ J N Clark, 'Reconciliation via Truth? A Study of South Africa's TRC' (2012) Volume 11 Journal of Human Rights, 189, 193

⁴¹⁶ Ibid

⁴¹⁷ Ibid

⁴¹⁸ Ibid 189, 194

⁴¹⁹ A Ljubojevic, 'What's the Story? Transitional Justice and the Creation of Historical Narratives in Croatia and Serbia' (2012) Volume 49 *Politička misao* 50

⁴²⁰ L K Bosire and G Lynch, 'Kenya's Search for Truth and Justice: The Role of Civil Society' (2014) Volume 8 *The International Journal of Transitional Justice* 256

⁴²¹ For details of Liberian historical background, see P James-Allen, A Weah, and L Goodfriend (ed), 'Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia' (2010) International Centre for Transitional Justice 1, 3- 32 <www.ictj.org> (Latest access 4 July 2018)

⁴²² T Khan and J Wormington, 'Mobile Courts in the DRC: Lessons from Development for International Criminal Justice' (2014) Oxford Transitional Justice Research Working Paper Series 1-2 <otjr.crim.ox.ac.uk/materials/papers/178/mobile%20courts%20DRC.pdf> (Latest access 4 July 2018)

⁴²³ J Vincent J and D T Smith 'Transitional Justice: Prioritizing Truth Commissions or International Tribunals to Ensure Healing and Reconciliation' (2013) *Journal of International and Global Studies* 1, 8 <<http://www.lindenwood.edu/jigs/volume5Issue1.cfm>> (Latest access 4 July 2018)

⁴²⁴ C Lawther, 'Denial, Silence and the Politics of the Past: Unpicking the Opposition to Truth Recovery in Northern Ireland' (2013) Volume 7 *The International Journal of Transitional Justice*, 157, 157-158

that draws on the various cultural approaches that co-exist with the dominant Western worldwide and practice.’⁴²⁵ This is because before peace building and reconciliation is realised in any affected society, transitional justice usually factors in the needs, experiences, and expectations of the following: victims, survivors, perpetrators and other sectors of the community who are directly affected by gross human rights violations, and who are also part of the peace building and reconciliation process.⁴²⁶ Also, transitional justice mechanisms can simply not afford to be designed without regard to the regional nature of the conflict, or the fact that massive human right abuses took place across borders, as this could lead to an ‘irreparable injustice’ for individuals and communities that are already affected. As a result of this, a regional approach to transitional justice is more likely to achieve the goals of sustainable peace, political stability, and respect for human rights within the region and affected countries. This is because there is still no single formula for dealing with past systematic and widespread human rights abuses. Moreover, there is no formula that fits in all contexts, as each community chooses particular ways of addressing past human rights abuses, as well as different approaches to implementing transitional justice.

In addition to the context of state building, and contributing to lasting peace, reconciliation and prosperity in post-conflict states, transitional justice does play an important role in establishing justice mechanisms that will address legacies of human right abuses, support political stability, recognition, order, autonomy, and make positive recommendations for legal, political, and administrative reforms. Transitional justice has now proven to be a significantly useful concept in dealing with the past; promoting acknowledgment, accountability, political and socioeconomic stability; providing sustainable peace and reconciliation; as well as improving lives and societies in Africa and around the globe.

Conclusion

Can this model be replicated in other countries? In answering these questions, one can say that procedural, normative and transitional mechanisms were used to help bring about lasting peace and reconciliation, serving justice as well as political stability in Sierra Leone. To return to the questions raised at the beginning: How effective was

⁴²⁵ W Lambourne, ‘Transformative justice, reconciliation and peace building’ in Kamari Maxine Clark (ed), *Transitional Justice Theories* (CUP, 2009) 1-2

⁴²⁶ Ibid

the hybrid court in delivering justice? Although in some respects, the legitimacy as well as the legality of the SCSL was contested as a result of an amnesty that was put in place and other moral concerns, the SCSL hybrid model served justice, and contributed to the broader process of providing accountability, peace, reconciliation and political stability in Sierra Leone.

Lessons can therefore be learned from the SCSL hybrid model which was the first of its kind. The SCSL hybrid model was not only able to build on past experience but also made a number of well-received innovations in order to meet the complex demands for justice and stability after the atrocities committed in the civil war. For instance, the SCSL's judicial practice and implementation in collaboration with its outreach educational programmes⁴²⁷ as well as the training and building of professional experts (this involved local lawyers in prosecution, defence and registry staff), not only prevented corruption practices, strengthened capacity building and provided a high quality representation for both victims and defendants, but also left a vital legacy through the restoration of the rule of law in the country.⁴²⁸ This thesis will illustrate that The SCSL hybrid model could now be seen as an example of a significant innovative hybrid court that can be replicated in other countries.

However, in considering how successful the SCSL hybrid model was in achieving justice, we need to acknowledge that while there is some consensus on the definition of justice, there is not total agreement. The concept also appears to be highly subjective, as achieving justice usually means culturally⁴²⁹ and traditionally different things to different people within their communities. As one commentator stated: 'Delivering justice usually means different things to different people. It is therefore a highly emotive debate among people speaking different conceptual languages.'⁴³⁰ Ultimately, however, 'the notion of justice is extremely powerful and inspiring, capturing the notion of putting things right, of restoring balance. Too often, though, it

⁴²⁷ S Ford, 'How Is the Special court's Outreach Section?' in Charles C Jalloh (ed), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013) 505-526

⁴²⁸ G Roberson, *Crimes Against Humanity: The struggle for Global Justice* (3rd edn, Penguin Books, 2006) 507

⁴²⁹ When States differ in the judgements of other individuals, the citizens of those States sometimes attribute this divergence either to 'culture' or 'customs' of the other. See V Hamilton and J Sanders, *Everyday Justice Responsibility and the Individual in Japan and United States* (Yale University Press, 1992) 3

⁴³⁰ H van der Merwe, 'Delivering justice during transition: Research challenges' in H van der Merwe, V Baxter and A R Chapman (ed), *Assessing the impact of transitional justice: Challenges for empirical research* (Washington, DC: United States Institute of Peace Press, 2009) 138

is also illusory and elusive, especially for victims of mass atrocities.’⁴³¹ One can argue that, despite the general international commitment and role played by the international community in securing legal and political stability, sustainable peace and reconciliation in these post-conflict states, each still continues to experience major challenges of legitimacy, governance, security, general viability and economic development.

In conclusion, this research can assert that justice and injustice are widely used terms. People are generally faced with a variety of legal matters throughout their lives. In order to address these matters, they need to take appropriate action. That is to say, they need to access justice.⁴³² Whenever an abuse or crime is perpetrated, we ask for justice for both the victim and the offender. Criminal trials in post-conflict state building (for instance Sierra Leone) can contribute immensely to sustainable peace and reconciliation, stability through justice, and offer much that can be replicated. Nevertheless, the achievement of any broad consensus that justice has been served faces any broad consensus that justice has been served faces a critical challenge because of the competing perceptions of what justice and injustice could mean for different people.⁴³³

Notwithstanding, this research will conclude by stating that based on the perspective of theories of justice, (procedural, retributive, corrective and transitional justice) highlighted above, the SCSL was successful in ending impunity, providing jurisprudential legacy, enhanced capacity building through outreach programs, and better administration of justice for the victims and defendants. This was done in an impartial and fair judicial process through effective support and upholding the rule of law.

The SCSL through theories of justice and interpretive lens, also gave satisfaction and fair justice to previously vulnerable victims who now see their powerful former perpetrators of serious crimes being humbled through convictions. This ultimately provides a new insight into the success impact and legacy of the SCSL, thereby

⁴³¹ J N Clark, ‘Reconciliation via Truth? A Study of South Africa’s TRC’ (2012) Volume 11 Journal of Human Rights, 372, 375

⁴³² M Barendrecht (ed), ‘Measuring Access to Justice in a Globalising World: The Hague Model of Access to Justice, Final Report- April 2010’ (2010) The Hague Institute for the Internationalisation of Law 1, 8

⁴³³ D A Crocker, ‘Punishment, reconciliation and democratic deliberation’ (2002) Buffalo Criminal Law Review 509, 549

representing original independent research and making a contribution to knowledge and to the discipline of International Criminal Law scholarship.

Chapter 3: The special characteristics of the Special Court for Sierra Leone

Introduction

The purpose of this chapter is to look at the special characteristics of the SCSL hybrid model. The SCSL model was distinct and innovative and has set a significant precedent in the field of International Criminal Law. The SCSL represented the first model to complete UN-mandated trials and prosecutions, and to include a closing and a transfer strategy to ensure continuity. It differed from the ICTY⁴³⁴ and ICTR⁴³⁵ and the ICC⁴³⁶ and even other hybrid courts, which had themselves presented a new approach to the prosecution of international crimes.

To understand the unique nature and distinct characteristics of the SCSL hybrid model, it must be seen in the light of the spirit and letter of the bilateral agreement reached between the Sierra Leone Government (SLG) and the United Nations (UN), as well as its legal framework. The overarching aim of both parties (the SLG and the UN) was to help deliver justice to the victims of the atrocities, but also to ensure that accountability and international standards of justice were met. By establishing the SCSL, the international community affirmed that it would ‘exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law.’⁴³⁷

As clearly stated in chapter 1 section 5, the SCSL hybrid model involved a number of ‘firsts.’ To recap, it was: 1) the first to be composed of judges, prosecutors, and registry staff who were recruited both nationally and internationally;⁴³⁸ 2) the first hybrid court to sit within the territory where the crimes were committed,⁴³⁹ as well as incorporating outreach programmes in its work ‘not only throughout Sierra Leone, but also in the

⁴³⁴ See S C Res. 827, U N Doc. S/RES/827 (1993) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf> (Latest access 5 July 2018)

⁴³⁵ See S C Res. 955, U N Doc. S/RES/955 (1994) <http://www.eisil.org/index.php?t=link_details&id=646&cat=502> (Latest access 5 July 2018)

⁴³⁶ See the legal text of the International Criminal Court (ICC), done at Rome on 17 July 1998, in force on (1 July 2002) <http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx> (Latest access 5 July 2018). Also see C W Mullins and D L Rothe, ‘The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment’ (2010) Volume 10 International Criminal Law Review 771, 771-786

⁴³⁷ See UNSC Resolution 1315 (2000) <<http://www.rscsl.org/Documents/Establishment/S-Res-1315-2000.pdf>> (Latest access 5 July 2018)

⁴³⁸ See Statute of the Special Court for Sierra Leone, Article 12 and 13 (16 January 2002) <http://www.issafrica.org/anicij/uploads/SCSL_Statute.pdf> (Latest access 5 July 2018)

⁴³⁹ C C Jalloh (ed), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013) 10

sub-region and beyond;’’⁴⁴⁰ 3) the first funded by voluntary contributions from over 40 interested states;⁴⁴¹ 4) the first to convict individuals responsible for the enlistment of child soldiers and for the crime of forced marriage;⁴⁴² 5) the first to indict, try, convict and sentence a former African head of state, Charles Taylor; and 6) the first to close its operations and transfer responsibilities to a residual court, thus offering valuable lessons for other international tribunals and hybrid courts in the future.⁴⁴³ An analysis of these special characteristics above will be discussed in detail in later sections below.

In this chapter, the thesis will look at the following: the SCSL’s jurisdiction and applicable laws; institutional arrangements; location; funding; and the closure and transfer of the SCSL to a Residual Special Court for Sierra Leone (RSCSL). In each of these areas I will highlight the special characteristics of the SCSL. I will then compare the SCSL model with other international criminal tribunals, other hybrid courts and the ICC, including the more recent Extraordinary African Chambers (EAC), in order to further clarify how the SCSL was unique.

3.1 Background

As already stated in Chapter 2, in order to achieve justice, lasting peace and reconciliation in post-conflict state building communities, both government officials and non-governmental advocates are likely to consider a number of approaches (for example, theories of justice frameworks used in this research), in order to response to human rights violations. These approaches are intended not only to help in the transformation of post-conflict state building communities, but also to form a first step in the process of attaining individual accountability, justice or at least leave a legacy that will engender peace, uphold the rule of law and some transformation in the country. That said, post-conflict states sometimes struggle to move forward, as accountability and redress for past violations of human rights can be enormously

⁴⁴⁰ See Press Release, Special Court for Sierra Leone Office of the Prosecutor, ‘Special Court Prosecutors Train Northern Police Prosecutors’ (Freetown, 5 May 2009) <<http://www.rscsl.org/Documents/Press/OTP/prosecutor-050509.pdf>> (Latest access 5 July 2018). See Press Release, Special Court for Sierra Leone Office of the Prosecutor, Deputy Prosecutor Completes Successful European Mission’ (Freetown, June 2009) <<http://www.rscsl.org/Documents/Press/OTP/prosecutor-060209.pdf>> (Latest access 4 July 2018). Also see S L Hodgkinson, ‘Are AD Hoc Tribunals an effective tool for Prosecuting International Terrorism cases?’ (2010) Volume 24 Emory International Law Review 515, 519

⁴⁴¹ G Robertson, *Crimes Against Human Rights: The struggle for global justice* (3rd edn, Penguin Books, 2006) 506

⁴⁴² See the Eleventh and Final Annual Report of the President of the Special Court for Sierra Leone (December, 2003) <<http://www.rscsl.org/Documents/AnRpt11.pdf>> (Latest access 5 July 2018)

⁴⁴³ Ibid

difficult and sometimes divisive. While the responsibility for bringing to justice to those who committed human rights violations in Sierra Leone after the war rested primarily with the government of Sierra Leone, some interested parties such as civil society groups advocated for the establishment of a Special Court that could effectively address justice for victims, and also for the documenting of past atrocities. This was because ‘domestic and international law guarantee the right for victims to seek redress for violations and the state is obliged to provide appropriate remedies for such violations.’⁴⁴⁴ They also believed this would constitute a significant step towards long term development, and consolidate peace and reconciliation in Sierra Leone.

The major obstacles that faced the Sierra Leone Government at the time were the complete collapse of the judicial legal system, and the lack of any mechanism for establishing the most effective and fair judicial process for bringing perpetrators of human rights violations to justice. As is evidenced in Amnesty International’s (AI) report on Sierra Leone, ‘as a result of the conflict, the judicial and legal systems have virtually collapsed and institutions for the administration of justice, both civil and criminal, are barely functional.’⁴⁴⁵ In situations where large-scale atrocities have been committed against civilians and domestic legal institutions are unable to deliver fair justice, international criminal tribunals or hybrid courts have been established to investigate allegations, and to indict and try perpetrators of core crimes.⁴⁴⁶ Serving justice, strengthening both the rule of law and political stability, and promoting peace and reconciliation are vital when nations have been damaged by violence and conflict.⁴⁴⁷

In the past decades, various international tribunals as well as hybrid courts have dealt with international crimes. Such legal institutions include: the International Military

⁴⁴⁴ See the Sierra Leone Court Monitoring Programme (SLCM) Press Release, Freetown, Sierra Leone (29 January 2009) <www.slcmp.org> (Latest access 5 July 2018)

⁴⁴⁵ Amnesty International argued that ‘after years of internal armed conflict, the judicial system in Sierra Leone faces serious obstacles in bringing perpetrators of human rights abuses to justice’, as well as its ability to guarantee independence and impartiality. AI further argued that under such circumstance, ‘the UN should establish, together with the Sierra Leone authorities, a judicial process of an international character’ because the Sierra Leone judicial legal system was ‘not in a position to try those alleged to be responsible for human rights abuses in trials which meet minimum international standards, without considerable international expert assistance.’ See Amnesty International’s review of the local court system in Sierra Leone: ‘Sierra Leone: Ending Impunity-An Opportunity not to be Missed’ (25 July 2000) Amnesty International <<http://www.amnesty.org/en/library/info/AFR51/061/2000/en>> (Latest access 5 July 2018). Also see E R Higonnet, ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform’ (2006) Volume 23 Arizona Journal of International and Comparative Law 347, 448

⁴⁴⁶ J E Stromseth, ‘The international Criminal Court and Justice on the Ground’ (2009) Arizona State Law Journal 427, 428

⁴⁴⁷ Ibid

Tribunals at Nuremberg and Tokyo, the International Criminal Tribunals in Yugoslavia and Rwanda, the ICC⁴⁴⁸, and the hybrid panels established by the international community in Cambodia, East Timor, and Lebanon.⁴⁴⁹ From Sierra Leone to Liberia, the Balkans to Rwanda, Cambodia to East Timor, Uganda to the Democratic Republic of Congo, Iraq to Libya and Afghanistan, difficult issues of delivering justice, establishing the rule of law and accountability have posed serious challenges to communities who want to move beyond conflict.⁴⁵⁰ Building credible legal institutions, establishing public confidence in the very idea of delivering justice and the restoration of the rule of law can be especially difficult. Despite this, the establishment of the SCSL hybrid model reflected wider trends in international legal order towards a new norm of international criminal justice and International Criminal Law.

The SCSL was officially opened on 10 March 2004 before an audience of both national and international dignitaries.⁴⁵¹ During the SCSL's operational period, the hybrid court has been seen not only to have delivered justice, but to have done so within due process and in concert with international standards. For example, in explaining its legal framework and mandate, the Appeals Chamber ruled in the case of *Taylor*'s request for immunity that, as a *sui generis treaty-based organ*, the SCSL has 'the characteristics associated with classical international organizations 'including legal personality; the capacity to enter into agreements with other international persons

⁴⁴⁸ See the Rome Statute of the International Criminal Court (ICC), Articles 17 and 28, adopted 17 July 1998 and entered into force (1 July 2002) <<http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94>> (Latest access 5 July 2018), see M C Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Martinus Nijhoff Publishers, 1987) 75. Also see M C Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (Transitional Publishers, Inc., 1998)

⁴⁴⁹ See Statute of the Special Tribunal for Lebanon (STL) (31 January 2007) <<http://www.stl-tsl.org/>> (Latest access 5 July 2018). Also see P McAuliffe, 'UN Peace-Building, Transitional Justice and the Rule of Law in East Timor: The limits of institutional response to political questions' (2011) *Netherlands International Law Review* 103, 177-122

⁴⁵⁰ J E Stromseth, 'The international Criminal Court and Justice on the Ground' (2009) *Arizona State Law Journal* 427, 428

⁴⁵¹ For a further discussion on the SCSL's establishment, structure, powers and organisation; see C Jalloh, *Consolidated Legal Texts of the Special Court for Sierra Leone*. (Brill Academic Publishers, Boston, MA, USA, 2007) 1-235, <<http://site.ebrary.com/lib/bodleianwi/reader.action?docID=10270851>> (Latest access 5 July 2018), A Smith, *Sierra Leone: The Intersection of Law, Policy, and Practice* in C P R Romano, A Nollkaemper and J K Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004) 125-139, see A Jejan-Cole, 'The Special Court for Sierra Leone: Conceptual Concerns and Alternatives' (2001) *African Human Rights Law Journal* 107, 107-126; and A Philip and G Ryan, *International Human Rights: The Successor To International Human Rights in Context: Law, Politics and Morals* (OUP, 2013) 1359

governed by international law; privileges and immunities; and an autonomous will distinct from that of its members.’⁴⁵²

3.1.1 Jurisdiction and applicable laws

Significant special characteristics of the SCSL include those relating to its jurisdiction, mandate and applicable laws.

In relation to its jurisdiction and mandate, the SCSL had a concurrent jurisdiction that stipulated that the court use both international and Sierra Leonean laws; and a restricted mandate that focused on specifically prosecuting only those ‘who bear the greatest responsibility’⁴⁵³ for serious domestic and international crimes committed during the latter part of the notoriously brutal Sierra Leonean conflict ‘with the expectation that this would lead to judicial efficiency and a short timeframe for the court’s work’.⁴⁵⁴ In relation to its applicable laws, the legal framework greatly assisted in bringing about peace and reconciliation and justice in Sierra Leone. This is the legal instrument which established the SCSL hybrid model, outlined its organisational structure and also determined the scope of its jurisdiction, mandate and practice; and laid down the punishment procedure for convicted offenders.

The SCSL model of mixed *ratione materiae* jurisdiction meant that the Prosecutor could use either international or Sierra Leonean law or both to try defendants. This was in contrast to the ICTY and ICTR, which used purely international law. While various hybrid courts like those of Cambodia, East Timor, Kosovo and Bosnia were allowed to invoke jurisdiction over specific international crimes, the SCSL was the first hybrid model mandated to prosecute a limited group of those bearing ‘greatest responsibility’ for offences and International Criminal Law. With the SCSL’s restricted subject matter, temporal, and territorial jurisdiction, it was clear that the UN’s aim was to establish a hybrid court that was to administer justice, accountability, reconciliation,

⁴⁵² See *Persecutor v Taylor* (SCSL-03-01-I), Appeals Chamber, (31 May 2004). Decision on motion made under protest and without waiving immunity to a head of state.

<http://www.rscsl.org/Taylor_Appeals_Chamber_Decisions.html> (Latest access 5 July 2018)

⁴⁵³ See Statute of the Special Court for Sierra Leone, Article 1 (1) (2002). See Charles Jalloh, ‘Prosecuting those bearing the greatest responsibility: the lessons of the Special Court for Sierra Leone’ (2017) Volume 96 *Marquette Law Review* 863, 865

⁴⁵⁴ T Cruvellie, ‘From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test’ (2009) International Centre for Transitional Justice and Sierra Leone Court Monitoring Programme 1

and sustainable peace,⁴⁵⁵ and also with a ‘narrower and more focused mandate compared’⁴⁵⁶ to the ICTY and ICTR.

Also, although the SCSL had jurisdiction over crimes under domestic law, the Prosecutor only charged defendants with international crimes. The procedural law applied in Sierra Leone was mainly also international. Schabas also supported this view, commenting that the SCSL’s legal framework is a ‘close relative of the “hybrid tribunals”, but is more accurately classified with the *ad hoc* tribunals because it is a creature of international law, not domestic law.’⁴⁵⁷ However, it can be argued that as a ‘treaty-based *sui generis* court of mixed jurisdiction and composition,’⁴⁵⁸ the SCSL model was not ‘anchored fully in either the United Nations or the Sierra Leonean constitutional systems’⁴⁵⁹ and in its intention and scope was hybrid in nature. Despite the fact that domestic laws were not used in practice, I would argue that the establishment of a legal framework which could draw on both domestic and international law remains a special characteristic of the SCSL.

3.1.2 Institutional arrangements

As stated earlier, one of the special characteristics of the SCSL model of hybridity can be seen in its institutional arrangements (mixed composition), which combined international and national laws, and international and national judges, prosecutors, and registry staff. The importance of this institutional arrangement is reflected in Cassese’s comments stating ‘resorting to mixed or internationalised criminal courts and tribunals may prove to be one of the most effective societal and institutional devices of the many which are at present available to international law-makers.’⁴⁶⁰ The international staff sat alongside their domestic counterparts to try and prosecute cases; at the same time they applied laws that included international standards. The judges also ensured that

⁴⁵⁵ C C Jalloh (ed), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013) 727

⁴⁵⁶ C C Jalloh, ‘Prosecuting those bearing the greatest responsibility: the lessons of the Special Court for Sierra Leone’ (2017) Volume 96 Marquette Law Review 863, 865

⁴⁵⁷ W A Schabas, *The UN International Criminal Tribunals, Former Yugoslavia, Rwanda and Sierra Leone* (CUP, 2006) 6

⁴⁵⁸ See UN Doc. S/2000/915 9200) (2000). See the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone <<http://www.rscsl.org/Documents/Establishment/S-2000-915.pdf>> (Latest access 5 July 2018)

⁴⁵⁹ F Donlon, ‘The Transition of Responsibilities from the Special Court to the Residual Special Court for Sierra Leone: Challenges and Lessons Learned for Other International Tribunals’ (2013) Volume 11 Journal of International Criminal Justice 1, 4

⁴⁶⁰ A Cassese, ‘The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality’ in Cesare P R Romano *et al* (eds), *Internationalized Criminal Courts: Sierra Leone East Timor, Kosovo, and Cambodia*, (OUP, 2004)10

the trials were fair, impartial, and accountable and that justice was done and seen to be done.

3.1.3 Location

In relation to location, both the ICTY and ICTR were created by the United Nations Security Council and located outside the concerned sovereign states. The approval of neither the former Yugoslavia nor Rwanda was sought. The ICTY was located in The Hague as it was already the site of the principal judicial organ of the UN, the International Court of Justice (ICJ). For the ICTR, it was located in Arusha, Tanzania with an office in Kigali. The SCSL model, on the other hand, was created by virtue of an agreement between the United Nations and the Sierra Leonean Government and located in Sierra Leone where the crimes were committed.

3.1.4 Funding

Another significant characteristic of the SCSL was its funding situation. The SCSL was funded through voluntary contributions from states rather than as a subsidiary organ of the

Security Council. It was also the first of its kind in the way in which non-judicial aspects were managed by a Management Committee comprised of interested third party states, who did not only provide advice and policy direction, but also assisted in fundraising during its operational period.⁴⁶¹ This meant that the SCSL did not count on the support of the Security Council and the UN system. The decision to use voluntary contributions from third party countries represented not only a significant shift in policy framework and in justice initiatives by the international community, but also involved a fundamental legacy for the SCSL and host country.⁴⁶² This is in contrast to other international criminal tribunals such as the ICTY and ICTR, as well as hybrid courts of STL and SPSC, which were funded by the UN budget.⁴⁶³ The SCSL's initial funding arrangements greatly helped to reduce the UN's costs as well as avoiding bureaucracy.⁴⁶⁴ However, the SCSL did receive some funding from the United Nations in 2004, 2011 and 2012, in addition to the voluntary funding.

⁴⁶¹ P Mochochoko and G Tortora, 'The Management Committee for the Special Court for Sierra Leone' in Cesare P R Romano *et al* (eds), *Internationalized Criminal Courts* (OUP, 2004) 141-156

⁴⁶² See Eleventh and Final Annual Report of the President of the Special Court for Sierra Leone (December 2003) <<http://www.rscsl.org/Documents/AnRpt11.pdf>> (Latest access 5 July 2018)

⁴⁶³ P Mochochoko and G Tortora, 'The Management Committee for the Special Court for Sierra Leone' in Cesare P R Romano *et al* (eds), *Internationalized Criminal Courts* (OUP, 2004) 141-156

⁴⁶⁴ G Robertson, *Crimes Against Human Rights: The struggle for global justice* (3rd edn, Penguin Books, 2006) 506

Although the SCSL's funding model was criticised in its initial stages, due to fears that its lack of financial and institutional support would deter it from achieving its goals⁴⁶⁵, this turned out not to be the case. This is because the bilateral nature of the SCSL made it as effective as any other *ad hoc* tribunal, for example, in overseeing the cost-effectiveness, running costs, efficiency, transparency and accountability of the budget. The management by a dedicated committee not only assisted in conducting speedy in-country trials, but also created the 'ability to implement more extensive outreach targeted at the local population,'⁴⁶⁶ thus making the SCSL special in its characteristic features.

3.2 Analysis of the SCSL special characteristics compared to the International Criminal Court

If we look now at the ICC's⁴⁶⁷ establishment, it is evidence that over the 'years since the Rome Conference, substantial progress has been made in producing important and detailed documents that will be crucial for the effective functioning of the Court.'⁴⁶⁸ For example, since the ICC's creation and operation over the years, it has already had a significant impact on the world of international criminal justice. The Rome Statute of the ICC may exercise jurisdiction over 'serious crimes'⁴⁶⁹ through any of three ways: if a situation is referred to the Prosecutor by a State party; a situation is referred to the Prosecutor by the UNSC under Chapter VII authority; or, the Prosecutor initiates an investigation.⁴⁷⁰ The ICC recognises the primacy and values of national courts as well as local prosecutions, since the ICC gives preference to solely domestic procedures as expressed clearly in its complementarity principle which hinged on the fact that 'the exercise of police power and penal law is state prerogative and that

⁴⁶⁵ S L Hodgkinson, 'Are AD Hoc Tribunals an effective tool for Prosecuting International Terrorism cases?' (2010) Volume 24 Emory International Law Review 515, 523. Also see C Schocken, 'The Special Court for Sierra Leone: Overview and Recommendations' (2002) Volume 20 Berkeley Journal of International Law 436, 436 – 462, See A Cassese, 'Report on the Special Court for Sierra Leone' (12 December 2006) Independent Expert 1,11

⁴⁶⁶ T Cruvellie, 'From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test' (2009) International Centre for Transitional Justice and Sierra Leone Court Monitoring Programme 1

⁴⁶⁷ See the Rome Statute of ICC established (17 July 1998) <<http://www.un.org/law/icc/index.html>> (Latest access 8 July 2018)

⁴⁶⁸ C Byron, D Turns, C Warbrick and D McGoldrick (ed), 'The preparatory Commission for the International Criminal Court' (2001) Volume 50 The International and Comparative Law Quarterly 420, 435

⁴⁶⁹ The Rome Statute of the ICC, Article 5 of 1998 defines 'serious crimes' as genocide, crimes against humanity, war crimes and it was considered that such a limited jurisdiction would facilitate widespread acceptance of the Rome Statute and accelerate the ratification process. State interests are also accommodated by the principle of complementarity, which gives priority to investigation and prosecution by national courts unless the State in question is unable or unwilling to do so.

⁴⁷⁰ See the Rome Statute of the ICC established (17 July 1998) <<http://www.un.org/law/icc/index.html>> (Latest access 8 July 2018)

therefore national courts should have primacy over the ICC.’⁴⁷¹ The ICC has been viewed as the only alternative approach to international criminal tribunals, and also as a last resort to be used when national sovereign jurisdictions fail to take effective action. Additionally, it is vital to state that even if ‘the ICC has jurisdiction over a set of crimes, it will never be able to try more than a handful of senior figures involved in any conflict’⁴⁷² due to cultural barriers like language and accountability as well as trying to reach out to local audiences, so may well rely on hybrid courts to bring about justice in post-conflict state building. The most effective way for the people to reconcile with the past and start building a future is to see that justice is done and seen to be done, but this may sometimes lie beyond the jurisdiction of the ICC. So, the introduction of hybrid courts⁴⁷³ like the SCSL model is a significant complement to the work of the ICC through which the development of criminal jurisprudence has already influenced the later practice of the ICC as well.⁴⁷⁴ For instance, some of the SCSL special characteristics appear to have been borrowed by the ICC. Firstly, and in relation to personal jurisdiction, the SCSL Statute indicated that it had the mandate to prosecute those ‘most responsible’ for serious violations of international law⁴⁷⁵ and this wording echoed that of the Statute and mandate of the SCSL.

The ICC can step in and provide an effective, independent, and universal process for vital cases in situations where the UN lacks the political will and capacity, or where the concerned sovereign state opposes the creation of a hybrid court. The ICC will be in a position to prosecute high profile, political and critical cases in a way that local or even hybrid courts could not, for example: the Lubanga Dyilo case⁴⁷⁶, the Kenyatta

⁴⁷¹ B S Brown, ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’ (1998) 23 Yale Journal of International Law 383, 423-424, see M H Arsanjani, ‘The Rome Statute of the International Criminal Court’ (1999) 93 American Journal of International Law 22, 22-43, see A Cassese, ‘ICC Some Preliminary Reflections’ (1999) Volume 10 European Journal of International Law 144, 144-171

⁴⁷² E Higonnet, ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform (2005) Paper 6 Student Scholarship Papers 1, 1-70

⁴⁷³ Ibid

⁴⁷⁴ For a detailed background on the history of how the International Criminal Court and the Rome Statute was drafted, established and entered into force 1 July 2002, see Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn, C H Beck Hart Nomos, 2008) 15-1904. Also see M C Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (Transitional Publishers, Inc, 1998), R S Lee (ed), *The International Criminal Court: the making of the Rome Statute : issues, negotiations and results* (Martinus Nijhoff 1999), R S Lee (ed), *The International Criminal Court: Elements of crimes and Rules of Procedures and Evidence* (Transitional Publishers, Inc., 2001), A Pellet, ‘Applicable Law’ in A Cassese (ed), *The Rome Statute of the International Criminal Court: A Commentary* (Volume 11, OUP, 2002) Introduction and W A Schabas (ed), *International Criminal Law* (Vol.1, Edward Elgar Publishing Limited, 2012)

⁴⁷⁵ See Statute of the SCSL, Article 1 (2002)

⁴⁷⁶ See *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 (10 July 2014). Lubanga was sentenced to a total of 14 years of imprisonment. A verdict and sentence confirmed by Appeals Chamber on 1 December 2014 <<http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf>>. Also see, Alex Whiting, Dynamic

case⁴⁷⁷ and the Gbagbo case⁴⁷⁸ and most recently the Dominic Ongwen cases. Despite the research can submit that the ICC has no binding obligation ‘over non-state parties.’⁴⁷⁹ Even after the ICC’s creation, ‘a majority of states will remain outside the jurisdiction of the ICC for a considerable period. I shall call this nature of the ICC “permanent voluntary multilateralism,” although it is possible that it might exert different kinds of functions.’⁴⁸⁰

In conclusion, this research can categorically posit that the SCSL had some unique characteristic features, as noted above, which have been emulated by the ICC and later hybrid courts.

3.3 Analysis of the SCSL special characteristics compared to the ICTY and ICTR, and other hybrid courts

The aim of this section is to compare the SCSL’s characteristics with those of the ICTY and ICTR, ICC and other hybrid courts. Comparing the SCSL’s model and judicial structures to those of the international criminal tribunals and other hybrid courts can both highlight unique features and help to assess the SCSL’s relative success in achieving justice and political stability, and contributing to sustainable peace and reconciliation and the rule of law.

3.3.1 The characteristic features of both the ICTY and ICTR

The ICTY and ICTR can usefully be considered together, as their logic and organisation are similar.⁴⁸¹ The applicable procedural laws of the two tribunals are also similar and are based on international standards of justice.

Jurisdiction and applicable laws: In 1993 the United Nations Security Council sought to justify the creation of the ICTY, mainly to meet short and medium term

Investigative Practice at the International Criminal Court (2013) Vol. 76, No 3 and 4 Law and Contemporary Problems 163, 165

⁴⁷⁷ See *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11 (13 March 2015) <<http://www.icc-cpi.int/iccdocs/PIDS/publications/KenyattaEng.pdf>> (Latest access 8 July 2018). Also see A Whiting, *Dynamic Investigative Practice at the International Criminal Court* (2013) Volume 76 Law and Contemporary Problems 163, 167

⁴⁷⁸ See *Prosecutor v Laurent Gbagbo at the ICC* (Arrest warrant issued 23 November 2011) (unsealed 30 November 2011) <http://www.amicc.org/docs/Gbagbo_QA.pdf> (Latest access 8 July 2018)

⁴⁷⁹ H Shinoda, ‘Peace- Building by the Rule of Law: An examination Intervention in the Form of International Tribunals’ (2002) Volume 17 International Tribunal Journal of Peace and Studies para 9 <<https://tinyurl.com/ya5droue>> (Latest access 20 October 2018)

⁴⁸⁰ Ibid para 9

⁴⁸¹ For detail commentary and analysis on ICTR legacy claim, see S Kendall and S M H Nouwen, ‘Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda’ (2016) Volume 110 The American Journal of International Law 212, 216-218

aims, in relation to the continuous conflict and the need for the restoration of peace.⁴⁸² The ICTY is a subsidiary organ of the Security Council and was created by the UNSC under its Chapter VII enforcement powers. The ICTY exercises jurisdiction with regards to ‘core crimes’ such as: serious violations of the 1949 Geneva Convention, war crimes, crimes against humanity and genocide.⁴⁸³ This is in contrast to the SCSL model which was empowered through the creation of a Statute to try individuals for crimes against humanity, war crimes, and also certain domestic crimes under Sierra Leonean law.⁴⁸⁴ One of the characteristics of the ICTY was its temporary *ad hoc* nature.⁴⁸⁵ Its jurisdiction was limited, but not consensual. It was compulsory authority and does not need to seek the consent of anybody in order to prosecute perpetrators.⁴⁸⁶ Judge Meron, the former President of the ICTY, stated that the ICTY ‘has always been mindful that its role is not that of a permanent court, but of an *ad hoc* entity intended to complete a task that is finite, albeit large and complex.’⁴⁸⁷ The ICTY’s temporary mandate to ‘prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute’⁴⁸⁸ was left open as the war was still raging on. In 1999, the mandate of the ICTY was expanded to include the conflict in Kosovo. Similarly, in 1994 in Rwanda (details of which will be discussed below) the UN created the ICTR with a mandate to stop ‘genocide and other serious violations of international humanitarian law and to take effective measures to bring to justice the persons who are responsible for them.’⁴⁸⁹ In order to accomplish the mandates of both tribunals and also to avoid any potential role conflict with the ICC in relation to

⁴⁸² ‘The establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of taking effective measures to bring to justice the persons responsible for them, and would contribute to the restoration and maintenance of peace.’ See the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/1993/704 (3 May 1993)

<http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf> (Latest access 6 July 2018)

⁴⁸³ See Statute of International Criminal Tribunal for the former Yugoslavia, Articles 2, 3, 4 and 5

(1993) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> (Latest access 6 July 2018)

⁴⁸⁴ See Statute of the SCSL (2002)

⁴⁸⁵ G Acquaviva, ‘Best Before the Date Indicated’: Residual Mechanisms at the ICTY’ (1 November 2009)

<<http://ssrn.com/abstract=1503923>> (Latest access 6 July 2018)

⁴⁸⁶ M Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judges Recollection* (OUP, 2012) 12

⁴⁸⁷ See Assessment and report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc S/2004/420 (24 May 2004)

<http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_18_nov2013_en.pdf> (Latest access 6 July 2018)

⁴⁸⁸ Ibid Article 1

⁴⁸⁹ See UN Doc. S/RES/955 (November 1994), United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda (1994) <<http://www1.umn.edu/humanrts/peace/docs/scres955.html>> (Latest access 6 July 2018)

exercising jurisdiction over crimes perpetrated within a territory of a state, the Statutes of both tribunals therefore ‘confer primacy for the ICTY and the ICTR in respect of national prosecutions.’⁴⁹⁰ This means that both the ICTY and ICTR can ask national authorities to defer local proceedings in order to make allowance for the tribunal to exercise its own jurisdiction. The ICTY began its function in mid-November 1993⁴⁹¹ and issued 44 indictments between 1994 and 1996.⁴⁹² The numbers of indictments reduced to 17 between 1996 to 1999 ‘with a similar number between 2000 and 2002.’⁴⁹³ The first trial took place in May 1996⁴⁹⁴ and the first judgment was made on 29 November 1996.⁴⁹⁵ Although the ICTY prosecutor concentrated his attention in 1997 on the indictment of high profile perpetrators, he failed to indict the Croatian President Franjo Tudman, the former Defence Minister Gojko Susak and the erstwhile Bosnian leader Mate Boban before their deaths.⁴⁹⁶ The ICTY’s temporary character increased its complexity, and impacted on its effectiveness, efficiency, and accountability.⁴⁹⁷ That notwithstanding, one can argue that the trials of the ICTY not only contributed to reconciliation through justice and developing a body of laws, but also ensured that justice was done and seen to be done, deterred further crimes, and contributed to political stability and sustainable peace.

The ICTR had its first trial on 9 January 1997, *The Prosecutor v Jean-Paul Akayesu*.⁴⁹⁸ This was considered one of the monumental cases in International Criminal Law. It is significant to note that the ICTR Statute concentrated on crimes committed in internal armed conflict, whilst the SCSL model hybrid included in its applicable law core crimes, but the Statute did not cover the crime of genocide, and instead included crimes of domestic nature. For instance, SCSL ‘had in its subject-

⁴⁹⁰ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictions Issues* (Hart, 2012) 37

⁴⁹¹ L A Barria and S D Roper, ‘How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR’ (2005) Volume 9 The International Journal of Human Rights 349, 357

⁴⁹² See First Indictment Issued (7 November 1994) <<http://www.icty.org/action/timeline/254>> (Latest access 6 July 2018)

⁴⁹³ L A Barria and S D Roper, ‘How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR’ (2005) Volume 9 The International Journal of Human Rights 349, 357

⁴⁹⁴ See *Prosecutor v Tadic* case, ICTY (1995) <<http://www.asylumlawdatabase.eu/en/content/icty-prosecutor-v-tadic-it-94-1-ar72-icty>> (Latest access 6 July 2018)

⁴⁹⁵ See *Prosecutor v Drazen Erdemovic*, CaseNo.IT-96-22-T (1996) <<http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts961129e.pdf>> (Latest access 5 July 2018)

⁴⁹⁶ L A Barria and S D Roper, ‘How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR’ (2005) Volume 9 The International Journal of Human Rights 349, 357 - 360

⁴⁹⁷ See the first Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (1991), see UNSC A/49/342-S/1994/1007 (29 August 1994) <<https://tinyurl.com/y84aa7yb>> (Latest access 6 July 2018)

⁴⁹⁸ See *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber 1, 2 (September 1998) <<http://www.icty.org>> (Latest access 6 July 2018)

matter jurisdiction recruitment of child soldiers and cruelty to children.’⁴⁹⁹ In the same vein, unlike the ICTY which included in its Statute the crime of genocide,⁵⁰⁰ the SCSL Statute did not include such a crime (in the Secretary-General’s report to the Security Council, the crime of genocide was viewed by both the Security Council and UN Secretary-General as not appropriate).⁵⁰¹ Also, unlike the ICTY and ICTR that are created under Chapter VII enforcement powers, the SCSL was established in pursuit of a bilateral agreement between the UN and the Sierra Leonean Government. This also represents the special characteristics of the SCSL model.

Institutional arrangements: The ICTY originally consisted of eleven judges; three sat in each of two Trial Chambers and five in the Appeals Chamber. A third Trial Chamber was created by Resolution 1166 (1998)⁵⁰² for the election of an additional three judges following ICTY Resolution 1320 (2000).⁵⁰³ It is significant to note that these two judges sat in both the ICTY and the ICTR Appeals Chambers, and with the understanding that the judges of the Appeals Chambers ICTY will also sit with the judges of the ICTR Chambers,⁵⁰⁴ but a third Trial Chamber was later added. The judges of both the ICTY and the ICTR are all international and elected by the UN General Assembly. This is in contrast to the SCSL where national judges were ‘included in the complement in chambers.’⁵⁰⁵

The original Prosecutor served on both Tribunals up until 5 September 2003⁵⁰⁶, then the ICTR had a different Prosecutor appointed by the UN. The Offices of the Prosecutors of the ICTY and ICTR were responsible for investigating all crimes over which they had jurisdiction, preparing indictments, and prosecuting defendants. The Prosecutor of the ICTY was originally the brain behind both the ICTY and the ICTR.

⁴⁹⁹ L. Johnson, ‘UN-Based International Criminal Tribunal’ 2008) Volume 36 Denv Journal of International Law and Policy 275, 278

⁵⁰⁰ See Article 4, Updated Statute of the ICTY (September 2009) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> (Latest access 5 July 2018)

⁵⁰¹ See UN Doc. S/2000/915 (4 October 2000), Report of the Secretary-General on the establishment of a Special Court for Sierra Leone (2000) <<http://www.rscsl.org/Documents/Establishment/S-2000-915.pdf>> (Latest access 6 July 2018)

⁵⁰² See UNSC S/RES/1166 (13 May 1998) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_1166_1998_en.pdf> (Latest access 6 July 2018)

⁵⁰³ See UNSC S/RES/1329 (2000) of 30 November (2000) <[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1329\(2000\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1329(2000))> (Latest access 26 April 2015)

⁵⁰⁴ Statute of the ICTR, Articles, 11 and 12 (1994) <http://www.icls.de/dokumente/ictr_statute.pdf> (Latest access 6 July 2018)

⁵⁰⁵ C C Jalloh, ‘Prosecuting those bearing greatest responsibility’: The lessons of the Special Court for Sierra Leone’ (2017) Volume 96 Marquette Law Review 863, 864

⁵⁰⁶ See UNSC S/RES/1503 (2003), 28 August (2003) <http://www.unmict.org/ictr-remembers/docs/res1503-2003_en.pdf> (Latest access 27 April 2015)

This was echoed by the Committee of Ministers of the Council of Europe who had this to say, ‘it is public prosecutors, not judges, who are primarily responsible for the effectiveness of the criminal justice system.’⁵⁰⁷ Each Tribunal had its own Registrar from the start, and s/he served both the Chambers and the Prosecutors.⁵⁰⁸

The Appeals Chamber was separate for each Tribunal, but the same judges sat in both Chambers. The ICTR has four Chambers in which judges adjudicate trials and motions before the ICTR: three lower Trial Chambers and one Appeals Chamber. All in all, the Chambers were composed of 16 permanent judges and 9 *ad litem* judges, who were appointed by the United Nations General Assembly. The ICTR has three permanent judges for each of the three Trial Chambers, and seven permanent judges for the Appeals Chamber, although only five of these seven permanent judges sat on the Appeals Chamber at any given time.⁵⁰⁹

With regard to the ICTY and ICTR, the tribunals only had international judges, prosecutors, registrar and staff appointed by the UN Secretary-General. In contrast, the SCSL included a mix of both national and international judges and prosecutorial staff. The first SCSL Prosecutor, Crane, stated that ‘50 per cent of (my) team were African and that 38 percent were Sierra Leonean.’⁵¹⁰

Location: In relation to location, both the ICTY and ICTR were created by the United Nations Security Council and located outside the concerned sovereign states. The approval of neither the former Yugoslavia nor Rwanda was sought. The ICTY was located in The Hague as it was already the site of the principal judicial organ of the UN, the International Court of Justice (ICJ). For the ICTR, it was located in Arusha, Tanzania with an office in Kigali. The SCSL model, on the other hand, was created by virtue of an agreement between the United Nations and the Sierra Leonean Government and located in Sierra Leone where the crimes were committed.

⁵⁰⁷ A M Donner, ‘Enhancing the Legitimacy and Accountability of the Prosecutorial Discretion at the International Criminal Court’ (2003) Volume 97 The American Journal of International Law 510, 512

⁵⁰⁸ See Statute of the ICTY, Article 32 (1993)

<http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> (Latest access 6 July 2018)

⁵⁰⁹ Statute of the ICTR, Articles, 11 and 12 (1994) <http://www.icls.de/dokumente/ict_r_statute.pdf> (Latest access 6 July 2018)

⁵¹⁰ See the SCSL first Chief Prosecutor David Crane on Tuesday 27 May 2003 addressed a meeting hosted by friends of Sierra Leone (FOSL) in Washington. <<http://www.theperspective.org/may2003.html>> (Latest access 6 July 2018)

Funding: With regards to funding, the ICTY⁵¹¹ and the ICTR⁵¹² were created by the Security Council under Chapter VII of the United Nations Charter.⁵¹³ The two tribunals were funded by organs of the UN, whilst the SCSL⁵¹⁴ was financed through voluntary contributions by interested UN member states. This is another indication of the SCSL's status as a unique hybrid model court.

The completion strategy of both ICTY and ICTR: In his 1993 UN report, the Secretary-General alluded to the fact that the lifespan of the ICTY would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia.⁵¹⁵ As an *ad hoc* tribunal, the ICTY was expected to have completed its work within a short timeline. The President of the ICTY put in a proposal in June 2002⁵¹⁶ through Resolution 1503 (2003) of August 2003, calling on both the ICTY and the ICTR to 'take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010.'⁵¹⁷ However it became clear that both the ICTY and the ICTR face many challenges in executing their completion strategy because (trials at both tribunals are still pending.)⁵¹⁸ It should be noted that during the ICTR's mandate it has indicted 93 leading persons. Out of these 93, '61 were convicted for genocide, crimes against humanity or war crimes; 14 were acquitted at trial or on appeal; 2 indictments were withdrawn prior to trial; 3 accused died prior to or during trial; and 10 have had their cases referred to national jurisdictions for trial.' There are six who are at large out of ten referred to national jurisdictions. A further three fugitives are

⁵¹¹ See Statute of the ICTY, Article 32 (1993)

<http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> (Latest access 6 July 2016)

⁵¹² Statute of the ICTR, Article 30 (1994). The ICTR Statute stipulates that, 'the expenses of the International Tribunal for Rwanda shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.' <http://www.icls.de/dokumente/ict_r_statute.pdf> (Latest access 6 July 2018)

⁵¹³ J Dieckmann and C Kerll, 'UN Ad Hoc Tribunals Under Time Pressure- Completion Strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defence' (2008) Volume 8 International Criminal Law Review 87, 88-89

⁵¹⁴ See Article 6 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002) <<http://www.rscsl.org/Documents/scsl-agreement.pdf>> (Latest access 6 July 2016)

⁵¹⁵ See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/1993/704 (3 May 1993) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf> (Latest access 6 July 2018)

⁵¹⁶ See Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2002/678, (19 June 2002) <<https://tinyurl.com/yd9kgjmg>> (Latest access 6 July 2018)

⁵¹⁷ See Security Council Resolution 1774 (2007), UN Doc. S/RES/1774 (2007), (14 September 2007) <<http://www.worldlii.org/int/other/UNSC/2007/36.pdf>> (Latest access 6 July 2018)

⁵¹⁸ See Statement by Justice H B Jallow Prosecutor UN-ICTR and UN-MICT to the Nations Security Council (June 2013) paras 2-12 <<https://tinyurl.com/y72hxygg>> (Latest access 20 October 2018)

awaiting judicial determination.⁵¹⁹ By Security Council Resolution 1966 (2010)⁵²⁰ of 22 December 2010, the completion date for both tribunals was extended to 31 December 2014.

When evaluating the two tribunals some critics have maintained that neither the ICTY nor the ICTR have been successful in contributing to peace building and accountability.⁵²¹ In both cases, some commentators have also maintained that locating the two tribunals some distance outside the country where the crimes were committed goes against the usual criminal law norms. Also, it claimed due to inefficiency, running costs, alleged corruption, and cultural and physical inaccessibility, both the ICTY and ICTR failed in their outreach programmes and in attempts ‘to strengthen a local culture of justice.’⁵²²

The ICTY started the transfer of its judicial documents to the International Residual Mechanism for Criminal Tribunals on 27 January 2015.⁵²³ In this regard therefore, this thesis will argue that although the ICTY and the ICTR have not completely achieved their mandate, they have provided more justice and security than national judicial systems have done.⁵²⁴

In relation to the SCSL, the research can argue that by virtue of the SCSL special characteristics, the SCSL model enjoyed greater domestic legitimacy and legacy as well as greater ability to build local capacity for justice than the more distant ICTY and ICTR.

We will now compare the SCSL’s characteristics and judicial structures with other hybrid courts.

⁵¹⁹ See Statement by Justice H B Jallow Prosecutor UN-ICTR and UN-MICT to the Nations Security Council (June 2013) paras 2-12 <<https://tinyurl.com/y72hxygg>> (Latest access 20 October 2018)

⁵²⁰ UN Doc S/RES/1966 (2010), adopted by the Security Council at its 6463rd meeting, on (22 December 2010) <<http://www.icty.org/sid/10016>> (Latest access 6 July 2018)

⁵²¹ A Roberts, ‘Implementation of the Laws of War in the Late-20th Century Conflict Part 11’ (1998) Vol. 29 Security Dialogue 137, 277

⁵²² E Higonnet, ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform’ (2005) Paper 6 Student Scholarship Papers 1, 62

⁵²³ See International Law Brief, ‘ICTY and ICTR Moving Towards Closure’ (January 2015) para 1 <<https://tinyurl.com/yczpnpb9>> Latest access 20 October 2018)

⁵²⁴ See Statement by Justice H B Jallow Prosecutor UN-ICTR and UN-MICT to the Nations Security Council (June 2013) paras 2-12 <<https://tinyurl.com/y72hxygg>> (Latest access 20 October 2018), Statement by Justice Hassan B Jallow, Chief Prosecutor, ICTR and MICT on the Commemoration of the 20th Anniversary of the Rwandan Genocide (April 2014) paras 6 and 7 <<https://tinyurl.com/y9b8vt4v>> (Latest access 20 October 2018)

3.4 The characteristic features of the Special Tribunal for Lebanon

Like the SCSL, the STL was created in pursuit of UN Security Resolution 1664 (2006) of 29 March,⁵²⁵ between the international community and the Lebanese Government. This means that there is shared ownership and responsibility between the Government of Lebanon and the international community. The STL⁵²⁶ – sometimes classed as a hybrid court – established in Lebanon but based in the Netherlands has been described by the Secretary-General of the UN as an international tribunal because its international characteristics outweighed the national ones.⁵²⁷ For example, ‘it deviates from most of the other hybrid tribunals in that it operates outside of the national system of justice, matched only by the SCSL.’⁵²⁸

Jurisdiction and applicable laws: The STL and the national courts have concurrent jurisdiction and the STL shall have primacy over the national courts.⁵²⁹ The STL has jurisdiction only over domestic crimes under the Lebanese Penal Code. The STL will have to adopt its rules of procedure and evidence in light of the Lebanese Code of Criminal Procedure. As a result of this, the STL is different from the SCSL and other hybrid courts because it does not charge defendants with international crimes. Although it is a tribunal of an ‘international character, the crimes in its jurisdiction all flow from the Lebanese Penal Code and relate to terrorist attacks and assassinations.’⁵³⁰

Unlike the SCSL and other tribunals and hybrid courts established after conflict with the sole aim of addressing the issues relating to war crimes, crimes against humanity and genocide, the STL has jurisdiction only over acts of ‘terrorism, crimes and offences against life and personal integrity, criminal participation and conspiracy’ under the Lebanese Criminal Code.⁵³¹ Also, another distinct and unique feature of the

⁵²⁵ See Statute of Special Tribunal for Lebanon (STL) (21 December 2007) <<http://www.stl-tsl.org/en/documents/stl-documents>> (Latest access 6 July 2018)

⁵²⁶ See UN Doc S/RES/1757 (2007), Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, adopted by the Security Council at its 5685th Meeting on (30 May 2007) <<http://www.stl-tsl.org/en/documents/un-documents/un-security-council-resolutions/security-council-resolution-1757>> (Latest access 6 July 2018)

⁵²⁷ See Statute of Special Tribunal for Lebanon (STL), Article 8 (21 December 2007) Agreement between the Kingdom of the Netherlands and the United Nations concerning the Headquarters of the Special Tribunal for Lebanon <<http://www.stl-tsl.org/en/documents/cooperation/STL-Headquarters-Agreement?tmpl=component&print=1>> (Latest access 6 July 2018)

⁵²⁸ J E Wetzel and Y Mitri, ‘The Special Tribunal for Lebanon: A Court “Off the Shelf” for a Divided Country’ (2008) 7 The Law and Practice of International Courts and Tribunals 86, 87

⁵²⁹ See Statute of Special Tribunal for Lebanon (STL), Article 4 (1) (21 December 2007)

⁵³⁰ M S McDougal Lecture and L D Johnson, ‘UN- Based International Criminal Tribunals: How they Mix and Match’ (2008) Volume 36 Denv Journal of International Law and Policy 275, 278

⁵³¹ This is in accordance with Article 2(a) of the STL Statute

STL which differentiates it from other international criminal tribunals and hybrid courts, including the SCSL model, is that it allows trial in absentia.⁵³²

On 16 January 2014, after considerable delay and several months of preparations, the STL Prosecutor began its first case, *Prosecutor v Ayyash, Badreddine, Oneissi and Sabra*;⁵³³ for their respective roles in the 14 February 2005 attack in Beirut.

Institutional arrangements: The STL, just like the SCSL, has a mixture of both international and national personnel. Most of its judges were internationally appointed by the UN Secretary-General in consultation with the Government of Lebanon. The Chief Prosecutor and Registrar were also internationally appointed by the UN Secretary-General, but the Deputy Prosecutor was appointed by the Government of Lebanon.⁵³⁴

Location: Unlike the SCSL hybrid model that was located in Sierra Leone where the crimes were committed, the STL hybrid was located near The Hague, rather than in Beirut, Lebanon for security reasons.⁵³⁵ Despite this, the STL, like the SCSL, engaged in outreach programmes to the Lebanese population, explaining the role and work of the tribunal.

As with the SCSL model, the STL also received voluntary funding for its operation from interested states. The STL's 'voluntary contributions from States make up 51 per cent of the STL's budget, with the Beirut Government financing the remainder.'⁵³⁶ Since the start of the STL, 28 countries including the European Union have made financial contributions either through voluntary contributions or in-kind support.⁵³⁷

⁵³² See the *Prosecutor v Salim Jamil Ayyash, Mustafa Amine, Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra*, STL-II-OI/TC (1 February 2012) on the decision to hold trials in absentia. <file:///C:/Users/13069587/Downloads/20120201_F0112_PUBLIC_TC_Decision_Trial_inAbsentia_Filed_EN.pdf> (Latest access 6 July 2018)

⁵³³ See *Prosecutor v Ayyash, Badreddine, Oneissi and Sabra*; Ayyash et al. (STL-11-01). This involves Messrs Salim Jamil Ayyash, Mustafa Amine Baddine, Hussien Hassan Oneissi and Assad Hassan Sabra. <<http://www.stl-tsl.org/en/the-cases/stl-11-01>> (Latest access 6 July 2018)

⁵³⁴ See Statute of Special Tribunal for Lebanon (STL) Article, 1(21 December 2007)

⁵³⁵ See STL Article 3 (21 December 2007) which stipulates that the 'the Tribunal shall have its seat in the Netherlands.' Also see J Erik Wetzel and Y Mitri, 'The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country' (2008) Volume 7 The Law and Practice of International Courts and Tribunals 86, 109. See STL Article 3 (21 December 2007) which stipulates that the 'the Tribunal shall have its seat in the Netherlands.'

⁵³⁶ Ibid 1, 32

⁵³⁷ See the STL Present's (David Baragwanath) report to the Secretary- General called, 'Fifth Annual Report 2013-2014' (10 March 2014) <<http://www.stl-tsl.org/en/documents/stl-documents/presidents-reports-and-memoranda/2984-fifth-annual-report-2013-2014>> (Latest access 8 July 2018)

3.5 The Special Panels for Serious Crimes of East Timor

East Timor⁵³⁸ experienced a bitter period of violence in 1999 surrounding a referendum on independence from Indonesia. In response to the conflict and violence, a number of fact-finding investigations⁵³⁹ concluded that there was substantial evidence of systematic and widespread attacks⁵⁴⁰ and abuses of human rights leading to claims of crimes against humanity on the people of East Timor. The UN agreed to the creation of an international panel in East Timor, and a national process in Indonesia, with the condition that the UN would monitor the process ‘towards a credible response in accordance with international human rights principles.’⁵⁴¹ The East Timorese judicial system was non-existent when the UNTAET was created. ‘There were fewer than ten lawyers in the country. The court buildings were burned and looted, the prospects were dismal.’⁵⁴²

Jurisdiction and applicable laws: The SPSC was created through UNTAET Regulations 2000/11 (6 March 2000)⁵⁴³ and 2000/15 (6 June 2000), which contained the enabling legislation for investigation, prosecution, and sentencing. The law for the SPSC trials was derived from the ICC’s Rome Statute, which provided one of the first tests of the various definitions contained within the Statute.⁵⁴⁴ Unlike the SCSL model, the SPSC regulation did not mandate a positive law direction in relation to what period prosecutions were to take place or to whom, or how many should be prosecuted. Also, and in relation to jurisdictional matters, Regulation No. 2000/15 was a mirror of the Statutes of both the ICTY and ICTR. It must be said that from the start of the SPSC operation, commentators have identified several failures of the tribunal. This was

⁵³⁸ I use the name East Timor throughout this thesis and chapter for purposes of consistence irrespective of the fact the official name of the territory of East Timor changed in November 2002 to Timor-Leste.

⁵³⁹ See UN Office of the High Commissioner for Human Rights ‘Report of the International Commission of Inquiry on East Timor to the Secretary-General’ (31 January 2000) <<http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/A.54.726,+S.2000.59.En>> (Latest access 8 July 2018)

⁵⁴⁰ See *Prosecutor v Kupreskic*, Case No. IT-95-16-T, Judgment, (14 January 2000) <<http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>> (Latest access 8 July 2018)

⁵⁴¹ Ibid See Secretary-General’s ‘Identical Letters dated 31 January 2000 from the UN Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights.’ <<http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/A.54.726,+S.2000.59.En>> (Latest access 8 July 2018)

⁵⁴² M C Bassiouni, *An Introduction International Criminal Law* (2 edn revised edition, Martinus Nijhoff Publishers / Brill Academic, 2012) 559

⁵⁴³ See UN SC S/RES/1410 (2002) (17 May 2002), UNTAET Regulation 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences, June 6, 2000 (2002) <<http://unsr.com/en/resolutions/1410>> (Latest access 8 July)

⁵⁴⁴ S D Roper and L A Barria, ‘Assessing the Record of Justice: A Comparison of Mixed International Tribunals versus Domestic Mechanisms for Human Rights Enforcement’ (2005) Volume 4 Journal of Human Rights 521, 528

collaborated by the report of the Secretary-General to the UN: ‘A serious lack of resources, both human and material, has hampered the investigative work of the Serious Crimes Investigation Unit. This has prevented investigations being undertaken in connection with the overwhelming majority of crimes against humanity and war crimes committed during 1999.’⁵⁴⁵

Before the end of its mandate, 20 May 2005,⁵⁴⁶ the SPSC had indicted a total of 391 individuals for crimes against humanity committed during and after the 1999 referendum. By early 2005, the SPSC had ‘completed 55 trials mostly involving relatively low-level defendants. In the course of these trials, 84 individuals were convicted and 3 acquitted.’⁵⁴⁷ It is understood that ‘nine indictments involving twenty defendants and one appeal are still pending’,⁵⁴⁸ with ‘sentences ranging from eleven months to thirty-three years.’⁵⁴⁹

Institutional arrangements: The SPSC has both international and national judges and prosecutors appointed by the Transitional Administrator upon non-binding recommendation of the Transitional Judicial Service Commission (TJSC), whereby a majority of East Timorese sit along with UNTAET personnel.⁵⁵⁰ The East Timorese judges, prosecutors and defence counsel were appointed by the TJSC. International judges were appointed by Regulation 2000/15 in accordance with existing laws on appointments.⁵⁵¹ The TJSC is meant to be a major player in the appointments process for internationals too, even though its recommendations can be ignored. This was reinforced by Regulation 2000/25, under which it is stressed that the TJSC ‘shall receive and review individual applications of international legal professionals for appointment in judicial or prosecutorial offices’ and ‘may conduct an interview with

⁵⁴⁵ See Report of the High Commissioner for Human Rights on the Situation of Human Rights in East Timor, U N Doc. E/CN.4/2001/37

⁵⁴⁶ See East Timor – UNMISET – Mandate. The UNMISET successfully concluded its mandate in East Timor. It was succeeded by a small follow-on political mission- the United Nations Office in Timor-Leste (UNOTIL), which was created by the UN Security Council ‘to ensure that underpinnings of a viable State are firmly in place in that country.’ <<http://www.un.org/en/peacekeeping/missions/past/unmiset/mandate.html>> (Latest access 8 July 2018)

⁵⁴⁷ The Special Panels for Serious Crimes – Deli, East Timor <<http://wcsc.berkeley.edu/east-timor/#Special-Reports>> (Latest access 8 June 2018)

⁵⁴⁸ L A Barria and S D Roper, ‘How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR’ (2005) 9 No 3 The International Journal of Human Rights 521, 530

⁵⁴⁹ See Human Rights Watch, Justice Denied for East Timor (December 2002)

<<https://www.globalpolicy.org/component/content/article/163/29176.html>> (Latest access 8 July 2018)

⁵⁵⁰ See UNTAET Regulation No. 1999/3 on the Establishment of a Transitional Judicial Service Commission, UNTAET/REG/1999/3

⁵⁵¹ See UNTAET Regulation No. 1999/3, UNTAET Regulation 2000/11, *supra* note 67, s. 10.3, UNTAET Regulation 2000/15

each candidate.’⁵⁵² All of UNTAET’s international judges were directly appointed to office by the Transitional Administrator at the recommendation of the Ministry of Judicial Affairs, entirely bypassing the TJSC. This is in sharp contrast to the SCSL model where the UN Secretary- General appointed the international judges, prosecutor and registrar, whilst the Sierra Leone Government was allowed to appoint national personnel without due influence from the UN. This was another clear illustration of the SCSL’s special characteristic nature.

Location: Similar to the SCSL, the SPSC is located in an affected state, East Timor, so that East Timorese can access the trials and proceedings of the court, giving a sense of ownership and belonging. Unlike the SCSL which generated Outreach Programmes which helped to educate the Sierra Leonean population about the work of the Court, the SPSC has been criticised for not engaging with the people of East Timor. As one commentator puts it, ‘the domination of international personnel and lack of outreach is likely to have played a contributing role in the lack of attendance by local communities.’⁵⁵³

Funding: In terms of funding, the SPSC prosecutorial team, which constituted a Serious Crimes Unit (SCU), was created within East Timor’s Office of the Prosecutor-General but staffed and funded by the UN budget.⁵⁵⁴ This is also in contrast with the SCSL, which was funded through voluntary donations by UN member states.

Completion strategy: The greatest challenge to the SPSC was not how they were operating, but that their work was prematurely shut down. For example, since the UN ended support for SPSC trials and prosecutions on 19 May 2005, no further trials have taken place or been concluded. This is unlike the SCSL model which represented the first model to complete UN mandate, trials, and prosecutions, and see that justice was done and seen to be done, while also providing a closure and continuation strategy.

⁵⁵² See UNTAET Regulation No. 2000/25 on Amending Regulation No. 1999/3, UNTAET/ REG/2000/25

⁵⁵³ A Ryan, ‘Special Panels for Serious Crimes of Timor-Leste: Lesson for the Region’ (2007) Asia Advocacy Officer for Progression (formerly the Catholic Institute for International relations)
1<<http://www.upf.pf/IMG/pdf/rjpcrim05.pdf>> 93,115(Latest access 8 July 2018)

⁵⁵⁴ See UNTAET Regulation 2000/16 of 6 June 2000 on the organisation of the Prosecution Service in East Timor. <<https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/8D973019EC2F15E4C1257091003406EE>> (Latest access 8 July 2018)

The SPSC hybrid model Panels in East Timor were created as a result of legislative action by transitional administrations⁵⁵⁵, in contrast to the SCSL model which was established by treaty agreement between the Government of Sierra Leone and the UN. Despite this, the SPSC is similar to the SCSL, in the sense that the SPSC hybrid model consisted of national and international judges and primacy over national courts with respect to crimes within their exclusive jurisdiction.⁵⁵⁶ However, as noted above, there were differences in funding, outreach, and closure and continuation.

3.6 The Extraordinary Chambers in the Courts of Cambodia (ECCC)

The Cambodia situation was a singular example of a regime that combined ‘extremist ideology with ethnic animosity and diabolical disregard for human life.’⁵⁵⁷ After the atrocious armed conflict of the late 1970s, with some of the most heinous crimes of the Pol Pot era in Cambodia⁵⁵⁸, the ability to hold the perpetrators accountable was delayed initially by two decades. This was largely due to disagreements over how best to move the country and its people forward.⁵⁵⁹ Similarly to the SCSL mode of establishment, the ECCC was created under the agreement of the Government of Cambodia and the United Nations in 2003⁵⁶⁰, and started its operation in 2006.

Jurisdiction and applicable laws: The mandate of the ECCC is to prosecute ‘senior leaders of Khmer Rouge and those most responsible’ for crimes under international

⁵⁵⁵ See UNTAET Regulation 2000/16 of 6 June 2000 on the organisation of the Prosecution Service in East Timor. <<https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/8D973019EC2F15E4C1257091003406EE>> (Latest access 8 July 2018)

⁵⁵⁶ See JSMP Report on ‘Digest of the Jurisprudence of the Special Panels for Serious Crimes’ (Dili, Timor Leste, April 2007) <http://www.locjkt.or.id/Timor_E/new/pdf/Digest%20of%20the%20Jurisprudence.pdf> (Latest access 8 July 2018)

⁵⁵⁷ See Cambodian Genocide Program <<http://chnm.gmu.edu/worldhistorysources/d/153/whm.html>> (Latest access 8 July 2018)

⁵⁵⁸ Between April 1975 and January 1979, an estimated 1.7 million people perished under Khmer Rouge rule. For general commentary, see J D Ciorciari and Y Chhang, ‘Documenting the Crimes of Democratic Kampuchea’ in Jaya Ramji & Beth Van Schaack, (eds), *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence before the Cambodian Courts* (Edwin Mellen Press, 2005) 240-86. Also see S Linton, Cambodia, ‘East Timor, and Sierra Leone: Experiments in International Justice’ (2001) Volume 12 Criminal Law Forum 186 -246, See Suzannah Linton, ‘Putting Cambodia’s Extraordinary Chambers into Context’ (2007) Volume 11 Singapore Year Book of International Law 195-295

⁵⁵⁹ R Jasini and V Phan, ‘Victim participation at the Extraordinary Chambers in the Courts of Cambodia: are retributive and restorative principles enhancing the prospect for justice?’ (2011) Volume 24 Cambridge Review of International Affairs 380,

⁵⁶⁰ See Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (ECCC Agreement) (June 2003) <http://www.eccc.gov.kh/sites/default/files/legaldocuments/Agreement_between_UN_and_RGC.pdf> (Latest access 8 July 2018)

and domestic law committed between 17 April 1975 and 6 January 1979,⁵⁶¹ namely: 1) senior leaders of Democratic Kampuchea; and 2) those believed to be most responsible for grave violations of national and international law. The mandate to prosecute and investigate was also proportionally shared between Cambodian and international co-prosecutors and co-investigating judges.⁵⁶² The ECCC had jurisdiction over crimes from the 1956 Penal Code of Cambodia (including homicide, torture and religious persecution) and international crimes such as war crimes, crimes against humanity, genocide and grave breaches of the Geneva Conventions, the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations.⁵⁶³

The ECCC, a hybrid judicial body, applies both Cambodian and international law, using international law to charge alleged perpetrators for crimes that are not prosecutable under Cambodian law, such as crimes against humanity and genocide. In addition, the ECCC follows Cambodian procedural rules,⁵⁶⁴ that is, it is part of the Cambodian domestic judicial system. This is in sharp contrast to the SCSL model which was independent and not linked to the domestic judicial system, making the SCSL more impartial, transparent and accountable. However, in both cases, the two hybrid courts exercise jurisdiction in accordance with international standards of justice and fairness, and follow the due process of law. This is because the ECCC has the closest personal jurisdiction that is similar to that of SCSL model. This similarity can be identified in Article 1 (1) of Statute of the ECCC above which made provision for the prosecution of ‘senior leaders... and those most responsible for the crimes.’⁵⁶⁵ This wording is ultimately an ‘improvement on what was used in Sierra Leone in the sense that the first part of the phrase specifically identifies senior leaders while the second

⁵⁶¹ See Article 1, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) <<https://tinyurl.com/y7d2cq12>> (Latest access 8 June 2018)

⁵⁶² P McAuliffe, ‘Hybrid Tribunals at Ten: How International Criminal Justice’s Golden Child became an Orphan’ (2011) Volume 7 Journal of International Law and International Relations 1, 27

⁵⁶³ See Article 5, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) <http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf> (Latest access 4 May 2015)

⁵⁶⁴ L Johnson, ‘UN-Based International Criminal Tribunal’ 2008) Volume 36 Denv Journal of International Law and Policy 275, 278

⁵⁶⁵ See Article 1, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) <http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf> (Latest access 8 July 2018)

part mentions those most responsible.’⁵⁶⁶ The ECCC drawing on the SCSL’s legal jurisprudence thus also demonstrates how the SCSL is special in its characteristics features.

In relation to victims’ active participation, the ECCC is the first tribunal using the Civil Law system which sustained victims’ active participation in the judicial proceedings as Complainants and Civil Parties. While Complainants are those who inform the Co-Prosecutors about crimes they believe have been committed, Civil Parties are those who have suffered harm directly from the crimes investigated by the court and wish to seek ‘moral and collective’ reparations.⁵⁶⁷

The ECCC is currently dealing with four cases: Case 001: Defendant: *Kaing Guek Eav alias Duch*,⁵⁶⁸ Case 002: Defendants: *Khieu Samphan, Ieng Sary* (deceased)⁵⁶⁹, *Nuon Chea, Ieng Thirith* ⁵⁷⁰(currently under judicial supervision after having been found incapable to stand trial), Case 003, Defendants: The identities of Suspects have not been made public, Case 004, Defendants: The identities or suspects have not been made public.⁵⁷¹ The Court has completed its first case against *Kaing Guek Eav alias Duch*, ⁵⁷²the former head of the infamous secret prison at Tuol Sleng (‘Case 001’) and is now in the midst of a second trial against a pair of senior surviving Khmer Rouge leaders (‘Case 002’) – former Deputy Secretary of the Communist Party of Kampuchea, Nuon Chea, and former President of the State Presidium, Khieu Samphan.⁵⁷³

Institutional arrangements: Similar to the SCSL model, the ECCC is composed of international and Cambodian laws, with a minority of international judges and a majority of domestic judges (purely local), an international Prosecutor, and an international Head of Administration. The ECCC is composed of three Chambers: the

⁵⁶⁶ C C Jalloh (ed), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013) 620

⁵⁶⁷ R Jasini and V Phan, ‘Victim participation at the Extraordinary Chambers in the Courts of Cambodia: are retributive and restorative principles enhancing the prospect for justice?’ (2001) Volume 24 Cambridge Review of International Affairs 380,

⁵⁶⁸ See the ECCC Court Report, Issue 84 (April 2015) <<http://www.eccc.gov.kh/en/publication/court-report-april-2015>> (Latest access 8 July 018)

⁵⁶⁹ Ibid

⁵⁷⁰ Ibid

⁵⁷¹ See the Extraordinary Chambers in the Courts of Cambodia at a Glance (April 2014) <<http://www.eccc.gov.kh/en/about-eccc/introduction>> (Latest access 8 July 2018)

⁵⁷² Ibid

⁵⁷³ Ibid

Pre-Trial Chamber, the Trial Chamber, and the Supreme Court Chamber.⁵⁷⁴ In the Pre-Trial Chamber, three Cambodian and two international judges hear motions and appeals from parties as an investigation is being conducted by the Co-Investigating Judges.⁵⁷⁵ There are two Co-Investigating Judges for each ECCC case, one Cambodian and one international; they carry out preliminary investigations into matters submitted to them by the Co-Prosecutors.⁵⁷⁶ Depending on the outcome of their investigation, the Co-Investigating Judges will either file an indictment and proceed with the trial or dismiss the matter.⁵⁷⁷ The Co-Prosecutors, one Cambodian and one international, head the Office of the Co-Prosecutors, which recruits both Cambodian and international staff. They are independent of the ECCC and carry out preliminary investigations, submit cases to the Co-Investigating Judges, and prosecute cases at all stages of the ECCC.⁵⁷⁸

The composition of mix judges, prosecutors and staff of the ECCC which is almost similar to the SCSL model also shows its special characteristics.

Location: The Extraordinary Chambers established in the trial court and the Supreme Court Chamber are located in Phnom Penh.⁵⁷⁹ The ECCC resides within the Cambodian legal system, but it has a specialised function and mandate. Despite the relatively clear lessons provided by the outreach weaknesses of preceding tribunals and hybrid courts, the ECCC was designed without explicit institutional provision for outreach.⁵⁸⁰

Funding: The financial situation at the ECCC is an improvement on the SPSC in East Timor, which was crippled from its conception by a lack of funds. The ECCC adopted the SCSL model of funding, which is through voluntary contributions⁵⁸¹ and is

⁵⁷⁴ See Article 9, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) <http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf> Also see Chambers, Judicial Offices: The Extraordinary Chambers in the Courts of Cambodia at a Glance (April 2014) <<http://www.eccc.gov.kh/en/about-eccc/introduction>> (Latest access 8 July 2018)

⁵⁷⁵ S Linton, 'New approaches to international justice in Cambodia and East' (2002) Volume 84 RICR Mars 93, 98 - 99

⁵⁷⁶ Ibid

⁵⁷⁷ Ibid

⁵⁷⁸ Ibid

⁵⁷⁹ See Article 4, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) <http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf> (Latest access 8 July 2018)

⁵⁸⁰ J D Ciorciari and A Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal' (2013) Michigan Journal of International Law 1-77

⁵⁸¹ See ECCC Financial Outlook (May 2014), Please note that the 'data are as of 31 May 2014, exclusive of outstanding/tentative pledges and Cambodia's in-kind contribution of \$9.5 million. UNAKRT's fund advance to

different both from the ICTY and ICTR tribunals that are funded by organs of the UN general budget, as well as the ICC, which is funded by assessed contributions from parties to the Rome Statute. Similar to the SCSL and STL, the ECCC is funded mainly by voluntary contributions, with the Government making up the balance. Despite this, the ECCC has difficulty in raising funds because its funding scope, which relies on voluntary donor contributions to each side of the Court, has rendered it vulnerable to under-funding. Successive funding shortfalls have strained morale and led to a strike by unpaid national staff. The fact that the Cambodian judicial system allows for a split national/international structure has allegedly undermined international justice.

However, debate continues about the timing and scope of the trials. Leading human rights advocates argue that the trials are long overdue, that perpetrators of grievous abuses remain free, and that the Cambodian Government and Prime Minister have been obstructing the work of the ECCC.⁵⁸² The ECCC differs from other hybrid courts in some ways. The ECCC has a strong basis in domestic law and is the only hybrid tribunal with a majority of domestic judges.⁵⁸³

One can conclude by stating that, despite so much delay and no completion strategy, the door to justice in Cambodia still remains open, although it is very doubtful that the ECCC will ‘produce anything but a few symbolic trials...’⁵⁸⁴

Completion strategy: The ECCC has no completion strategy, which is in complete contrast to the SCSL model that had a transfer and closure strategy – adding to its special characteristics. The ECCC has been criticised for its cost, functionality, objectivity, and independence as a transitional justice mechanism. Through it all, closure and justice have remained elusive for many Cambodians.

3.7 Extraordinary African Chambers (EAC)

More recently, another new tribunal called Extraordinary African Chambers (EAC), also labelled as a hybrid court, is a ‘special ad hoc procedure of an international character’ created on 22 August 2012 pursuant to an agreement between Senegal and

the national side comes from the contributions to the international side, which are already included in the amount of respective donors. As the national side treats the advance fund as a donation, \$3,255,000 is counted twice in the grand total of \$216,827,940 (Source: ECCC Budget and Finance Offices’
<<http://www.eccc.gov.kh/sites/default/files/Financial%20outlook%20May%202014.pdf>> (Latest access 8 July 2018)

⁵⁸² S Linton, ‘Putting Cambodia’s Extraordinary Chambers into Context’ (2007) Volume 11 Singapore Year Book of International Law 195, 213-214

⁵⁸³ Ibid

⁵⁸⁴ M C Bassiouni, *Introduction to International Criminal Law* (2 edn, Kluwer Law International, 2012) 552

the African Union (AU), established within the Senegalese judicial system.⁵⁸⁵ The EAC was officially inaugurated on 8 February 2013. The mandate of the Statute of the new EAC is to prosecute the ‘person or persons most responsible’ for international crimes (genocide, crimes against humanity, war crimes and torture) committed in Chad between 7 June 1982 and 1 December 1990.⁵⁸⁶ Like the SCSL, the EAC trial has its seat in Senegal and has a mixed composition of Senegalese judges and judges from other AU countries. The EAC had determined and concluded its first experimental prosecutorial case, the *Habré* case, which began in July 2015 and completed in February 2016, after it heard a testimony from 93 witnesses.⁵⁸⁷ In May 2016, *Habré* was found guilty and sentenced to life in prison Dakarr, Senegal.⁵⁸⁸ In April 2017, the Appeal court confirmed the verdict and ordered ‘Habré to pay approximately 123 million euros in victim compensation.’⁵⁸⁹

The legal arguments and brief analysis relating to Habré’s conviction are: 1) *Habré* is the ‘first former head of state to be convicted of crimes against humanity’ by an African court.⁵⁹⁰ According to Human Rights Watch, *Habré* is also the ‘first head of state to be personally convicted of rape,’⁵⁹¹ as well as the first trial of universal jurisdiction case to be determined and tested in Africa⁵⁹²; 2) arguably, the trial and the conviction provided ‘renewed hope for the capability of African regional and national

⁵⁸⁵ See Statute of the Extraordinary African Chambers (EAC) Article 1 (2 September 2013). The Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990. Article 37 EAC Statute states that the, ‘shall be dissolved in their own right once all judgments are final.’ <<http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>> (Latest access 8 July 2018)

⁵⁸⁶ Ibid Articles 3 and 4

⁵⁸⁷ Hissène Habré, President of Chad from 7 June 1982 to 1 December 1990, was charged with crimes against humanity, torture and war crimes and placed in pre-trial detention on the 2nd of July 2013, and his trial commenced in July 2015. For detailed commentary, see Human Rights Watch, ‘Q and A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal’ (May 2016) Questions and Answers paras 1-35 <<https://tinyurl.com/y7vpr69a>> (Latest access 8 July 2018) Also see Facts on ‘Hissène Habré’ (January 2018) Trial International <<https://trialinternational.org/latest-post/hissene-habre/>> (Latest access 8 July 2018)

⁵⁸⁸ R Maclean, ‘Chad’s Hissène Habré found guilty of crimes against humanity’ the Guardian (London, May 2016) paras 1-3 <<https://tinyurl.com/howl3v3>> (Latest access 8 July 2018)

⁵⁸⁹ See Human Rights Watch, ‘The Trial of Hissène Habré’ (April 2017) Hissène Habré para 1 <<https://www.hrw.org/tag/hissene-habre>> (Latest access 8 July 2018). Also see Human Rights Watch, ‘Senegal/Chad: Court Upholds Habré Conviction’ (April 2017) para 1 <<https://tinyurl.com/ycmgjko2>> (Latest access 8 July 2018)

⁵⁹⁰ J P Pérez-León-Acevedo, ‘The conviction of Hissène Habré by the Extraordinary African Chambers in the Senegalese Courts: Bringing justice in cases of serious human rights violations in Africa’ (June 2016) Africa Law Advancing the role and rule of law in Africa paras 1- 4 <<https://tinyurl.com/ycejmav7>> (Latest access 8 July 2018)

⁵⁹¹ R Maclean, ‘Chad’s Hissène Habré found guilty of crimes against humanity’ the Guardian (London, May 2016) paras 1-2 <<https://tinyurl.com/howl3v3>> (Latest access 8 July 2018)

⁵⁹² ‘Universal jurisdiction is a principle of international law that allows national courts to prosecute the most serious crimes even when committed abroad, by a foreigner and against foreign victims.’ See Human Rights Watch, ‘Q and A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal’ (May 2016) Questions and Answers para 2 <<https://tinyurl.com/y7vpr69a>> (Latest access 8 July 2018)

mechanisms of criminal justice to deal with massive or systematic serious human rights abuses.’⁵⁹³ This is significant because in accordance with theories of justice, (procedural, retributive, corrective and transitional lens), the judgment gave justice to ‘victims of serious human rights violations constitutive of international crimes’⁵⁹⁴ for both in Africa and the globe; and 3) in a similar judgment in Sierra Leone, the SCSL hybrid court convicted and sentenced the former President of Liberia Charles Taylor for grave crimes of international nature.⁵⁹⁵ Taylor was condemned to 50 years in prison and currently serving his prison sentence in the United Kingdom. Taylor’s trial case and judgment will be discussed in detail in chapter 6 section 2.

Based on the above, we should note here that hybrid courts appear to be gaining preference over the *ad hoc* international tribunals, not only as a cheaper and faster option, but also as a way of providing a comprehensive response to grave atrocities that has greater relevance for the affected state, as well as the dispensation of fair justice. The innovative and unique principles offered by hybrid courts (mixing both national and international judges, prosecutors, staff and laws, location, outreach programmes and capacity building) helped to promote and bring about justice as well as acting as a transitional model for the international community.

Conclusion

One can conclude by stating that, this research illustrates that while the SCSL does share some characteristics with other hybrid courts, as set out in the analysis above, the SCSL has a number of innovative special characteristics. In the context of the justice theories and interpretive community approaches, the location, funding and the establishment of the Residual SCSL helped to illuminate importance and relevance of the SCSL model and provides useful context and analysis as to how hybrid courts can be important and the legacy of the SCSL. Nonetheless, while not all of the SCSL features are unique, it is perhaps the combination of characteristics which enhanced the SCSL’s accountability, impartiality, and contribution to justice and sustainable peace.

⁵⁹³ J Pablo Pérez-León-Acevedo, ‘The conviction of Hissène Habré by the Extraordinary African Chambers in the Senegalese Courts: Bringing justice in cases of serious human rights violations in Africa’ (June 2016) Africa Law Advancing the role and rule of law in Africa para 3 <<https://tinyurl.com/ycejmav7>> (Latest access 8 July 2018)

⁵⁹⁴ Ibid para 3

⁵⁹⁵ Ibid para 5

The fact that the SCSL was situated in Freetown where the atrocities occurred gave it a sense of ownership and belonging to the people of Sierra Leone, combined with an assurance of impartiality and accountability as well as having more potential for legacy than purely international justice processes. This is because in post-conflict state building where a decision has been made to pursue individual criminal responsibility, it is important that the public understands the decisions and means of implementation. If trials are to be a means of achieving sustainable peace and reconciliation through justice, then the people have a right to be kept informed about the judicial system that is affecting them. This was further strengthened by the Outreach Programme – absent in Cambodia, even where the court was in-country. Had the SCSL been located in a third country, as was the case for the ICTY, ICTR, and the STL, it would have deprived the ‘local communities - the victims - of being a part of the judicial processes.’⁵⁹⁶

Another significant aspect of the SCSL’s special characteristics is its jurisdiction and limited mandate – prosecuting those who ‘bear the greatest responsibility.’ This is not to say that the SCSL was without its problems. As already indicated in chapter 1 section 5, it is a limitation of the court that a relatively small number of individuals were prosecuted, given the vast scale of atrocities committed. This was due primarily to the limited mandate of the court, in addressing only atrocities committed between 1996 and 1999.⁵⁹⁷

In addition, the issue of legacy was not specifically incorporated in the mandate. Instead, the SCSL mandate focused mostly on subject-matter jurisdiction. However, a primary focus on successful investigations and prosecutions, followed by convictions and subsequent enforcement of sentences, is seen as the major hallmark of success both nationally and internationally. It is also important not to underestimate the extent to which these prosecutions did make the delivery of justice visible and enabled the country to move forward.

Moreover, another feature of the SCSL is the mix of both national and international judges, lawyers and staff, learning from each other and giving the local staff a sense of ownership and involvement in the judicial process, thereby helping to restore the rule of law in the country. Another key aspect of the SCSL’s special characteristics is having the SCSL continue to RSCL after its formal closure. This way, many Sierra

⁵⁹⁶ N K Stafford, ‘A Model War Crimes Court: Sierra Leone’ (2003) Volume 10 ILSA Journal of International and Comparative Law 117

⁵⁹⁷ See chapter 1 section 1 for more information and detailed analysis

Leoneans take great pride in the facilities of the Court because it is classed as part of the SCSL legacy. This research can now demonstrate that countries facing the same issues as Sierra Leone could learn much from the special characteristics of the SCSL model: the location in the country where the crimes were committed, the innovative Outreach Programme which focused on improving domestic understanding of the court's function, as well as voluntary funding mechanisms, thus advancing the state of international criminal justice while strengthening the country's domestic legal system.

The research therefore shows that within justice theories approaches employed here, it was this degree of hybrid administration, legal sources, and legal teams, and the incorporation of Sierra Leonean staff within the Court's structures, which allowed the Court to draw on domestic and international expertise that distinguishes the SCSL model. All in all, the SCSL's special characteristics contributed to its legacy and to its apparent success in achieving justice and contributing to political stability, lasting peace and reconciliation in Sierra Leone.

Chapter 4: The hybrid nature of the SCSL Tribunal and its effectiveness

Introduction

The purpose of this chapter is to look at how effective was the SLSC hybrid model? How much did its effectiveness derive from its high degree of hybridity? The chapter will attempt to answer two of the research objectives:

- 1) To investigate the extent to which the SCSL has been effective in achieving justice and sustainable post-conflict stability within Sierra Leone through its establishment and judicial practice with reference to its hybrid features
- 2) To explore the potential for replication of the hybrid model.

Whilst there is plenty of research work (literature) carried out on the *ad hoc* International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda, and the International Criminal Court, there is very little research and academic work on hybrid tribunals.⁵⁹⁸

The chapter will also outline the SCSL's unique hybrid nature and its implementation. The chapter will set out the SCSL Statute and offer a detailed look at the process that shaped the Court. In its conclusion, the chapter will argue that despite some limitations and criticisms, the SCSL model was not only truly a hybrid tribunal, but left a legacy that was very successful because it created a landmark in the history of International Criminal Law, as it represented a new (national and international) hybrid model, the second generation of international criminal justice.

4.1 Background

Together with the hybrid tribunal Panels of Extraordinary Chambers in the Courts of Cambodia, the Special Panels for Serious Crimes in East Timor and the Special Tribunal for Lebanon, the SCSL model of hybridity represented a new way to fight against impunity and against massive, widespread and systematic violations of international humanitarian law. In terms of the SCSL legacy success, the mechanisms used in setting up the SCSL model have now been followed by other hybrid courts. for example, the ECCC in Cambodia and the STL in Lebanon.⁵⁹⁹

⁵⁹⁸ L A Dickinson, 'The Relationship Between Hybrid Courts and the International Courts: The Case of Kosovo' (2003) 37 New England Law Review 1059. Also see L A Dickinson, 'The Promise of Hybrid Courts' (2003) Volume 97 America Journal of International Law 295. See S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected jurisdictional Issues* (Hart, 2012) 188

⁵⁹⁹ C C Jalloh (ed), *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007) 772

Several factors necessitated the evolution of hybrid tribunals as a way to uphold justice and end impunity. In order to put this into context, this chapter will look at the following themes: the SCSL's mode of establishment, its legal basis, location, capacity building and personnel and jurisdiction as contained in the Statute of the SCSL. This chapter will also draw from some emerging doctrinal principles and practices such as the ECCC in Cambodia, the SPSC in East Timor and the STL in Lebanon which are also considered to have major features of hybrid tribunals. Although these models to some extent differ in their design, structure, features, legal framework and subject-matter jurisdictions, they equally have some similarities both in their features and doctrinal principles as enshrined in their respective Statutes.

Also, their emergence has now conveyed a clear signal that hybrid tribunals will become pivotal to the evolution of International Criminal Law and the development of jurisprudence in coming years. This is because the international community is now increasingly dependent upon hybrid tribunals and their applicable laws in order to try and prosecute international crimes and assist in overcoming social divisions as well as seeking reconciliation and sustainable peace, and the restoration of the rule of law through transitional justice in a post-conflict scenario.⁶⁰⁰ Additionally, hybrid courts are created in post-conflict states as a tool for international criminal justice where the domestic judicial system has been paralysed by either civil war or international arms conflict, and also where no politically viable and credible international tribunal is in existence.⁶⁰¹

As noted in an earlier chapter, the concept of a Special Court for Sierra Leone stemmed from an evolution in recent International Criminal Law that can be traced back to the end of the International Military Tribunals (IMT) of Nuremberg and Tokyo almost 50 years ago.⁶⁰² It is noteworthy to state that the genesis of the Nuremberg and Tokyo tribunals was born out of the ideas of powerful Allied countries like the United States of America, United Kingdom, France and Russia who wanted to see punishment for a greater degree of justice and individual accountability for the many and grave crimes committed against humanity during that era. The punishment of German leaders, not

⁶⁰⁰ L A Dickinson, 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law* 295

⁶⁰¹ Ibid Also see F Megret, 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice' (2005) Volume 38 *Cornell International Law Journal* 725 <<http://ssrn.com/abstract=1285471>> (Latest access 9 July 2018)

⁶⁰² V G Curran, 'From Nuremberg to Freetown: Historical Antecedents of the Special Court for Sierra Leone' in Charles C Jalloh, *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2014) 42

to mention the future of the German state, was a significant national security concern for all the Allied powers at the time. The Nuremberg and Tokyo tribunals therefore led to people taking on legal roles and issues of international law as well as taking international human rights into a new era. Since Nuremberg and Tokyo, the concept has been clearly set out that no one, ‘no matter his or her situation in public life, may commit crimes of *jus cogens* with impunity.’⁶⁰³ This assertion is supported in Article 7 of the Nuremberg Charter which stipulates that, ‘[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.’⁶⁰⁴ The above assertion sent a very clear message that even heads of state were not immune to war crimes prosecutions.⁶⁰⁵ There appeared to be no more protection for holders of public office, be it a head of state or top government official, where the issue of serious crimes against humanity was concerned.

The application of this doctrine was evidenced in the trials of both former Liberian Head of State, Charles Taylor⁶⁰⁶ and the former Head of State for Yugoslavia, Slobodan Milosevic⁶⁰⁷ as it is clearly enshrined in Articles 6 (2)⁶⁰⁸ and 7 (2)⁶⁰⁹ of the SCSL Statute and the ICTY, respectively. It is important to emphasise that it is over two decades now since the United Nations Security Council created both the ICTY and ICTR in May 1993 and November 1994 respectively as *ad hoc* International Criminal Tribunals under Chapter VII powers to try and prosecute perpetrators of ‘core crimes’, war crimes, crimes against humanity and genocide within the context of international law, which has eventually ushered in the importance of hybrids in the era of International Criminal Law. Although located outside the area where the crimes were committed, the ICTY and the ICTR have since then developed a body of rules, procedures, definitions and precedents with a view to ensuring ‘that the individuals

⁶⁰³ V G Curran, ‘From Nuremberg to Freetown: Historical Antecedents of the Special Court for Sierra Leone’ in Charles C Jalloh, *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2014) 43

⁶⁰⁴ See Article 7 of the Charter of the International Nuremberg Tribunal (1945) <<https://tinyurl.com/azn719>> (Latest access 13 July 2018)

⁶⁰⁵ M Sieff, ‘A “Special Court” for Crimes of War’ (2001) Global Policy Forum paras 1-3 <<https://tinyurl.com/ybu7hmsx>> (Latest access 13 July 2018)

⁶⁰⁶ *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-1-A Appeal’s Judgment (26 September 2013) <<http://www.rscsl.org/Taylor.html>> (Latest access 13 July 2018). Also see C C Jalloh, ‘International Decision: Prosecutor v Taylor: Case No. SCSL-03-01-A: Appeals Judgment’ (2014) Volume 108 Legal Studies Research Paper Series 58, 63-68

⁶⁰⁷ *Prosecutor v Slobodan Milosevic*, Case No. IT-02-54-T, Trial Chamber’s decision (14 March 2006), order terminating the proceedings after Milosevic death <<https://tinyurl.com/gsbuylx>> (Latest access 13 July 2018)

⁶⁰⁸ See Article 6 (2) of the Statute of the Special Court for Sierra Leone (SCSL) (2002) <<http://www.rscsl.org/Documents/scsl-statute.pdf>> (Latest access 13 July 2018)

⁶⁰⁹ See SCSL statute, Article 7 (2) of (2002)

responsible for massive violations of human rights and humanitarian law are held accountable, regardless of their position.’⁶¹⁰

However, irrespective of the great achievements made by the ICTY and ICTR, by the end of the 1990s enthusiasm for *ad hoc* tribunals as mechanisms for administering international criminal justice had begun to fade away. The most suitable type was the Nuremberg and Tokyo model which was less expensive and which administered speedy justice to the top officials of the Nazi leadership. It was estimated that by 2000 and operating under Chapter VII powers, the ICTR and ICTY had ‘accounted for over 10 per cent of the UN’s regular budget: an enormous drain on the organization at a time when it was implementing a zero-growth budget.’⁶¹¹ By the end of 2003, the ICTY tribunal received from the UN budget nearly \$695 million,⁶¹² and the ICTR about \$544 million.⁶¹³ As of December 2009, the ICTR had spent about \$1.4 billion⁶¹⁴ and the ICTY \$1.79 billion⁶¹⁵ respectively. As a result of this, there were major criticisms made against both the ICTR and ICTY of their being costly to run, very big in size, slow, and ineffective as well as inefficient. Their deficiencies in terms of expenditure and running costs, location and timeframe as coupled with ‘incapacity of the ICC project to enlist a sufficiently wide consistency of States to its Statute left a gap in the international legal system which could hardly be countenanced if there were to be a credible international activity in this field.’⁶¹⁶

As a result, the notion of combating impunity still remains today the central focus of international criminal law as well as the international community. It is therefore not surprising that the international community deemed it necessary to create various substantive judicial institutions that are less expensive, generally located in the affected sovereign state, with a limited timeframe and enlisting both international and national judges and laws with the aim of completing trials quickly. By the time the SCSL was established in June 2002⁶¹⁷, there was jurisprudence and practice, though rather limited in nature. The SCSL was therefore able to build on past experience and

⁶¹⁰ B K Dougherty, ‘Right-sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone’ (2004) Volume 80 International Affairs 311

⁶¹¹ Ibid 311, 312

⁶¹² Ibid

⁶¹³ Ibid

⁶¹⁴ C C Jalloh, ‘Special Court for Sierra Leone: Achieving Justice?’ (2011) Volume 32 Michigan Journal of International Law 395, 430

⁶¹⁵ Ibid

⁶¹⁶ C Warbrick, ‘Forward’ in Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected jurisdictional Issues* (Hart, 2012) 437

⁶¹⁷ See Statute of the Special Court for Sierra Leone (SLSC) (2002) < <http://www.rscsl.org/Documents/scsl-statute.pdf> > (Latest access 13 July 2018)

also innovate to meet the complex demands for justice and stability after the atrocities committed in the civil war.⁶¹⁸

So when the former President of Sierra Leone, late Ahmad Tejan Kabbah,⁶¹⁹ wrote to the then Secretary-General of the UN, Kofi Annan, in August 2000 asking for a ‘strong and credible Court’⁶²⁰ for Sierra Leone in order to ‘try RUF leaders for crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages’⁶²¹ the Security Council was determined to discover a new model. In October, the UN Secretary-General presented to the UN Security Council a model for the court, which was neither along the lines of the UN International Criminal Tribunals created for the former Yugoslavia and Rwanda (ICTY and ICTR) nor a domestic judicial court. Instead, it was a hybrid tribunal to be jointly managed by the UN and the SLG. This was because it consisted of both national and international applicable laws and justice. Many Sierra Leoneans and diplomats hoped that the Special Court for Sierra Leone would provide a new model for the prosecution of war crimes.⁶²² The adoption of UNSC Resolution 1315 on 14 August 2000 crystallised this model, and mandated the Secretary-General ‘to negotiate an agreement with the Government of Sierra Leone to create an independent Special Court consistent with this agreement.’⁶²³ Some of the reasons for the official request then was that the creation of an independent criminal court would not only assist the prosecution of leaders and individuals who systematically carried out brutal civil war conflict and committed mass atrocities and grave crimes, but would also assist to bring justice, and promote the rule of law as well as sustainable peace in the country.

⁶¹⁸ S Datzberger, ‘Lumpen Youth, Civil War, and Conflict Resolution Civil Society in Sierra Leone Before and During the War’ (The Journal of Sierra Leone Studies) Vol. 1 (2edn, 2012) 30, see A Bundu, *Democracy by Force? A study of international military intervention in the conflict in Sierra Leone from 1991-2000* (Universal Publisher, 2011) 32- 45, see J A D Alie, *A New History of Sierra Leone* (Macmillan, 2008) 63-67, see Parliament Official website for full history <<http://www.sl-parliament.org/>> (Latest access 13 July 2018). See R Adjovi, ‘The Special Court for Sierra Leone’s Appeals Judgment in the AFRC case’ (2008) Volume 3 Hague Justice Journal 25

⁶¹⁹ The late President passed away on March 13th 2014 at his private residence in Freetown. After completing his two terms in office, he handed over power to the current President Ernest Bai Koroma in September 2007. The former President is credited with laying the foundation for the country’s current progressing democratic politics and for the restoration of a peaceful, rule of law and stable socio-economic and political climate in Sierra Leone. See Awareness Times, ‘Sierra Leone Former President Alhaji Dr. Ahmad Tejan Kabbah Passes Away’ (Awareness Times online Newspaper 13 March 2014) <http://news.sl/drwebsite/publish/article_200524935.shtml> (Latest access 13 July 2018) <https://www.facebook.com/awarenesstimes/posts/10155998468516343>

⁶²⁰ C C Jalloh, ‘Special Court for Sierra Leone: Achieving Justice?’ (2011) Volume 32 Michigan Journal of International Law 395, 398

⁶²¹ See Fifth report of the Secretary General on the Mission in Sierra Leone (New York: United Nations, 31 July 2000), UN Doc. S/2000/751, para 9

⁶²² M Sieff, ‘A “Special Court” for Crimes of War’ (2001) Global Policy Forum < <https://tinyurl.com/ybu7hmsx>> (Latest access 13 July 2018)

⁶²³ UNSC Res. 1315, UN Doc. S/RES1315(2000) < <https://tinyurl.com/yb97bbao>> (Latest access 13 July 2018)

Additionally, the local judiciary in Sierra Leone lacked the capacity to try lower-level offenders, which effectively meant that thousands would elude justice.⁶²⁴ As was clearly stated by the late President Kabbah in his letter to the UN Secretary-General, ‘but for international support, Sierra Leone would not have the legal, logical, human, and other resources necessary to prosecute those responsible for atrocities.’⁶²⁵

The SCSL was a ‘treaty-based *sui generis* court of mixed jurisdiction and composition’⁶²⁶ without Chapter VII authority. The SCSL therefore represents a new national–international ‘hybrid’ model, the second generation of international criminal justice. Although the Statute was completed in February 2001, the court was not officially created until 16 January 2002, and then entered into force on 12 April 2002.⁶²⁷

The Statute’s temporal jurisdiction was to try and prosecute those leaders and individuals who had threatened the creation and implementation of the peace process in the country, focusing particularly on those who bore ‘the greatest responsibility’ for the crimes committed after 30 November 1996. The substantive subject-matter jurisdiction included war crimes, crimes against humanity, and other serious violations of international humanitarian law.⁶²⁸ In the SCSL Agreement also, the SLG and the UN officials agreed to share the appointment of prosecutors and judges. It is significantly this aspect of the criminal court model that led many to label it as a ‘hybrid’ tribunal. As already noted in Chapter 1 section 5, the SCSL model is particularly intriguing because of its unique hybrid nature and had scored a number of firsts.

The central focus in this chapter is to examine the hybrid nature of the SCSL model and how it can be used in other countries. In order to do this, it is important to briefly set out within a broader context some definitions of hybrid tribunals.

⁶²⁴ B K Dougherty, ‘Right-sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone’ (2004) Volume 80 International Affairs 311, 327

⁶²⁵ C C Jalloh, *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2014) 10

⁶²⁶ See UN Doc S/2000/915, (4 October 2000), report of the Secretary General on the establishment of a Special Court for Sierra Leone (hereafter cited as Report of the Secretary General) <www.un.org/docs/sc/reports/2000/sgrep00.htm> (Latest access 13 July 2018)

⁶²⁷ See the Special Court Agreement, 2002 (Ratification) Act (2002) <<https://tinyurl.com/y7jgqrtn>> (Latest access 13 July 2018)

⁶²⁸ See Articles 1, 2, 3 and 4 of the Statute of the Special Court for Sierra Leone (SCSL) (2002)

4.2 Definition of hybrid tribunals

To begin with, it is important to state that there is no uniform, single or conclusive definition of hybrid tribunals. Due to the recent nature of the hybrid phenomenon, a specific definition is still unfolding. Many scholars, academics, and writers as well as policy makers have tried to define hybrid tribunals as a ‘generic category.’⁶²⁹ As Pellet states, ‘the general “species” of internationalised tribunals is highly heterogeneous; the circumstances of their creation are extremely different; their degree of “internationalisation” is far from uniform; the scope of their jurisdiction varied; their modes of functioning are highly comparable.’⁶³⁰ Also, Williams maintains that ‘this degree of “ad-hocism” makes it difficult to identify any conclusive definition for hybrid and internationalised tribunals, and there is certainly no uniformly agreed definition.’⁶³¹ Despite this scepticism, several scholars, academics and writers have attempted to craft a form of definition of ‘hybrid.’ Dickinson, one of the eminent proponents of hybrid courts, attempts to define hybrid tribunals as follows:

Hybrid courts are courts in which both the institution and the applicable law consist of a blend of the international and domestic: foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries and at the same time, the judges apply domestic law that has been reformed to include international standards. These courts have developed in an ad hoc way, the result of on-the-ground innovation rather than grand international design. Typically, they have emerged in post-conflict situations to address cases involving mass atrocity, usually where no politically viable fully-fledged international tribunal exists...⁶³²

Another exponent of the hybrid model, Costi, maintained that hybrid tribunals incorporate ‘national laws, judges and prosecutors, contributing to the capacity-building of the local judiciary and the legal system; while also including international standards, personnel, resources, experience and technical knowledge, conferring legitimacy upon them,’⁶³³ Dickinson further stated that hybrid tribunals ‘hold a good deal of promise and actually offer an approach that may address some of the concerns about purely international justice, on the one hand, and purely local justice, on the

⁶²⁹ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart 2012) 188

⁶³⁰ A Pallet, ‘Internationalized Courts: Better Than Nothing...’ in R Cesare, P R N André and K J Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004) 437

⁶³¹ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart 2012) 188

⁶³² L A Dickinson, ‘The Relationship Between Hybrid Courts and the International Courts: The Case of Kosovo’ (2003) Volume 37 New England Law Review 1059

⁶³³ A Costi, ‘Hybrid Tribunals as a viable Transitional Justice Mechanism to combat impunity in Post-Conflict Situation’ (2006) Volume 22 New Zealand Universities Law Review 213

other’⁶³⁴ and as such, they ‘complement’ both international and domestic tribunals,⁶³⁵ and therefore may have more legitimacy and offer more prospects for capacity building and norm penetration.⁶³⁶ However, Megret argued that although this is ‘undeniably true in practice, this ‘soft’ compatibility discourse does not particularly highlight the fact that, at a conceptual level, hybrid tribunals also contradict some of the conceptual premises of the opposition between domestic and international tribunals.’⁶³⁷ Cohen commented that hybrid tribunals ‘involve the combined effort of the international community and the national institutions of the country where these crimes were committed. The hybrid tribunals typically employ both national and international judicial actors and incorporate both domestic and international law in their statutes.’⁶³⁸

There is no right or wrong definition of hybrid tribunals. Almost all of the hybrid or mixed and internationalised tribunals are unique in their creation and Statutes even though they share some similarities in their design and structures. For instance, the uniqueness of hybridity of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Panels for Serious Crimes (SPSC) in East Timor, the Special Tribunal for Lebanon (STL), and the Special Court for Sierra Leone (SCSL) represents a model of ‘more balanced, and negotiated process...’⁶³⁹ All these four hybrid courts are in different stages of their history, as they were all created in ‘response to a request from the affected state for assistance in providing accountability for crimes alleged to have been committed, yet the situation leading to the request was different in each case.’⁶⁴⁰ Consequently, ‘this “promise” of the hybridized model made them, for some, a superior option for the trial of serious crimes than distant international tribunals like

⁶³⁴ L Dickinson, ‘Accountability for War Crimes: What Roles for National, International and Hybrid Tribunals?’ (2004) American Society of International Law: Proceedings of Annual meeting 181. Also see S Linton, ‘Cambodia, East Timor, Sierra Leone: Experiments in International Justice’ (2001) 12 Criminal Law Forum 185. See S Nouwen, ‘Hybrid Courts’: The Hybrid Category of a New Type of International Crimes Courts’ (2006) Volume 2 Utrecht Law Review 190

⁶³⁵ A Costi, ‘Hybrid Tribunals as a viable Transitional Justice Mechanism to combat impunity in Post-Conflict Situation’ (2006) Volume 22 New Zealand Universities Law Review 213, 225

⁶³⁶ Ibid 213, 225

⁶³⁷ F Megret, ‘In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice’ (2005) Volume 38 Cornell International Law Journal 725

⁶³⁸ D Cohen, ‘Hybrid’ Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future’ (2007) Volume 43 Stanford Journal of International Law Stanford Journal of International Law 1, 2

⁶³⁹ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart 2012) 191

⁶⁴⁰ Ibid 191-192

the ICTY or ICC.’⁶⁴¹ Cohen summed up the composition of hybrid tribunals in the following:

They offer unique opportunities for capacity-building in all areas of the court. Training court actors and administrators, introducing best practices and modern systems in case and document management, and providing a model for the domestic legal system and for the operation of the rule of law, represent some of the most important contributions that a ‘hybrid’ tribunal can make.⁶⁴²

The characteristic elements of these hybrid courts can be illustrated through their origins, legitimacy, location of the Court/personnel, capacity building, and substantive law. The next section presents a brief comparative historical analysis of the different stages of establishment and legislative process of the mixed jurisdictions of these hybrid tribunals.

4.3 Location of the Court

One of the major advantages of hybrid tribunals is the issue of location in the affected countries, facilitating access for the wider population. The victims and others with an interest can travel to the trials, ‘facilitating restorative justice and possibly some degree of emotional catharsis.’⁶⁴³ The media can also attend Court proceedings and report on the lessons and history told in the Court. This came at a time when proponents of transitional justice were advocating that ‘actions in trials could have beneficial communicative effects in the field of politics and community, it was blithely accepted that trials could similarly have a demonstrative effect on public attitudes to legal processes.’⁶⁴⁴ Just as Higonnet commented, ‘translation and cultural mediation can be an integral part of the tribunal rather than an afterthought or a bureaucratic detail.’⁶⁴⁵ Whilst domestic courts usually only employ nationals and international courts employ nationals of states other than where the atrocities took place, the hybrid courts in East Timor, Sierra Leone, and Cambodia employed a mixture of international and national staff. The local judges and lawyers taking a prominent role in foundational trials in

⁶⁴¹ P McAuliffe, ‘Hybrid Tribunals at Ten How International Criminal Justice’s Golden Child became an Orphan’ (2011) Volume 7 Journal of International Law and International Relations 1, 4; see E R Higonnet, ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform’ (2006) Volume 23 Arizona Journal of International and Comparative Law 347, 417; also see B Hall, ‘Using Hybrid Tribunals as Trivias: Furthering the Goals of Post-Conflict Justice While Transferring Cases from the ICTY to Serbia’s Domestic War Crimes Tribunal’ (2005) Volume 13 Michigan Stanford Journal of International Law 39

⁶⁴² D Cohen, ‘Hybrid’ Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future’ (2007) Volume 43 Stanford Journal of International Law 1, 36-37

⁶⁴³ P McAuliffe, ‘Hybrid Tribunals at Ten How International Criminal Justice’s Golden Child became an Orphan’ (2011) Volume 7 Journal of International Law and International Relations 1, 13

⁶⁴⁴ Ibid 1, 5

⁶⁴⁵ E R Higonnet, ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform’ (2006) Volume 23 Ariz Journal of International and Comparative Law 347, 365

their local country would have a beneficial ‘demonstration effect’ on evolving local legal systems. In addition, the presence of international prosecutors and judges (and defenders, where provided) in either a majority or minority helped resolve fears of partiality or lack of independence of national prosecutors and judges.⁶⁴⁶ Although international elements were a prerequisite in relation to impartiality, it was perceived that the proceedings would be seen as fair and legitimate in the local communities as judges ‘of their own kind are present as actors in the tribunal.’⁶⁴⁷ In this regard, the presence of the local staff (both judges and prosecutors) in the courts helped to create a sense of ownership and responsibility for the outcome of the judicial process.

Also, both foreign staff and domestic staff can confer with each other and gain greater sensitivity to cultural background, ethnic and political beliefs, local history and attitudes. This cooperation would eventually lead to the establishment of a ‘framework for consultation that may have enhanced the general perception of the institution’s legitimacy;’⁶⁴⁸ and would also further the promotion of sustainable and lasting peace in those war-torn countries.

Eventually, the trial process would be seen to offer a unique standard of impartiality and independence, and also embed a sense of commitment among the population. Ultimately, in treating the trials as legitimate, the local community might also treat the institution of the courts as widely being legitimate and so help to restore the rule of law in those countries.⁶⁴⁹

4.4 Capacity building

At the time of the establishment of the hybrid tribunals, the international *ad hoc* tribunals of the ICTR and ICTY had no capacity building or training requirements for domestic courts. ‘Any contact between the ad hoc courts and the domestic courts was more about the pursuit of accountability in the former than development of the latter.’⁶⁵⁰ This was evidenced in the administrative set-up of the tribunals which were almost exclusively carried out by foreign staff, meaning that there was no element of connection between Rwandan prosecutors and the foreign counterparts; they played

⁶⁴⁶ Ibid 1,12

⁶⁴⁷ Ibid 1,13

⁶⁴⁸ Ibid

⁶⁴⁹ See the Office of the United Nations High Commissioner for Human Rights (OHCHR), Rule-of- Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts (New York: United Nations 2008) 19 <<https://tinyurl.com/ybl72qqm>> (Latest access 13 July 2018)

⁶⁵⁰ Ibid 1,14

no role in investigating the crimes with their international practitioners. Similarly, in the case of ICTY, the Bosnian judges played no part in adjudicating the trials of their countrymen. ‘This was considered particularly unfortunate given that the sheer size and complexity of the cases, allied to the qualifications of the staff involved, could have trained domestic actors in almost all conceivable skills that a domestic criminal court requires.’⁶⁵¹ Tolbert, in his review of the ICTY, clearly stated that the tribunal suffered from ‘a strategic failure in that (it) has not had much impact on the development of courts and justice systems in the region...’⁶⁵²

The central focus was primarily on putting an end to impunity for leading criminals in the war, ‘with no specific role in judicial reconstruction for the self-evidently shattered domestic systems.’⁶⁵³ Hybrid tribunals were therefore created as a response to these dismal deficiencies.⁶⁵⁴

4.5 Jurisdiction

In relation to substantive law, some hybrid courts apply both domestic and international criminal law directly, with Cambodia, Sierra Leone, Lebanon and East Timor examples of this.⁶⁵⁵ Taking into account their founding instruments, the ECCC⁶⁵⁶ and the panels in SPCS are all part of the domestic system and their legal status is that of a domestic court. In the SCSL, although it has jurisdiction over crimes under domestic law, the Prosecutor only charged international crimes. The procedural law applied in Sierra Leone was mainly international.⁶⁵⁷

⁶⁵¹ Ibid

⁶⁵² D Tolbert, ‘The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings’ (2002) Volume 26 Fletcher F World Aff 1, 10

⁶⁵³ P McAuliffe, ‘Hybrid Tribunals at Ten How International Criminal Justice’s Golden Child became an Orphan’ (2011) Volume 7 Journal of International Law and International Relations 1, 14

⁶⁵⁴ J K Kleffner & A Nollkaemper, ‘The Relationship Between Internationalized Courts and National Courts’ in C P R Romano, A Nollkaemper ‘and J K Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004) 378, see P K Mendez, ‘The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International (Humanitarian) Law or an Idealistic Solution With Empty Promises?’ (2009) Volume 20 Crim LF 53, 94

⁶⁵⁵ S Nouwen, ‘Hybrid Courts’: The Hybrid Category of a New Type of International Crimes Courts’ (2006) Volume 2 Utrecht Law Review 190, 190-214 <<http://www.utrechtlawreview.org>> (Latest access 16 July 2018) 190, 206

⁶⁵⁶ UN Doc. S/2004/616, ‘Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies...a mixed tribunal for Cambodia, proposed under a national law specially promulgated in accordance with a treaty.

⁶⁵⁷ S Nouwen, ‘Hybrid Courts’: The Hybrid Category of a New Type of International Crimes Courts’ (2006) Vol. 2 Utrecht Law Review 190, 206 <<http://www.utrechtlawreview.org>> (Latest access 16 July 2018)

In addition, most of the literature stated the fact that ‘the applicable law consist (s) of a blend of the international and the domestic’⁶⁵⁸ as another characteristic of hybrid courts. The similarities which can be illustrated in the hybrid panels in Sierra Leone, Cambodia and East Timor all related to mixture of national and international law. Nevertheless, the hybridity elements of both staff and applicable law does vary greatly from one hybrid court to the other. The documents creating the hybrid courts in Cambodia, Sierra Leone and East Timor authorise the panels to apply directly both substantive international criminal law and substantive domestic law.⁶⁵⁹ In all three cases, direct reference is cited to crimes under international law and under domestic law. For example, the ECCC law gave the Chambers absolute mandate and authority against internationally protected persons.⁶⁶⁰ In the same way, the Statute of the SCSL included both international crimes (crimes against humanity, violations of common Article 3 of the Geneva Conventions and of Additional Protocol II and other serious violations of humanitarian law) and crimes under Sierra Leonean law (offences relating to the abuse of girls and offences relating to the wanton destruction of property) (SCSL Statute).⁶⁶¹ This will be discussed in detail under the SCSL hybridity section.

The SPSC in East Timor have the widest range of substantive jurisdiction of all these hybrid tribunals. The SPSC have jurisdiction over murder and sexual offences under the applicable Penal Code of East Timor and over international crimes that include almost all those stipulated by the ICC Statute.⁶⁶² Also, ‘it is the only hybrid court, and the only international crimes court in general, that claims universal jurisdiction.’⁶⁶³ The laws authorising the prosecutions are domestic; the laws criminalising the behaviour to which these laws refer are national and international.⁶⁶⁴ The differences in the legal apparatus can be highlighted in their mode of establishment. For example, the SCSL was established both by international and domestic legislation, but

⁶⁵⁸ L A Dickinson, ‘The Relationship Between Hybrid Courts and the International Courts: The Case of Kosovo’ (2003) Volume 37 New England Law Review 1059

⁶⁵⁹ S Nouwen, ‘Hybrid Courts’: The Hybrid Category of a New Type of International Crimes Courts’ (2006) Vol. 2 Utrecht Law Review 190, 206 <<http://www.utrechtlawreview.org>> (Latest access 16 July 2018)

⁶⁶⁰ Article 3-8 Amended Extraordinary Chambers Law (5 October 2004) <<http://www.cambodia.gov.kh/krt/english/index.htm>> (Latest access 15 January 2014)

⁶⁶¹ See Statute of the Special Court for Sierra Leone (2002) <<http://www.sc-sl.org>> (14 August 2000) (Latest access 16 July 2018)

⁶⁶² See sections 4-9 of UNTAET/REG/2000/15. Please note the greater import of the ICC crimes and torture highlight grave problems with respect to the *nullum crimen sine lege* provision, taking into account the panels have unlimited temporal jurisdiction in the beginning in 1975

⁶⁶³ Ibid

⁶⁶⁴ S Nouwen, ‘Hybrid Courts’: The Hybrid Category of a New Type of International Crimes Courts’ (2006) Volume 2 Utrecht Law Review 190, 206 <<http://www.utrechtlawreview.org>> (Latest access 16 July 2018)

compared to the ECCC, it is a complete reversal of roles. In the absence of Chapter VII powers and through Security Council resolution, the Secretary-General was mandated to reach a bilateral agreement with the Government of Sierra Leone; it was the bilateral agreement that actualised the establishment of the Statute of the SCSL.⁶⁶⁵ The Statute is therefore an integral part of that international agreement.⁶⁶⁶ In the case of Cambodia, the agreement was incorporated into the domestic legislation: the Special Court Agreement Ratification Act.⁶⁶⁷

Likewise, the SPSC in East Timor took place not because of negotiations and agreements with the affected state: unlike in the case of Cambodia and Sierra Leone, there was no legitimate government to negotiate with at the time. The UN itself acted as *de facto* government and decreed regulations on the formation of the panels. The power to do so was obtained from Chapter VII powers under UN Security Council resolutions. Indirectly, therefore, international documents served as the legal basis for these court systems.

Nonetheless, these international documents did not directly generate the creation of these courts, but mandated the UN administration with the authority to decree *domestic* laws. The regulations that necessitated creating these hybrid tribunals should be considered as domestic documents.⁶⁶⁸

In conclusion, it is clear from the above analysis that common legal basis is not a rationale for putting hybrid courts into one category. Despite the combined national and international legislation involved in their establishment, their real creation was generated under either an international agreement or a domestic law. For instance, the SCSL hybrid is similar to the ICC in this regard, as its legal creation was based on an international agreement, albeit not among a group of states, but between its local government (affected state) and the UN. The rest of the hybrid tribunals cited above are more like domestic courts, because they stem from domestic legislation, albeit that international documents have accelerated the adoption of domestic legislation or have complemented it.

⁶⁶⁵ Article 1(1) of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, (16 January 2002)

⁶⁶⁶ Ibid Article 1(2)

⁶⁶⁷ Special Court Agreement (Ratification) Act (2002) <www.specialcourt.org/documents/SpecialCourt.html> Latest access 16 July 2018) The Special Court is Parliament's ratification and implementation Bill of the – nonself- executing – Agreement between the Government and the UN

⁶⁶⁸ S Nouwen, 'Hybrid Courts': The Hybrid Category of a New Type of International Crimes Courts' (2006) Volume 2 Utrecht Law Review 190, 206 <<http://www.utrechtlawreview.org>> (Latest access 16 July 2018)

Finally, based on the above advantages and disadvantages as well as the similarities highlighted, one can posit that the problems envisaged in the domestic justice systems that led to the creation of these tribunals (hybrid tribunals) were fundamentally critical. The hybrid courts are seen to correct the wrongs of purely domestic trials and proceedings by purely international courts, such as the International Criminal Tribunals for the former Yugoslavia (ICTY), Rwanda (ICTR) and the International Criminal Court (ICC). The model of hybridity of these courts would therefore ‘endeavor to combine the strengths of the ad hoc tribunals with the benefits of local prosecutions.’⁶⁶⁹ Additionally, the courts not only helped remedy the ravaged local judicial legal institutions, but allowed greater opportunities for public debate and participation. Also, they helped to create experience and knowledge sharing between international experts and local practitioners, as well as domestic norms. Hybrid trials would therefore act as a forum in which local people ‘absorb, apply, interpret, critique and develop international norms in the national criminal justice system. Indeed, the current hybrid courts all display this ‘amalgam of local and international elements’⁶⁷⁰ with respect to staff and laws.

In summary and to conclude, based on the literature and arguments advanced above, the research will argue within justice theories that although there are some similarities in the hybridity elements of these tribunals, the nature of their establishment is what differentiates these courts from one another, not what unites them. Further, hybrid courts were ‘developed “experimentally” as a response to the shortcomings of the *ad hoc* tribunals’⁶⁷¹ as well as responding to special situations. It is prudent to restate that the dual and primary ‘distribution of responsibility for punishing war crimes and gross breaches of human rights between national courts and The Hague is becoming ever more entrenched.’⁶⁷² It is therefore not surprising that the international community and International Criminal Law saw the advent of hybrid tribunals as a ‘preferable option to purely domestic or purely international jurisdiction’.⁶⁷³ As summed up by Costi,

⁶⁶⁹ S Katzenstein, ‘Hybrid Tribunals: Searching for Justice in East Timor’ (2003) Harvard Human Rights Journal 245

⁶⁷⁰ D Orentlicher, ‘The Future of Universal Jurisdiction in the New Architecture of Transitional Justice’ (2003) in: S Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes* (University of Pennsylvania Press, 2004) 214-239

⁶⁷¹ P McAuliffe, ‘Hybrid Tribunals at Ten How International Criminal Justice’s Golden Child became an Orphan’ (2011) Volume 7 Journal of International Law and International Relation1, 23

⁶⁷² Ibid 1, 23. See S Linton, ‘Cambodia, East Timor, Sierra Leone: Experiments in International Justice’ (2001) Volume 12 Criminal Law Forum 185

⁶⁷³ Ibid 1, 51

⁶⁷⁴ Ibid

hybrid tribunals are dependent upon national laws, prosecutors and judges, making a vital contribution to the capacity building of the local judiciary legal system, while also incorporating personnel, resources, experience, technical knowledge and international norms.⁶⁷⁴ Their evolution has now demonstrated that hybrid tribunals will become central to the development of International Criminal Law, the International Criminal Court and its jurisprudence in the years to come.

Given the above, the section below will look in detail at the nature and elements of the SCSL model of hybridity in relation to its origins, location, personnel, and outreach initiatives, which will help us determine and assess its legacy, success, and fairness, as well as how this model can be replicated in other countries.

4.6 The hybrid nature of the SCSL model

To start with, one can categorically argue that the SCSL model of hybrid tribunal should be ‘commended for establishing accountability as a standard of law and governance where the alternative was systematic impunity’, and the ‘presence of international actors in the hybrid tribunal established a standard of fair or competent trial unattainable, and hitherto unprecedented...’⁶⁷⁵ The set-up of the complementarity regime stipulated in Article 17 of the 1998 Rome Statute seems to have consolidated the choice of either the International Criminal Court or purely domestic trials as the main pathway for criminal accountability in the event of war or gross human rights violations.⁶⁷⁶ It is significant to state that the different hybrid courts created were as a result of different negotiations and were given different authorities and powers that would help to establish different elements of hybridity in nature as well as structures.

⁶⁷⁴ A Costi, ‘Hybrid Tribunals as a viable Transitional Justice Mechanism to combat impunity in Post-Conflict Situation’ (2006) Volume 22 New Zealand Universities Law Review 213

⁶⁷⁵ Ibid

⁶⁷⁶ Rome Statute of the International Criminal Court, 2187 UNTS 90 (17 July 1998) www.icc-cpi.int/nr/rdonlyres/add16852-ace9.../romestatuteng1.pdf > (Latest access 16 July 2018)

Subsection 1 stipulates that:

‘Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.’

The SCSL is therefore no exception to this. The SCSL true model of hybridity and its legacy can be discerned in the under-mentioned competing factors: the mandate and closure of the SCSL hybrid court, its mode of establishment and legality, its location, capacity building and voluntary funding streams.

4.7 The SCSL mode of establishment and its legality

Similar to the ICC, the SCSL is a hybrid nature established by treaty-based negotiations between the concerned state (SLG) and the UN.⁶⁷⁷ The SCSL was independent of Sierra Leonean courts as well as of the UN. As noted by Williams, ‘this was the first, and up to date the only occasion on which this legal basis has been utilised.’⁶⁷⁸ The establishment of such a treaty agreement between the concerned state and the UN “represent[s] a significant departure from the traditional method of establishing an international criminal judicial body by way of an international treaty between two or more states.”⁶⁷⁹ Whilst the ICC was established in pursuit of a multilateral treaty agreement between states,⁶⁸⁰ in a similar fashion to the SCSL, the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Panels for Serious Crimes (SPSC) in East Timor and the Special Tribunal for Lebanon (STL) were all created due to a request made by the concerned state in order to provide assistance in relation to previous core crimes perpetrated, although in each case the circumstances leading to the request were quite different.⁶⁸¹

However, unlike the SPSC in East Timor, the SCSL’s model of hybridity was given a distinct mandate in its Statute: that is, to prosecute those who ‘bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone after November 30 1996.’⁶⁸² Also, the fact that the SCSL model was created through a formal agreement between the SLG and the UN also helped to clarify the issue of ownership and avoid the kinds of problems that faced the SPSC in this regard.⁶⁸³

⁶⁷⁷ See Statute of the Special Court for Sierra Leone Article 1 (2002) < <http://www.sc-sl.org>>, see UN Doc. (14 August 2000). See UNSC S/RES/1400 (2002) <www.un.org/Docs/sc/> (Latest access 16 July 2018)

⁶⁷⁸ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart 2012) 272

⁶⁷⁹ Ibid

⁶⁸⁰ Rome Statute of the International Criminal Court, 2187 UNTS 90 (17 July 1998) <www.icc-cpi.int/nr/rdonlyres/add16852-ace9.../romestatutengl.pdf> (Latest access 16 July 2018)

⁶⁸¹ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart 2012) 191-192 and 271. Also see S Nouwen, ‘Hybrid Courts’: The Hybrid Category of a New Type of International Crimes Courts’ (2006) Volume 2 Utrecht Law Review 190, 192

⁶⁸² Article 1 of the Statute of the Special Court for Sierra Leone (2002)

⁶⁸³ D Cohen, ‘Hybrid’ Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future’ (2007) Volume 43 Stanford Journal of International Law Stanford Journal of International Law 1, 13

Given this mandate, one can therefore argue that the legal bases employed in creating the SCSL model through bilateral treaty agreement demonstrates hybridity and internationalised tribunal character. It is significant to state here that the SCSL model of jurisprudential meaning of greatest responsibility was demonstrated by the CDF and AFRC Trial Chambers as well as the Appeals Chamber of the SCSL.⁶⁸⁴ Each of the two Trial Chambers, which are not legally bound to adopt each other's interpretations, framed the concept in a different way because 'the Statute and Rules of Procedure and Evidence do not constrain the Trial Chambers to giving one another's judgment binding authority.'⁶⁸⁵

However, the subjective elements of interpreting the legality as well as the illegality of the Court was evidenced in the trial case of Chief Sam Hinga Norman, former Civil Defence Force Commander (CDF) where he challenged the jurisdiction of the Court and the Lomé Peace Accord Amnesty application.⁶⁸⁶ Following his arrest and detention, the security situation in Freetown was fluid, so SCSL officers had to put in special security measures such as 'holding his initial appearance in closed session and seeking to negotiate his detention outside of the country'⁶⁸⁷; for example, the option of flying him out to The Hague (or Arusha),⁶⁸⁸ although this did not materialise. Norman later died while in the custody of the SCSL, in the period between the conclusion of his case and issuance of the judgment. The Trial Chamber subsequently ended the proceedings against him, though his family opposed termination because they felt he would have been exonerated from the charges levied against him.⁶⁸⁹ Also, the funding of the SCSL streams became the subject of a 'preliminary jurisdictional

⁶⁸⁴ V Oosterveld & A Marlowe, 'Special Court for Sierra Leone International Decisions' (2007) 101 American Journal of International Law 848, 855 - 856. For discussion and comparison of the "greatest responsibility" as considered in the Civil Defence Forces (CDF) and AFRC Trial Chamber Judgments, also see V Oosterveld, 'Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu and Prosecutor v Moinina Fofana and Allieu Kondewa' (2009) Volume 103 American Journal of International Law 103 (commenting the Appeals Chamber position on the issue)

⁶⁸⁵ C C Jalloh, 'Special Court for Sierra Leone: Achieving Justice?' (2011) Volume 32 Michigan Journal of International Law 395, 414

⁶⁸⁶ *The Prosecutor v Morris Kallon and Brima Buzzy Kamara*, Case No. SCSL-2004-15-AR72 (E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber, 13 March 2004) (hereinafter Lomé Decision) paras 63-71

⁶⁸⁷ P Alston and R Goodman, *International Human Rights: The Successor To International Human Rights in Context: Law, Politics and Morals* (OUP, 2013) 1364. Chief Norma was the former leader of the pro government militia groups and the Minister of Internal Affairs.

⁶⁸⁸ Ibid

⁶⁸⁹ *Prosecutor v Norman, Fofana & Kondewa*, Case No. SCSL-04-14-T, Decision on Registrar's Submission of Evidence of Death of Accused Sam Hinga Norman and Consequential Issues (May 21, 2007) <<https://tinyurl.com/y8ewny6v>>, *Prosecutor v Norman, Fofana & Kondewa*, Case No. SCSL-04-14-T, Norman Defence Team Submissions on His Death, 21 (March 2007), <<https://tinyurl.com/y8ooajn7>> (Latest access 16 July 2018)

challenge as some of the defendants filed petitions claiming that the donations-based system effectively compromised the independence of the judges and therefore the SCSL as a whole.’⁶⁹⁰ This legal phenomenon marked one of the distinct differences between the SCSL and ICC in relation to ‘concurrent jurisdiction with, and the primacy in respect of, the national courts of Sierra Leone’⁶⁹¹, which ‘in contrast to the jurisdiction of the ICC is subject to the principle of complementarity.’⁶⁹²

However, the SCSL Appeals Chamber ruled that amnesties granted by the Lomé Peace Accord Agreement to individuals of fighting factions and or groups in the Sierra Leone civil war ‘are no bar to prosecution before it.’⁶⁹³ This decision is the first ruling of an international criminal tribunal unequivocally stating that amnesties do not bar the prosecution of international crimes before international or foreign courts.’⁶⁹⁴ However, the SCSL Appeals Chamber did not take into account Sierra Leone’s own responsibility to investigate and prosecute in international law, but only hinged its investigations on the doctrine of universality.⁶⁹⁵ The Norman case and the ruling on the validity of the Lomé Peace Accord Agreement by SCSL is a step towards removing blanket amnesties for mass atrocities rather than a landmark in the development of International Criminal Law.⁶⁹⁶

4.8 Voluntary financial contributions

The SCSL model of hybridity, its impact, legacy, and success can be illustrated in its voluntary financial contributions from western world powers. The absence of Chapter VII powers compounded the funding situation with the SCSL. Unlike the ICTY and ICTR, the SCSL was not established under Chapter VII authority and as such it did not benefit from any financial support from the UN, but only voluntary contributions from UN member states (donor community) as well as the Sierra Leonean Government in whose territory the crimes took place, rather than as a subsidiary organ of the Security Council.⁶⁹⁷ The Secretary- General objected to this, arguing that such a

⁶⁹⁰ However, the judges rejected that claim with reasoning that, at best, leaves some serious room for debate. See *Prosecutor v Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (May 2004) <<https://tinyurl.com/yafdu7y7>> (Latest access 16 July 2018)

⁶⁹¹ S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart 2012) 309

⁶⁹² Article 17 of the Rome Statute of the International Criminal Court (17 July 1998)

⁶⁹³ The issue of amnesty is discussed and analysed in detail in chapter 1 section 1

⁶⁹⁴ S M Meisenberg, ‘Legality of amnesties in international humanitarian law The Lomé Amnesty Decision of the Special Court for Sierra Leone’ (2004) Volume 86 IRRC 837, 851

⁶⁹⁵ Ibid 837, 857

⁶⁹⁶ Ibid

⁶⁹⁷ C C Jalloh, ‘Special Court for Sierra Leone: Achieving Justice?’ (2011) Volume 32 Michigan Journal of International Law 395, 428

volatile funding structure was neither viable nor sustainable. This is in contrast to the ICTY and ICTR Tribunals, that were directly financed by the UN central budget.⁶⁹⁸ This financial squeeze inevitably contributed to the SCSL's limited scope and speedier operation of trials than originally scheduled. The SCSL was also constrained in generating voluntary contributions in order to boost the minimised budget, also classed as a weakness in the same vein.⁶⁹⁹ In practical terms, the success of the SCSL was dependent upon the level of funding it received from UN donor members.

Nevertheless, the fact that the SCSL was created through a formal agreement between the local government and the UN assisted in clarifying the concept of ownership and avoiding the kinds of problems that faced the SPSC in this circumstance. Also, as a way of compromise, as is the practice at the ICTY and ICTR, the UN appointed an administration to run the SCSL without any of the kinds of interference from national government so often associated with the process in East Timor.⁷⁰⁰

Additionally, a Management Committee was created consisting of the countries that had contributed or funded the operations of the SCSL hybrid model. The Agreement establishing the SCSL states that the Management Committee (whose members were the US, Britain, Canada, the Netherlands, Lesotho, and Nigeria, as well as Sierra Leone) was 'to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction in all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested states'.⁷⁰¹ The aim was to assist the SCSL's fundraising endeavours and also provide advice and policy direction on the overall operations of the Court in relation to accountability and transparency. Robin Vincent, Registrar, was therefore appointed as the chief Administrative officer of the SCSL. The Security Council's expectations of a cheaper Court have, in many ways, been met by the SCSL's unique mode of funding and ownership as well as its timeline, the first of its kind compared to other tribunals.

⁶⁹⁸ P Mochochoko and G Tortora, 'Management Committee for the Special Court for Sierra Leone' in Cesare P Romano, *et al Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004) 142-144. Also see C L Sriram, 'Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone' (2006) Volume 29 Fordham International Law Journal 470, 483

⁶⁹⁹ Ibid

⁷⁰⁰ D Cohen, 'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future' (2007) Volume 43 Stanford Journal of International Law Stanford Journal of International Law 1, 13

⁷⁰¹ See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, UN-Sierra Leone, (16 January 2002) <<http://www.sc-sl.org/scsl-agreement.html>> (Latest access 16 July 2018)

Conclusion

In conclusion, irrespective of the criticisms levied on hybrid tribunals, one can argue that the emergence of hybrid court in Sierra Leone, Cambodia, East Timor, and Lebanon is a clear indication that hybrid tribunals will be pivotal to the development of International Criminal Law and the ICC in the coming decades. I have also attempted to define what hybrid tribunals are. To reiterate, this research had stated earlier that there is no clear definition of hybrid tribunals as this definition is still unfolding. Many scholars, academics, and commentators have defined hybrid tribunals as encompassing both national and international applicable laws, where local and foreign judges and prosecutors sit together to share knowledge and experiences of the judicial legal system; however, there are complexities within the combination of international and domestic law, and significant variations in their application.

If applied this broad model of combined national and international legal systems, the SCSL can be classed as being a truly hybrid tribunal. It served as a leaner and cheaper institutional judicial model that accounted for and successfully delivered justice to post-conflict Sierra Leone. The SCSL model was the first court since Nuremberg and Tokyo that was located in its sovereign territory; that is, the first hybrid court to sit within the territory of its country. The location of the SCSL where the crimes happened enabled the Sierra Leonean population to identify more easily with the process and to see that justice was done.

The physical distance of the ICTY and ICTR from the killing fields left many victims feeling frustrated, and necessitated complicated efforts to bring witnesses to the trials. It was also the first court to have a defined and restricted mandate (personal jurisdiction) targeting perpetrators and the leaders who committed heinous war crimes, a move to voluntary financial contributions, a limited timeframe of operation, and a lack of Chapter VII powers.⁷⁰² The Court relies on a voluntary funding mechanism, with its finances overseen by a Management Committee comprising representatives of the major donors to the Court. This is because the SCSL hybrid court not only demonstrated the efforts maximised by the international community to address the failings of the ICTY and ICTR *ad hoc* international tribunals, but also illuminated and reflected a strong sense of commitment and ownership by the Sierra Leonean people.

⁷⁰² B K Dougherty, 'Right-sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone' (2004) Volume 80 International Affairs 311, 324

On numbers alone, as compared to the ICTR and ICTY, the Security Council's expectation of a less expensive court has, in various ways, been achieved by the SCSL hybrid model. This is because, besides shifting the responsibility of its budget cost to interested voluntary UN member states instead of using the resources of the organisation as a whole, the SCSL, with a total budget of about \$208.7 million,⁷⁰³ has overall been a less costly project compared to the ICTR and the ICTY.

The SCSL hybrid model demonstrates the international community's commitment to international criminal justice, the ending of impunity, restoration of the rule of law, building of national healing and reconciliation and ushering in of sustainable peace in the country. As expressed in the words of a highly placed UN official, 'I am not suggesting there's a price for justice, but this is the real world – and in the real world, states are not going to pay for huge transitional justice institutions.'⁷⁰⁴ Based on justice theory and interpretive community frameworks, this research can conclude that, with the speedy and successful conclusion of the SCSL trials; its impressive and lasting legacy; and the handing over of the court to the SLG to be used as a Residual Mechanism, the selection and application of the SCSL hybrid model by the international community has proved the most appropriate judicial mechanism for the prosecution of war crimes and crimes against humanity.

Finally, it is the degree of hybrid administration, legal sources and judicial and prosecutorial teams - which allowed the court to draw on domestic expertise - that gives the SCSL its legitimacy and which may have contributed to its apparent success in achieving justice and helping to build stability. Given its unique degree of hybridity within the framework of justice theories, the SCSL is a potential model for future tribunals and hybrid courts to learn from.

⁷⁰³ C C Jalloh, 'Special Court for Sierra Leone: Achieving Justice?' (2011) Volume 32 Michigan Journal of International Law 395, 395-456

⁷⁰⁴ B K Dougherty, 'Right-sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone' (2004) Volume 80 International Affairs 311, 328

Chapter 5: The implications of the SCSL for International Criminal Law: jurisprudential, legitimacy and institutional effects with a particular focus on child soldiers

Introduction

The purpose of this chapter is to examine the implications of the SCSL for International Criminal Law through exploring its legal jurisprudential context and its institutional effects. This chapter will focus particularly on the recruitment and enlistment of child soldiers, while Chapter 6 will look at forced marriage (other inhumane acts) as crimes against humanity⁷⁰⁵ and the *Taylor case* on (aiding and abetting). These three case studies are specifically used in these chapters because their arguments and analysis sit within the research thesis, reflecting on both the theories of justice and interpretive community perspectives. The SCSL new judgments (case law) on child soldier recruitment and forced marriage also argued for the recognition and incorporation of the offence of the recruitment and use of child soldiers and forced marriage in International Criminal Law. Today, the jurisprudence of other International Criminal Tribunals and hybrid courts have recognised and applied the principles of law.

It is argued here that theories of justice and interpretive community methodology discussed in detail in Chapter 2 can help us better understand the contribution of the SCSL's model and its success, and the extent to which its judgments provided a helpful expansion of International Criminal Law's understanding of war crimes and crimes against humanity. The theories of justice and interpretive community methodology help to highlight the local perceptions of international criminal justice delivery. Additionally, the theories of justice research methodology employed here significantly helps to assess and understand the success and unique nature of the SCSL model through the analysis of its case laws, the complex interplay of political influences, the global human rights movement and the SCSL's own internal operations. Despite its apparent initial problems, and some of the criticisms to which it has been subject,⁷⁰⁶ one can argue here that the SCSL model has been in many respects successful.

⁷⁰⁵ See the Special Court for Sierra Leone: Residual Special Court Sierra Leone (RSCSL) (2010) <<http://www.rscsl.org>> (Latest access 17 July 2018)

⁷⁰⁶ C C Jalloh, 'Special Court for Sierra Leone: Achieving Justice?' (2011) Volume 32 Michigan Journal of International Law 395, 446-447

The chapter will interrogate the jurisprudence of the SCSL model through its judgments. It will also examine the legal landscape, and analyse the reasoning on which the case law was based against the theories of justice and through the lens of interpretive community.

Within the context of this research, and as already stated in Chapter 2, the theories of justice are as follows: procedural,⁷⁰⁷ retributive,⁷⁰⁸ corrective⁷⁰⁹ and transitional justice.⁷¹⁰ With reference to the theory of ‘interpretive communities,’ the civil society groups developed a framework and campaign strategies in order to stop the use of child soldiers in international armed conflict. They formed a coalition of NGOs (interpretive community) called the Coalition to Stop the Use of Child Soldiers.⁷¹¹ Civil society groups also assisted in championing the campaign for the drafting and adoption of a protocol to the CRC on the involvement of children in armed conflict.⁷¹² The campaign called for a protocol that would lift the minimum age for recruitment to 18 years as a threshold, but this did not meet any success at the time.⁷¹³ The theories of justice and the lens of interpretive community methodology can be usefully applied in the SCSL’s CDF, AFRC and RUF trials, judgments and convictions.⁷¹⁴

In the Sierra Leone case, by the time the SCSL hybrid model was established in June 2002, there was legal jurisprudence and practice from other international tribunals such as the ICTY and ICTR.⁷¹⁵ The SCSL was therefore able to build on past experience but also innovated (introduced new international crimes)⁷¹⁶ to meet the complex demands for justice, political stability and the rule of law after the damage caused by 11 years of civil war.

⁷⁰⁷ K Engle, ‘Anti-Impunity and the turn to Criminal Law in Human Rights’ (2015) Volume 100 Cornell Law Review 1069, 1073-1079. Also see Antonio Cassese (ed.), *International Criminal Law* (3th edn, OUP, 2013) 63-386. Also see A Cassese, ‘On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ (1998) Volume 9 European Journal of International Law 2, 9-11

⁷⁰⁸ J Q Adams, ‘Retributive Punishment’ (2013) Volume 39 Social Theory and Practice 213, 213, 219

⁷⁰⁹ Ibid

⁷¹⁰ R Teitel, *Globalizing Transitional Justice* (OUP, 2015) 3-117. Also see C Corradetti, N Eisikovits and J V Rotondi, (ed.), *Theorizing Transitional Justice* (Routledge, 2016) 13-237

⁷¹¹ This involves Amnesty International, Human Rights Watch, the International Save the Children Alliance, the Jesuit Refugee Service, the Quaker United Nations Office, and the Terre des Hommes International Federation in 1998. Also see C Kelso, ‘The Coalition to Stop the Use of Child Soldiers’ (November 2002) Child Soldier 139 Report 1, 81- 84 <<https://tinyurl.com/y83c4khj>> (Latest access 17 July 2018)

⁷¹² Ibid

⁷¹³ Ibid

⁷¹⁴ L A B and S D Roper, *The Development of Institutions of Human Rights: A Comparative Study* (Palgrave Macmillan, 2010) 149-153

⁷¹⁵ S LeVert, *Cultures of the World: Sierra Leone* (Marshall Cavendish Benchmark, New York, 2006) 22-23

⁷¹⁶ S Wharton, ‘The Evolution of International Criminal Law: Prosecuting ‘New’ Crimes before the Special Court for Sierra Leone’ (2001) Volume 11 International Criminal Law Review 217

5.1 Background: Historical background on child soldier recruitment, conscription, enlistment and participation in both armed and non-armed conflict as well as the development of International Criminal Law and definitions/legal standards.

Historically, although the recruitment and or participation of child soldier in armed conflict was understood to be a criminal offence prior to 1996, thereby acquiring the status of International Law (IL)⁷¹⁷, however; there were no convictions reached on the use of children in war as indicated above. The Sierra Leone 11 year-long civil war was fought by children.⁷¹⁸ Tens of thousands of children were actively involved in the hostilities, many of whom were as young as seven at the time of their recruitment into the armed conflict.⁷¹⁹ It was reported that 70 per cent of ex-combatants were children at the start of the war, and 72 per cent of all ex-combatants claim to have been forcibly conscripted.⁷²⁰ On 10 March 2003, the Chief Prosecutor David Crane indicted the following warring groups: 1) the RUF leader, the RUF military commanders 2) the AFRC leader and 3) the former Deputy Minister of Defence, who was leader of the pro-government Civil Defence Forces (CDF) or Kamajors.⁷²¹ These cases are significant with reference to the protection of child soldiering in general as all three sides recruited and used child soldiers in the armed conflict in Sierra Leone. However, it is important to state that, although it is the case that all three sides recruited and used child soldiers, not all were indicted for these crimes.

The prohibition of the recruitment, enlistment and use of child soldiers has been defined under the following international legal legislations and organisations. Firstly, the second Protocol Additional to the four Geneva Conventions of 1949 stipulates thus: ‘the minimum age for recruitment and use in all types of armed conflict is set to 15 years of age.’⁷²² This minimum standard is applicable to all parties, both governmental and non-governmental, in both international and internal armed conflict.

⁷¹⁷ *Prosecutor v Sma Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction, (31 May 2004) para 4 <<https://tinyurl.com/y8huhg3o>> (Latest access 17 July 2018)

⁷¹⁸ T Guberek *et al* (ed), ‘Truth and Myth in Sierra Leone: An Empirical Analysis of the Conflict, 1991-2000’ (2006) Benetech – ABA report on Sierra Leone 1, 3-5 (A Report by the Benetech Human Rights Data Analysis Group and the American Bar Association) <<http://www.benetech.org>> (Latest access 17 July 2018). See Elizabeth M Evenson, ‘Truth and Justice in Sierra Leone: Coordination between Commission and Court’ (2004) Volume 104 Columbia Law Review 762

⁷¹⁹ Ibid See ‘The Sierra Leone Truth and Reconciliation Commission: Witness to Truth’ (2004) Vol. 1 The Mandate of the Commission para 43 <<https://tinyurl.com/y9xayn35>> (Latest access 17 July 2018)

⁷²⁰ Ibid

⁷²¹ A F Presse, ‘Sierra Leone War Crimes Trial Begin in June’ (13 May 2004) Global Policy Forum para 5 <<https://tinyurl.com/y9odcs18>> (Latest access 17 July 2018)

⁷²² Additional Protocols to the four Geneva Conventions of 1949 (1977) <<https://tinyurl.com/ybny8u73>> (Latest access 17 July 2018)

Secondly, the Convention of the Rights of the Child (CRC) states that even though a child is generally defined as a person below the age of 18 in the Convention, ‘the age of 15 is used as the minimum age of recruitment and participation in armed conflict.’⁷²³ This rule has been ‘considered as customary international law applying equally in situations of international and non-international armed conflict, and to both Government armed forces and non-State armed groups.’⁷²⁴ It is worth noting that there is an emerging body of law to support the concept of the involvement of ‘non-state actors’ in violations or abuses of human rights.⁷²⁵

However, ‘non-state actors’, whether they are individuals, groups or organisations, are ‘neither parties to international human rights or international humanitarian law treaties nor are they, as a general rule, bound by national constitutions.’⁷²⁶ Quite a number of non-state actors do function today in armed conflicts, but in relation to International Law definition, one can find only a few of this term.⁷²⁷ For example, the UNSC defined a non-state actor as being an ‘individual or entity, not acting under the lawful authority of any State.’⁷²⁸ The Africa Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (‘the Kampala Convention’) advanced ‘armed groups’ to mean ‘dissident armed forces or other organized armed groups that are distinct from the armed forces of the state.’⁷²⁹ Given the above definitions, the research can attempt to state that both the RUF and AFRC forces can be classed as non-state actors or armed groups during the Sierra Leone civil war.⁷³⁰ This principle however does not apply to the CRC because it has no possibility of calling non-state actors to account. Notwithstanding, ‘it may be possible to impute certain violations and abuses

⁷²³ Convention of the Rights the Child (CRC) (1989) < <https://tinyurl.com/zzjdxxn> > (Latest access 17 July 2018), see Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict which stipulates that: The age of 18 is set as the minimum age for direct participation in hostilities; nevertheless states can accept volunteers from the age of 16 (OHCHR) May 2000 < <https://tinyurl.com/ybvlnpaq> > (Latest access 17 July 2018)

⁷²⁴ See ‘Office of the Special Representative of the Secretary-General for Children and Armed Conflict’ (2013) Working Paper 1-29 <<https://childrenandarmedconflict.un.org/>> (Latest access 17 July 2018)

⁷²⁵ See ‘The Sierra Leone Truth and Reconciliation Commission: Witness to Truth’ (2004) Volume 1 The Mandate of the Commission para 43 <<https://tinyurl.com/y9xayn35>> (Latest access 17 July 2018)

⁷²⁶ Ibid

⁷²⁷ R Duthie and P Seils, *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (International Centre for Transitional Justice, New York 2017) 236 <<https://tinyurl.com/ybo49xle>> (Latest access 17 July 2018)

⁷²⁸ Ibid

⁷²⁹ Ibid

⁷³⁰ Ibid 242. However, it is claimed that ‘states have the obligation to exercise due diligence and do everything in their capacity to protect everyone in their jurisdiction against threats to the enjoyment of human rights posed by non-state armed groups,’ hence the robust action taken by the then Sierra Leone Government that held perpetrators criminality and individually accountable for crimes committed during the conflict in Sierra Leone.

of human rights and international humanitarian law to them.’⁷³¹ Thirdly, the Rome Statute of the International Criminal Court indicates that the ‘ICC shall try persons charged with committing war crimes, which includes the conscription, participation and use of children under the age of 15 in both war and internal armed conflict.’⁷³² The Rome Statute of the ICC was the first treaty to include the elements of crimes⁷³³ of enlistment, conscription and use of children in hostilities as war crimes, crimes against humanity, genocide and aggression⁷³⁴ entailing individual criminal responsibility.⁷³⁵ Fourthly, the ILO Worst Forms of Child Labour Convention 182 of 1999 maintains that states should ‘take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.’⁷³⁶ Fifthly, the African Union (AU)’s the African Charter on the Rights and Welfare of the Child (same as CRC) defines a ‘child as any person under the age of 18.’⁷³⁷ Sixthly, the Paris Principles stipulate that ‘the Commitments consist of legal and operational principles to protect children from being recruited and used in armed conflict.’⁷³⁸ The legal weight of the Paris Principles commitments is politically but not legally binding, and has so far been endorsed by 95 countries.⁷³⁹ Paris Principles defines a child as ‘any person less than 18 years of age in accordance with the Convention on the Rights of the Child.’⁷⁴⁰ Seventhly, the UNSC RES S/RES/1882 (2009) contains condemnation of the recruitment and use of children in hostilities. The Security Council failed to provide its own definition of a child, but requested that all parties in armed conflicts should comply with International Law, thus making reference to the Convention on the Rights of the Child and its Optional Protocol as

⁷³¹ Ibid See ‘Office of the Special Representative of the Secretary-General for Children and Armed Conflict’ (2013) Working Paper 1-29 <<https://childrenandarmedconflict.un.org/>> (Latest access 17 July 2018)

⁷³² Rome Statute of the International Criminal Court (1998), UN Doc.2187 UNTS 90, entered into force (1 July 2002) Also see M C Bassiouni, *International Criminal Law Conventions and their Penal Provisions* (Ardsley Park, N Y Transitional Publishers, 1997) 46

⁷³³ Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the International Criminal Court (1998)

⁷³⁴ Ibid

⁷³⁵ M C Bassiouni, *International Criminal Law Conventions and their Penal Provisions* (Ardsley Park, NY Transitional Publishers, 1997) 46

⁷³⁶ The ILO Worst Forms of Child Labour Convention 182 of 1999 < <https://tinyurl.com/y8gddq52>> ((Latest access 17 July 2018))

⁷³⁷ The African Union (AU): the African Charter on the Rights and Welfare of the Child (1999) <<https://tinyurl.com/y986o6ak>> (Latest access 17 July 2018)

⁷³⁸ The Paris Principles and Paris Commitments (2007) UNICEF paras 1-2 <<https://tinyurl.com/ybbtbo18>> ((Latest access 17 July 2018)

⁷³⁹ Ibid

⁷⁴⁰ Ibid

well as the Geneva Conventions and their Additional Protocols that set the minimum age to either 15 or 18.⁷⁴¹

In relation to child soldiering and recruitment, the SCSL contained in its statute⁷⁴² jurisdiction and definitions of the crimes of ‘conscripting’, recruiting and using children in armed conflict.⁷⁴³ Based on the notion of modern armed conflict, state parties are prohibited from recruiting and enlisting children under 15 years into armed conflict, as evidenced in the Additional Protocol II which states that: ‘children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.’⁷⁴⁴

Although there are contentions in relation to the application of some of the main terms relating to recruitment, conscription, enlistment and participation as stated above, the protections are based on customary international law.⁷⁴⁵ This is because conduct of ‘conscripting’, ‘enlisting’ and ‘use to participate actively in hostilities’ consists of the *actus reus* of the child-soldier-related offences.⁷⁴⁶ The first two types of committing of *actus reus* are often subsumed under the heading ‘recruitment.’ Both are crimes of a continuing character in the sense that they continue to be committed as long as a child is under 15 and remains in the armed force or group.⁷⁴⁷ The difficulty is in delineating activities that relate to direct or active participation of children in hostilities as well as those that do not take part. The acts that can be described as active participation include: scouting,⁷⁴⁸ spying,⁷⁴⁹ sabotage,⁷⁵⁰ or the use of children at

⁷⁴¹ UNSC S/RES/1882 (2009) - reframing resolution: 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005) and 1882 (2009) <<http://unscr.com/en/resolutions/1882>> (Latest access 17 July 2018)

⁷⁴² See Statute of the SCSL, Article 4 (2002). The SCSL Statute states that: ‘The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law: ... conscripting or enlisting children under the age of 15 years into armed forces or groups.’

⁷⁴³ Ibid Also see ICRC Customary International Law IHL: Practice Relating to Rule 136. Recruitment of Child Soldiers <https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule136> (Latest access 17 July 2018)

⁷⁴⁴ See Article 4(3)(c), Additional Protocol to the Geneva Conventions 12 August 1949, and relating to the Protection of victims of Non-International Armed Conflicts (Protocol 11), 8 June 1977(8 June 1977) <<https://www.icrc.org/ihl/INTRO/475?OpenDocument>> (Latest access 17 July 2018)

⁷⁴⁵ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone UN RES S/2000/9154 (October 2000) <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2000/915> (Latest access 17 July 2018)

⁷⁴⁶ See the Rome Statute of the ICC on Elements of Crimes, Article 8(2)(e)(vii) (1 July 2002). This was later adopted by the SCSL Statute (2002)

⁷⁴⁷ N H B Jørgensen, ‘Child Soldiers and the Parameters of International Criminal Law’ (2001) Chinese Journal of International Law (2012) 657, 665. M E Kurth, ‘The Recruitment and Use of Child Soldiers: Some Reflections on the Prosecution of a New War Crime, in Carsten Stahn and Larissa van den Herik (ed), *Future Perspectives on International Criminal Justice* (T M C Asser Press, 2010) 475, 485-486

⁷⁴⁸ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, RUF Trial Judgment (2 March 2009) para 1729 <RUF- http://www.rscsl.org/RUF_Trial_Chamber_Decisions.html> (Latest access 17 July 2018); CDF Trial Judgment, separate and Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe para 10 (9 December 2004) <<http://www.rscsl.org/Documents/Decisions/RUF/294/SCSL-04-15-T-342.pdf>> (Latest access 17 July 2018)

⁷⁴⁹ Ibid

⁷⁵⁰ Ibid para 737

checkpoints,⁷⁵¹ armed patrols,⁷⁵² in combats,⁷⁵³ manning/guarding military objectives, as human shields,⁷⁵⁴ couriers and bodyguards for commanders or guards of military objects.⁷⁵⁵ Only if the activities were completely unrelated to the hostilities should they *not* be covered by the *actus reus*. The acts that do not relate to hostilities and which are not under the category of the use of children are: ‘domestic labour, to forage food, or to undertake domesticated jobs of a purely civilian character like cooking, food finding, laundry or running routine errands.’⁷⁵⁶ However, it must be said that:

The presence of children in the camps of armed groups or the armed forces does not automatically mean that the law of non-international armed conflict is being violated. What is prohibited is participation in hostilities, not all forms of involvement in the armed conflict in general. Thus families may legitimately move to camps of the armed group in order to seek protection.⁷⁵⁷

Additionally, and in relation to active and direct participation under International Humanitarian Law (IHL), parties to an armed conflict must differentiate between civilian and military objectives, and attacks directed against civilians are highly prohibited. Nonetheless, civilians lose this protection when they take a ‘direct participation in hostilities.’⁷⁵⁸ In practical terms, the Rome Statute’s semantic inconsistencies, drawn from International Humanitarian Law, could be solved by using ‘direct participation’ to explain the general restriction of protection, and ‘active participation’ as a reference to child soldiering.

In relation to the active and direct participation of women in armed conflict, the Beijing Platform for Actions, a non-governmental effort brought together the concept of gender mainstreaming and cited the experience of women in armed conflict as a central area of concern,⁷⁵⁹ thus enhancing understanding of gender in International

⁷⁵¹ Ibid CDF Trial Judgment, separate and Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe para 10 (9 December 2004) <<http://www.rscsl.org/Documents/Decisions/RUF/294/SCSL-04-15-T-342.pdf>>, Also see, *Prosecutor v Thomas Lubanga Dyilo*, Trial chamber, Case No. 1CC-01/04-01/06-T, (29 January 2007) paras 261-263 Decision on the Confirmation of Charges.

⁷⁵² *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, RUF Trial Judgment (2 March 2009) paras 1717-1718 <RUF- http://www.rscsl.org/RUF_Trial_Chamber_Decisions.html> (Latest access 17 July 2018)

⁷⁵³ Ibid paras 1710-1716; CDF Trial Judgment, separate and Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe para 10(9 December 2004) <<http://www.rscsl.org/Documents/Decisions/RUF/294/SCSL-04-15-T-342.pdf>> (Latest access 17 July 2018)

⁷⁵⁴ Ibid

⁷⁵⁵ Ibid Also see S Sivakumaran, *The Law of Non-International Armed conflict* (OUP, 2012) 317-318

⁷⁵⁶ S Sivakumaran, *The Law of Non-International Armed conflict* (OUP, 2012) 318

⁷⁵⁷ Ibid 316-317

⁷⁵⁸ See Additional Protocol 1, Article 51 (3) and Additional Protocol II, Article 3 (3) of 1949 (1977)

⁷⁵⁹ A Barrow, ‘UN Security Council Resolutions 1325 and 1820: constructing gender in armed conflict and international humanitarian law’ (2010) Volume 92 International Review of the Red Cross 221, 228

Humanitarian Law.⁷⁶⁰ Despite this, the framework of UNSC Resolution 1325 failed to provide a clear insight of how a gender mainstreaming process using, for instance, ‘gender-based violence indicators’, should operate in a peace and security context.⁷⁶¹ The statement (Resolution 1325) supports the notion that during armed conflict, International Humanitarian Law and applicable Human Rights Law (HRL) should provide women and girls with non-discriminatory general protection and specific protection where it is deemed relevant. Nonetheless, women are still enlisted and or used today both as direct and indirect participants in armed conflict.

Moreover, the general principle for the use of children in armed conflict is that IHL applies only during situations of armed conflict, whereas Human Rights Law applies at all times. UNSC S/RES/1674 (2006)⁷⁶² and UNSC S/RES/1894 (2009),⁷⁶³ for example, has also referred in the following provisions in which girls are entitled to specific protection as children:⁷⁶⁴ Nevertheless, the research also illustrates that many women and girls have joined the armed opposition groups due to gross human rights abuses, including sexual violations, perpetrated by state forces against them and their families.⁷⁶⁵ Whilst women and girls are entitled to the relevant protections of International Humanitarian Law and Human Rights Law, for example ‘expectant mothers are protected, albeit through the provisions on the wounded and sick...the

⁷⁶⁰ Ibid 221, 229. The universal or regional legal instruments that also provide protection to women and girls during and after armed conflict are: a) the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly in 1993; b) the African Charter on the Rights and Welfare of the Child, adopted in 1990; c) the Convention on the Rights of the Child, adopted in 1989, and its 2000 Optional Protocol on the Involvement of Children in Armed Conflict; d) the Rome Statute of the International Criminal Court 1998 and e) the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa that came into force in November 2005. See Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly in (1993) <<https://tinyurl.com/yb4u3uy4>> (Latest access 12 May 2016), African Charter on the Rights and Welfare of the Child, adopted in (1990) <<https://tinyurl.com/yafcobud>> (Latest access 17 July 2018), Convention on the Rights of the Child, adopted in 1989, and its Optional Protocol on the Involvement of Children in Armed Conflict (2000) <<https://tinyurl.com/y8fkctal>> (Latest access 17 July 2018), Rome Statute of the International Criminal Court, Article 8 (a) (xxvi) and (c) (xxvi) of (1998) <<https://tinyurl.com/yaay87o3>> (Latest access 17 July 2018), Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa that came into force in (November 2005) <<https://tinyurl.com/ybowgx9n>> (Latest access 17 July 2018)

⁷⁶¹ Ibid

⁷⁶² See UNSC S/RES/1674(April 2006) (‘the commission of systematic, flagrant and widespread violations of international humanitarian *and human rights law* in situation of armed conflict may constitute a threat to international peace and security.’) <<https://www.securitycouncilreport.org/>> (Latest access 17 July 2018)

⁷⁶³ See UNSC S/RES/1894(November 2009) ‘the deliberate targeting of civilians as such and other protected persons, and the commission of systematic, flagrant and widespread violations of applicable international humanitarian *and human rights law* in situations of armed conflict may constitute a threat to international peace and security.’ <<<https://www.securitycouncilreport.org/>> (Latest access 17 July 2018)

⁷⁶⁴ D Mazurana, ‘Geneva Call, Women in Armed Opposition Groups in Africa and the Promotion of International Humanitarian Law and Human Rights (2005) The program for the study of International Organisation (s) 1, 23 <https://www.icrc.org/eng/assets/files/other/women_armed_groups_2005.pdf> (Latest access 17 July 2018)

⁷⁶⁵ S Sivakumaran, *The Law of Non-International Armed conflict* (OUP, 2012) 314

death sentence is prohibited from being carried out on pregnant women and mothers of young children.’⁷⁶⁶

Furthermore, it is significant to state that individuals are not bound by HRL – only states are so bound.⁷⁶⁷ The reason being, the IHL concentrates on these three layers: pregnant women, mothers and sexual violence have been opposed as protecting women ‘in terms of their relationship with others and not as individuals in their own right.’⁷⁶⁸ This notion is however beginning to change with focus being paid to other aspects of the effect of armed conflict on women in peace and security.⁷⁶⁹

Although many states have signed and not ratified one or more of the above-mentioned international legal instruments⁷⁷⁰, ‘even the member States that have not yet ratified these Conventions should respect, promote and realize the principles.’⁷⁷¹

However, the ICRC commentary on Protocol II clearly states that it does not require a total prohibition on the use of children in conflict. The ICRC had suggested that the Protocol require state parties to ‘take all necessary measures’... or ‘take all feasible measures’, which is not a total prohibition on their doing so.⁷⁷² Additionally, ‘refraining from recruiting children under fifteen does not exclude children who volunteer for armed service.’⁷⁷³

In conclusion, this research can posit that based on the above International Law and definitions, the use of under-age recruitment, conscription and enlistment of children constitutes both compulsory and voluntary recruitment. This difference is clearly illustrated in both the SCSL and ICC statutes which both state that ‘conscripting or enlisting children under the age of fifteen into armed forces (or groups) or using them to participate actively in hostilities is prohibited.’⁷⁷⁴ That is, even if children were not forced to become actively engaged in an armed conflict, but claimed to have

⁷⁶⁶ Article 6 (4) of the Additional Protocol II <<https://tinyurl.com/y83vh5ro>> (Latest access 17 July 2018)

⁷⁶⁷ There is an argument as to how much non-state actors are bound by human rights law, but individuals are not bound. See Ya’el Ronen, ‘Human Rights Obligations of Territorial Non-State Actors’ (2013) Volume 46 Cornell International Law Journal 21, 21-30 <<https://tinyurl.com/yddh93xs>> (Latest access 17 July 2018)

⁷⁶⁸ S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, 2012) 314

⁷⁶⁹ Ibid

⁷⁷⁰ As many as 120 states have ratified the Optional Protocol on the involvement of children in armed conflict, including Sierra Leone. See Vienna Convention on the Law of Treaties Done at Vienna on (23 May 1969) <<https://tinyurl.com/y8tgqsbt>> (Latest access 17 July 2018)

⁷⁷¹ Ibid

⁷⁷² Ibid

⁷⁷³ Ibid

⁷⁷⁴ Rome Statute of the International Criminal Court, Article 8(e)(vii) (17 July 1998). (this concerns only non-international armed conflict).

voluntarily joined one of the parties, the criminal responsibility of individuals who are liable for their recruitment, conscription and use in hostilities is not diminished.

Within justice theories perspective, the SCSL's achievements can be illustrated through the judgments made on the following SCSL cases: *Prosecutor v Moinina Fofana & Allieu Kondewa*, *Prosecutor v Norman* (CDF cases)⁷⁷⁵; *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, (AFRC case)⁷⁷⁶ and *Prosecutor v Sesay, Kallon and Gbao*, (RUF case).⁷⁷⁷ These all include charges relating to child soldier enlistment which constitutes war crimes and crimes against humanity charged for the first time in ICL.⁷⁷⁸ These four areas of case law mentioned above will provide an overview of the findings of the SCSL's Trial Chamber and Appeals Chamber Trial and convictions and a basis for the legal landscape, analysis and reasoning of its procedural and substantive areas of interest in the judgments.

5.1. The implications for the development of ICL case law (the CDF, AFRC and RUF cases) on child soldiering.

In order to understand the SCSL's impact, implications, legitimacy and its institutional effects on ICL, we need to examine its jurisprudence in Sierra Leone and beyond. The CDF, AFRC and RUF cases that are based on procedural, retributive, corrective and transitional justice are important for their jurisprudential impact, and institutional effects (including both national law and ICL), including with regards to child soldiering. The arguments and analysis fit within the research thesis, thus reflecting on both the theories of justice and interpretive community lens. An examination of the case law follows in the sections below.

⁷⁷⁵ *Prosecutor v Fofana and Kondewa*, Trial Chamber 1, SCSL-04-14-T (2 August 2007) <CDF-
http://www.rscsl.org/CDF_Trial_Chamber_Decisions.html> (Latest access 16 July 2018)

⁷⁷⁶ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*, No. SCSL-04-16-T, Trial Chamber 11 (20 June 2007) <http://www.rscsl.org/AFRC_Trial_Chamber_Decisions.html> (Latest access 16 July 2018)

⁷⁷⁷ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, (2 March 2009) <RUF-
http://www.rscsl.org/RUF_Trial_Chamber_Decisions.html> (Latest access 16 July 2018)

⁷⁷⁸ G Waschefort, 'Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leone' (2010) 1 *International Humanitarian Legal Studies* 189, 189-204 <<https://www.deepdyve.com/lp/brill/justice-for-child-soldiers-the-ruf-trial-of-the-special-court-for-axpnWE1MdR>> (Latest access 16 July 2018)

5.1.1 The CDF case, *Prosecutor v Norman* (2004)

The CDF⁷⁷⁹ was a security force that fought in the civil war in Sierra Leone in support of the country's elected government.⁷⁸⁰ The force consisted primarily of Kamajors, traditional hunters who inhabited rural parts of the country. Enlisted at the outset of the conflict in 1991 to assist soldiers of the Sierra Leone Army (SLA) in navigating the bush in rural areas, the Kamajors became an independent fighting force following the 1997 AFRC coup against the government.⁷⁸¹ The CDF's base fought in many areas of Sierra Leone.⁷⁸² The CDF leaders, Hinga Norman, Moinina Fofana and Allieu Kondewa were indicted for eight counts of crimes against humanity and war crimes allegedly carried out between November 1996 (the start of the SCSL temporal jurisdiction) and December 1999. Fofana held the position of director of war within the CDF. He was responsible for planning and executing strategies for war operations.⁷⁸³ Kondewa was the chief initiator and 'high priest' of the CDF organisation, with responsibility for new Kamajor recruits.⁷⁸⁴ Together with Norman, Fofana and Kondewa formed the central command of the CDF and served as the executive of the Kamajor Society, but all of them were arrested in 2003.

The trial of the three CDF accused commenced on 3 June 2004 and closed on 30 November 2006. In the *Prosecutor v Norman* case in 2004⁷⁸⁵, the SCSL Appeals Chamber indicated that child recruitment and use of children under 15 to participate actively in hostilities are prohibited as war crimes which hinged on customary international law.⁷⁸⁶ That is, before November 1996, the prohibition of child recruitment had already been crystallised as customary international law – there was already sufficient state practice and *opinio juris* to support the charge.⁷⁸⁷ Norman's

⁷⁷⁹ *Prosecutor v Fofana and Kondewa*, Case No. SCSL-04-14-T, Trial Chamber 1 (2 August 2007) <http://www.rscsl.org/CDF_Trial_Chamber_Decisions.html> (Latest access 16 July 2018). Also see M C Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (CUP, 2011) 241

⁷⁸⁰ Ibid, para 2. See W A Schabas, 'The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases,' in: K Arts and V Popovski, *International Criminal Accountability and the Rights of Children* (Hague Academic Press, 2006) 19 and 30

⁷⁸¹ M A Drumbl, *Reimagining Child Soldiers in International Law and Policy* (OUP, 2012) 64

⁷⁸² *Prosecutor v Fofana and Kondewa*, Case No. SCSL-04-14-T, Trial Chamber 1 (2 August 2007) paras 288-289 <http://www.rscsl.org/CDF_Trial_Chamber_Decisions.html> (Latest access 16 July 2018)

⁷⁸³ Ibid paras 338-340

⁷⁸⁴ Ibid paras 293-344

⁷⁸⁵ *Prosecutor v Samuel Hinga Norman*, Case No. SCSL-2004-14-AR72 (E) (31 May 2004) <<https://tinyurl.com/yafdu7y7>> (Latest access 16 July 2018)

⁷⁸⁶ Ibid Also see the Rome Statute of the ICC, Article 7 (2002). For detailed explanation on areas where Article 7 of the ICC Rome Statute outlines elements of customary international law, see Antonio Cassese (ed.), *International Criminal Law* (3th edn, OUP, 2013) 70

⁷⁸⁷ Ibid Also see E T Swaine, 'Rational Custom' (2002) Volume 52 Duke Law Journal 559, 567-568 <<https://tinyurl.com/y8t8masa>> (Latest access 18 July 2018)

defence challenged the SCSL's jurisdiction to prosecute him for crimes under Article 4 (c) of the SCSL Statute on the basis that the crime of child recruitment had not formed part of customary international law⁷⁸⁸ at the time related to his indictment.⁷⁸⁹ On 31 May 2004, the SCSL Appeals Chamber rejected Norman's challenge⁷⁹⁰, ruling that customary international law⁷⁹¹ had already crystallised so as to criminalise child recruitment prior to 30 November 1996, the commencement of the SCSL's temporal jurisdiction⁷⁹², and as a result, these acts could be defined as international crimes for which individuals should be held to account. To support this premise, the SCSL Appeals Chamber offered an extensive explanation, using the test already created by the ICTY *Tadic* case, to determine whether a violation of International Humanitarian Law was subject to prosecution and punishment.⁷⁹³ According to this test, the rule must be part of customary or conventional law and the breach must contain an infringement of IHL.⁷⁹⁴ Although Additional Protocol II addresses internal conflicts, the ICTY Appeals Chamber in the *Tadic* case held that 'it does not matter whether the 'serious violation' has occurred within the context of an international or an internal armed conflict.'⁷⁹⁵ Children are protected by the fundamental guarantees, regardless of whether there is an internal or international conflict.⁷⁹⁶

The second part of the defence challenge was to question whether the violation was of a serious character and entailed individual criminal responsibility at the time of the indictments. In this regard, the SCSL Appeals Chamber had relied heavily on the *amicus curiae* letters from various human rights organisations as correctly stating state practice and understanding of international law, which strongly emphasised the

⁷⁸⁸ A Cassese (ed), *International Criminal Law* (3th edn, OUP, 2013) 70

⁷⁸⁹ Under Article 4 of the SCSL Statute, it has the power to try perpetrators of serious violations of international humanitarian law including: 'Conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities ('child recruitment'). For more details relating to child soldier recruitment, see Alison Smith, 'Child Recruitment and the Special Court for Sierra Leone' (2004) Volume 2 Journal of International Criminal Justice 1141, 1141-1153

⁷⁹⁰ *Prosecutor v Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E) (31 May 2004) Appeals Chamber, ('Decision on Preliminary Motion Based on Lack of Jurisdiction ('Child Recruitment')' <<https://tinyurl.com/yafdu7y7>> (Latest access 18 July 2018)

⁷⁹¹ See Rome Statute of the ICC, Article 7 (2002). For detailed explanation on areas where Article 7 of the ICC Rome Statute outlines elements of customary international law

⁷⁹² SCSL Statute Article 1 (1) (2002)

⁷⁹³ *Prosecutor v Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Appeals Chamber (31 May 2004), ('Decision on Preliminary Motion Based on Lack of Jurisdiction, ('Child Recruitment')

⁷⁹⁴ *Prosecutor v Dusko Tadic*, Case No. IT-94-1-AR72, (2 October 1995) para 94. (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ('Tadic Jurisdiction Decision') <<https://tinyurl.com/q8cmd79>> (Latest access 18 July 2018). Also see *Prosecutor v Tadić* Case No.: IT-94-1-A 15, ICTY Tadić judgement (July 1999) 128-129 <<https://tinyurl.com/6zn3mbp>> (Latest access 18 July 2018)

⁷⁹⁵ Ibid

⁷⁹⁶ *Prosecutor v Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Appeals Chamber (31 May 2004) 11-12, ('Decision on Preliminary Motion Based on Lack of Jurisdiction, ('Child Recruitment')

fundamental value of the prohibition of recruitment and use of children in armed conflict.⁷⁹⁷ The view that the recruitment and use of children in armed conflict was a crime by the time of the SCSL indictments was supported by the UN Secretary General.⁷⁹⁸ Enlistment was defined as ‘accepting and enrolling individuals when they volunteer to join an armed force or group.’⁷⁹⁹ It requires that the person voluntarily agreed to be part of the armed force or group. Conscription, on the other hand, made reference to the ‘compulsory enlistment of persons into military service.’⁸⁰⁰ In giving definition to the phrase ‘using children to participate actively in hostilities’, the SCSL Appeals Chamber endorsed the wording, which states that ‘using’ and ‘participate actively’ have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and use of children as decoys, couriers or at military checkpoints.⁸⁰¹ This does not cover activities that were not related to hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s accommodation.⁸⁰²

Based on the SCSL judgment, *Hinga Norman’s case* can be described as both procedural and corrective justice, and could be described as a landmark ruling and justice for all victims. The SCSL judgments also illustrated that the government and the population, as well as the international community, had supported the pursuit of both procedural and corrective justice for victims after the civil war as ‘crimes against international law are committed by men, not by abstract entities.’⁸⁰³ The SCSL case law can therefore be replicated both with the Sierra Leone judicial system and in future by different jurisdictions. The judgments and judicial affirmation made in the SCSL

⁷⁹⁷ Ibid The Appeals Chamber stated thus: ‘The rejection of the use of child soldiers by the international community was widespread by 1994 ... Citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law. Child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictments.’

⁷⁹⁸ See Report of the Secretary General on the establishment of a Special Court for Sierra Leone, 4 October (2000), where he indicated that: ‘violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused.’ <<https://tinyurl.com/y9dnfde>> (Latest access 18 July 2018)

⁷⁹⁹ Ibid

⁸⁰⁰ Ibid

⁸⁰¹ CDF Trial Judgment, separate and Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe (9 December 2004) para 10 <<https://tinyurl.com/yanq7bnf>> (Latest access 19 July 2018). Also see the ICC Rome Statute Article 8 (2) (b) (xxvi) and Article 8 (2) (e) (vii)

⁸⁰² The Additional Protocol II, Articles 4 (3)(c) of 1949 (1977)

⁸⁰³ N Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (OUP, 2015) 207. Also see ‘Nuremberg Trials: Judgment’ (1945-46) para 1 <<https://tinyurl.com/n8xvqvn>> (Latest access 19 July 2018)

and the ICC are evidence of the SCSL legal legacy and the position the international community has taken (through an interpretively community lens) regarding recruitment and use of children in armed conflict.⁸⁰⁴

5.1.2 The AFRC case, Prosecutor v Brima, Kamara and Kanu (2007)

In the AFRC case, the *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* in 2007⁸⁰⁵, the SCSL Trial Chamber I rendered another judgment of historic significance. In this case, the SCSL Trial Chamber I dealt *inter alia* with the reasoning of ‘using children to participate actively in the hostilities’⁸⁰⁶ and on this case expanded the legal interpretation that was held. The SCSL Trial Chamber I reasoned that the term constitutes not only participation in combat, but ‘any labour or support that gives effect to, or helps maintain, operations in a conflict.’⁸⁰⁷ This is due to the fact that without logistical support an armed force would not be able to function well on its operations. As a result, activities like ‘carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment..., making or finding route’⁸⁰⁸ are defined as active participation. Although the SCSL AFRC Trial Chamber I conclusion was subject to appeal, its legal interpretation on child soldiering was not however replicated in both the CDF case above and the RUF case below. In both cases, the SCSL Trial Chamber I took a rather narrower interpretation of ‘active participation in hostilities’ as provided by the ICC’s Rome Statute commentary.⁸⁰⁹

The SCSL Trial Chamber I began by taking into account alleged effects in the form of indictments. The AFRC indictment charged all three accused with ‘committing’⁸¹⁰ all crimes in the indictment, that is, the actual physical perpetration of the crimes. A substantial amount of evidence was presented at the trial which implicated the accused as physical committers of crimes. In order to uphold the principle of legality, in

⁸⁰⁴ For example: This judicial affirmation and legacy was evidenced in 2004, when SCSL ruled in the Hinga Norman case that the ‘recruitment and use of children in armed conflict is a war crime under customary international law. Also, the ICTY and ICTR statutes determined that the ‘recruitment and use of children under the age of 15 years in armed conflict is a war crime.’ The ICC echoes this point as well. See, ‘Office of the Special Representative of the Secretary-General for Children and Armed Conflict’ (2013) Working Paper1,12 <<http://childrenandarmedconflict.un.org>> (Latest access 19 July 2018)

⁸⁰⁵ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Trial Chamber 11 (20 June 2007) <<https://tinyurl.com/y7cy5njg>> (Latest access 19 July). Also see M C Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* Page (CUP, 2011) 241

⁸⁰⁶ Ibid paras 736 -737

⁸⁰⁷ Ibid

⁸⁰⁸ Ibid

⁸⁰⁹ *Prosecutor v Fofana, Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber Judgment (28 May 2008) para193 <<https://tinyurl.com/yaarmq9b>> (Latest access 19 July 2018)

⁸¹⁰ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Trial Chamber 11 (20 June 2007) <<https://tinyurl.com/y7cy5njg>> (Latest access 19 July)

particular *nullum crimen sine lege*,⁸¹¹ the SCSL Trial Chamber however had to establish that the charges against the accused in relation to child soldier recruitment formed part of customary international law at the period when they were committed.⁸¹² The issue had already been reached by an interlocutory ruling of the SCSL Appeals Chamber, which held by a majority vote that ‘child recruitment was criminalised (as a matter of customary international law) before it was set out as a criminal prohibition in treaty law.’⁸¹³

All three accused were convicted on the charge of recruiting child soldiers.⁸¹⁴ The SCSL Trial Chamber II ruled that this crime had attained the status of customary international law, because it found that ‘conscription’ denotes compulsion, including complete abduction and forced recruitment; that ‘enlistment’ includes accepting and enrolling individuals when they volunteer to join an armed force or group; and that ‘using’ children to participate actively in hostilities includes an element of putting their lives directly at risk in combat.⁸¹⁵ The latter risk includes risk arising from labour support that gives effect to, or helps maintain operations, in a conflict.⁸¹⁶ The SCSL Trial Chamber therefore convicted the three defendants of war crimes and crimes against humanity and sentenced them to 45 and 50 years.

In terms of justice theory, the AFRC case is an example of both procedural and retributive justice. This is evident in the SCSL findings, reasoning and legal interpretation of the terms ‘conscription, enlistment, recruitment and participation’ of children in armed conflict, as well as in the sentencing pattern. It can also be argued that the SCSL judgment based on procedural, retributive and corrective justice theories did not only provide redress for victims but appears to have proven effective and successful because it adjudicated and convicted perpetrators of grave international crimes. Its case law (legacy) on child soldier enlistment, recruitment and conscription can now serve as a model in Sierra Leone and future hybrid courts and tribunals as well.

⁸¹¹ Rome Statute of the International Criminal Court, Article 22 (1998). Also see A Cassese, *International Criminal Law* (3rd edn, OUP, 2013) 71

⁸¹² UN Doc. S/2000/915 (2000), referring to Report of the UN Secretary-General on the Establishment of the SCSL, 4 October 2000 <<https://tinyurl.com/y9saltlt>> (Latest access 19 July 2018)

⁸¹³ *Prosecutor v Hinga Norman*, Case No. SCSL-2004-14-AR72 (E), Interlocutory Motion (31 May 2004). Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) <<https://tinyurl.com/yafdu7y7>> (Latest access 19 July 2018)

⁸¹⁴ *Ibid* paras 2113, 2117, 2121

⁸¹⁵ *Ibid* paras 73 1, 734 -336

⁸¹⁶ *Ibid* paras 737

5.1.3 The CDF case, *Prosecutor v Fofana and Kondewa* (2008)

In the CDF trial, the SCSL Trial Chamber convicted both *Fofana and Kondewa* (CDF forces) for aiding and abetting and planning of war crimes, in particular: murder, cruel treatment, burning of civilian property, collective punishment and, for Kondewa, recruiting and conscripting child soldiers.

In the CDF trial, the Prosecutor failed to advance a proper legal argument relating to women and girls in the indictment of Kondewa on child soldiering crimes. Instead, he attempted to present the alleged use of ‘mystical powers’ by Kondewa as a way of proving the guilt and culpability of the accused.⁸¹⁷

On appeal, the majority of the judges of SCSL Appeals Chamber⁸¹⁸, based on the Rome Statute of the ICC that included the elements of crimes⁸¹⁹ of enlistment, conscription and use of children in armed conflict, found that there was sufficient evidence to convict both Fofana and Kondewa for crimes against humanity. However, the SCSL Appeals Chamber overturned the convictions for both accused ‘for the offense of collective punishment due to the absence of specific intent.’⁸²⁰ Kondewa’s conviction for enlisting child soldiers was also overturned as the factual nexus between Kondewa’s conduct and the child joining the CDF was missing⁸²¹ and ‘whether such a nexus exists is a question of fact which must be determined on a case-by-case basis.’⁸²²

The judges of the SCSL Appeals Chamber reasoned that the SCSL Trial Chamber ‘erred in law when it considered the Accused’s political motives as a mitigating circumstance.’⁸²³ The SCSL CDF judgment could be described as applying procedural, retributive and corrective justice. The procedural aspect is demonstrated in the acquittal of the *Kondewa* case for not being found guilty of child soldiering.

⁸¹⁷ M Staggs, ‘Second Interim Report on The Special Court for Sierra Leone: ‘Bringing Justice and Ensuring Lasting Peace’-Some Reflections on the Trial Phase at the Special Court for Sierra Leone.’ (2006) California U C Berkeley War Crimes Studies Centre 1, 12 <<https://tinyurl.com/y8ocqm7g>> (Latest access 19 July 2018)

⁸¹⁸ *Prosecutor v Fofana, Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber Judgment (28 May 2008) <<https://tinyurl.com/yaarmq9b>> (Latest access 19 July 2018)

⁸¹⁹ Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the International Criminal Court (1998)

⁸²⁰ Ibid The SCSL Appeals Chamber entered new counts, 1 and 3, after overturning the Trial Chambers ruling that the Prosecutor had failed to present the necessary elements of crime against humanity. See *Prosecutor v Fofana, Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber Judgment (28 May 2008) Paras 141 and 146 <<https://tinyurl.com/yaarmq9b>> (Latest access 19 July 2018)

⁸²¹ Ibid

⁸²² Ibid 141

⁸²³ See Press Release, Special Court for Sierra Leone Outreach and Public Affairs Office, Freetown, Sierra Leone: ‘Appeals Chamber Overturns Convictions, Enters New Ones, and Increases Sentences for Former Civil Defence Forces Leaders (28 May 2008) <<https://tinyurl.com/yajef5g4>> (Latest access 19 July 2018), *Prosecutor v Fofana, Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber Judgment (28 May 2008) para 535 <<https://tinyurl.com/yaarmq9b>> (Latest access 19 July 2018)

Additionally, the SCSL Appeals Chamber's overturning of Kondewa's conviction on child soldiering is significant because the procedural, retributive and corrective justice of the judgment can be seen in the conviction, sentencing and acquittal – again, another vital legacy of the SCSL model. However, and in terms of procedural and fair justice, one can argue that failure by the SCSL judges to convict Kondewa (a CDF government militia) for the enlistment and recruitment of child soldiers could raise serious doubt about their independence and neutrality. This, in my view could be deemed to be based on either biasness or lack of experience, hence in my opinion, has had an impact on the legitimacy, legacy and standard of justice of the SCSL model.

5.1.4 The RUF case, *Prosecutor v Sesay, Kallon and Gbao* (2009)

This case examines the use of children by the RUF commanders to commit crimes against the civilian population in Sierra Leone during the civil war, and the related findings, convictions and judgments reached by the SCSL.

By the time the RUF case, *Prosecutor v Sesay, Kallon and Gbao* in 2009⁸²⁴ was presented before the SCSL Trial Chamber I, it had already established (procedural rulings), for example, SCSL Trial Chamber I convictions and judgments made in the AFRC case (*Prosecutor v Brima, Kamara and Kanu*), and the acquittal made in the CDF case (*Prosecutor v Fofana and Kondewa*). In these judgments, the SCSL Trial Chamber I had already developed a new case law ⁸²⁵ by convicting commissioners of crimes of child soldier enlistment and conscription in armed conflict, as well as the acquittal of Kondewa. Most significantly and as already stated above, in the CDF case, Hinga Norman (*Prosecutor v Hinga Norman*) had challenged the SCSL's mandate over the crime of enlistment, conscription and the use of children in hostilities.⁸²⁶ The SCSL Trial Chamber I had then ruled against Hinga Norman, thereby paving the way for prosecutions of similar charges on child soldiering in the future. The SCSL Trial

⁸²⁴ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, (2 March 2009) para 1623 <<https://tinyurl.com/ybs37z79>> (Latest access 19 July 2018)

⁸²⁵ *Prosecutor v Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Trial Chamber II Judgment (20 June 2007); <<https://tinyurl.com/y7cy5njg>> (Latest access 19 July 2018); *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, (2 March 2009) <<https://tinyurl.com/ybs37z79>> (Latest access 19 July 2018); *Prosecutor v Fofana and Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber judgment (28 May 2008) <<https://tinyurl.com/yaarmq9b>> (Latest access 19 July 2018); *Prosecutor v Brima, Kamara and Kanu*, Case No. SCSL-2004-16-A, Appeals Chamber judgment (22 February 2008) <<https://tinyurl.com/y9gpz2lo>> (Latest access 19 July 2018)

⁸²⁶ *Prosecutor v Hinga Norman*, Case No. SCSL-2004-14-AR72 (E) Interlocutory Motion (31 May 2004). Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) <<https://tinyurl.com/yafdu7y7>> (Latest access 19 July 2018)

Chamber I in the CDF case reasoned that enlistment also consists of ‘conscription,’ whilst in the AFRC case, the SCSL Trial Chamber II determined that enlistment means ‘accepting and enrolling individuals when they volunteer to join an armed force or group.’⁸²⁷ In the RUF case, all three accused, Sesay, Kallon and Gbao were indicted with the offence of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities and ‘other serious violations of international humanitarian law in accordance with SCSL Statute.’⁸²⁸ The SCSL Trial Chamber I also found that the RUF’s recruitment method or policy was such that a large number of children were abducted.⁸²⁹ Many of them, aged between eight and fifteen, received military training and became part of ‘Small Boys Units’ or ‘Small Girls Units’, commonly called SBUs and SGUs.⁸³⁰ Nonetheless, not all children received such military training as most of them were used in other positions such as domestic servants, especially girls.⁸³¹

In the RUF case in particular, the Prosecutor failed to give an in-depth explanation of the lesser crime of enlistment of child soldiers. In contrast, he presented his argument on forced training, abduction and the use of children in armed conflict.⁸³² The SCSL Trial Chamber reasoned that such crimes must involve military acts (in relation to armed conflict), and/or direct support for the military operations of the armed group. As a result, using children as domestic labour or for food finding missions did not amount to the war crime of using children to participate actively in hostilities.⁸³³

Taking into account the *actus reus* of ‘conscription’, followed by that of ‘use’, the SCSL Trial I Chamber then ruled that abduction of children and forcing into military training as well as using for specific purposes can constitute conscription.⁸³⁴ Nonetheless, in respect of *casu* (‘abduction’), the SCSL Trial Chamber I had to address

⁸²⁷ *Prosecutor v Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Trial Chamber II Judgment (20 June 2007) para 733 <<https://tinyurl.com/y7cy5njg>> (Latest access 19 July 2018)

⁸²⁸ SCSL Statute, Article 4(c) (2002)

⁸²⁹ G Waschefort, ‘Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leone’ (2010) Volume 1 International Humanitarian Legal Studies 189, 197

⁸³⁰ *Ibid*

⁸³¹ *Ibid*

⁸³² *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, (2 March 2009) para 1694 <<https://tinyurl.com/ybs37z79>> (Latest access 19 July 2018)

⁸³³ *Ibid*

⁸³⁴ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, (2 March 2009) paras 1695 and 1700 <<https://tinyurl.com/ybs37z79>> (Latest access 19 July 2018)

the issue of abduction and training as continuous act, thereby allowing the court to obtain a single charge of conscription without improperly duplicating charges.⁸³⁵

The SCSL Trial Chamber I held that the specific elements of using children under the age of 15 years to participate actively in hostilities ‘encompasses putting their lives directly at risk in combat.’⁸³⁶ Apparently, the term was found not to be unlimited and consisted ‘(a) any labour or support that gives effect to, or helps maintain, operations in a conflict’ such as finding and or acquiring food, carrying loads for the fighting faction, ammunition or equipment, acting as decoys, carrying messages, finding routes, manning checkpoints, making trails or acting as human shields.⁸³⁷ The SCSL Trial Chamber I found that these specific elements of using children included the following: 1) that one or more persons were used by the accused to actively participate, conscript and enlist in hostilities; 2) that such person or persons were under the age of 15 years; 3) that the accused knew or had reason to know that such person or persons were under the age of 15 years; and 4) that the accused intended to use the said persons to participate actively in hostilities. Despite this, SCSL Trial Chamber I objected to the ‘inclusion of food-finding missions in the concept of use to participate actively in hostilities.’⁸³⁸ On appeal, the Appeals Chamber also recognised the application of the special protection provided by Article 4(3) (d) of Additional Protocol II in the event that children under the age of 15 years are conscripted, enlisted, or used to participate actively in hostilities.

Sesay and Kallon were both found individually criminally responsible for ‘planning the use of children to actively participate in hostilities, pursuant to Article 6(1) of the SCSL Statute in relation to events in Kenema, Kailahun, Kono and Bombali Districts.’⁸³⁹ The SCSL Appeals Chamber ruled that the Trial Chamber I erred in its application of the law on JCE against Gbao, especially for crimes committed after April 1998. The Appeals Chamber therefore acquitted Gbao on those grounds.⁸⁴⁰ The

⁸³⁵ G Waschefort, ‘Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leone’ (2010) Volume 1 International Humanitarian Legal Studies 189, 204

⁸³⁶ N H B Jørgensen, ‘Child Soldiers and the Parameters of International Criminal Law’ (2012) Vol. 11 Chinese Journal of International Law 657, 669

⁸³⁷ Ibid

⁸³⁸ Ibid 657, 670

⁸³⁹ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, (2 March 2009) paras 679, 683 and 686 <<https://tinyurl.com/ybs37z79>> (Latest access 19 July 2018)

⁸⁴⁰ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-A, Appeals Chamber (26 October 2009) 395-396 and 568 <<https://tinyurl.com/ybk425kl>> (Latest access 19 July 2018)

Prosecutor's appeal against Gbao's acquittal proved successful.⁸⁴¹ In the same vein, both Sesay and Kallon appealed on that basis relating to their conviction under Article 4 (c), but their appeal was rejected.⁸⁴² Sesay, Kallon and Gbao, were found guilty of war crimes and crimes against humanity on the recruitment of child soldiers, which took place during the civil war between 1991 and 2002. They all received sentences between 25 and 52 years in prison.⁸⁴³ Arguably, based on the reasoning and legal interpretation advanced on child soldiering by the SCSL judges, the RUF judgment could be described as both procedural and corrective justice, as well as retributive. This is clearly demonstrated in all of the convictions, sentencing and acquittals as already indicated above.

In conclusion and as previously noted, prior to the SCSL judgments there had been no conviction for child soldier recruitment and enlistments by previous tribunals. As already mentioned above, the theories of justice (that is: procedural, retributive and corrective justice), help us to understand the findings of the SCSL's new judgments when in 2007, it convicted and sentenced three rebel leaders of war crimes (amongst other crimes) for conscripting, enlisting, participation and using children in armed conflict.

In summary, and within a justice theories perspective (procedural, transitional, retributive, corrective and transitional), although there were some limitations and failures to convict some CDF militias for child soldier enlistment and recruitment, one can argue that the SCSL legacies and successes examined so far include the following: 1) recognising and acknowledging victims' rights to justice, thereby re-enforcing and strengthening the practice of the rule of law in the judicial system and in the law books of Sierra Leone, as well as assisting the country to go forward; 2) helping to create a reliable, sound and authoritative historical archive for the kind of crimes committed in Sierra Leone civil war and lastly, 3) the SCSL's new judgments being amongst the case laws to have influenced the ICC, and deserving the careful attention of the international legal community, civil society, legal practitioners and human rights scholars in Sierra Leone and beyond. As supported by some practitioners, the SCSL new judgments have 'strengthened Sierra Leone's domestic legal system and

⁸⁴¹ Ibid

⁸⁴² *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-A, Appeals Chamber (26 October 2009) paras 26-27, 136-145, 771-775 and 927 <<https://tinyurl.com/ybk425kl>> (Latest access 19 July 2018)

⁸⁴³ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-A, Appeals Chamber Judgment, (26 October 2009) <<https://tinyurl.com/ybk425kl>> (Latest access 19 July 2018)

encouraged Sierra Leoneans to have faith in their justice system.’⁸⁴⁴ However, and in relation to interpretive community lens perspective, the SCSL has been criticised for the limited numbers of those who committed international crimes, tried and convicted, as well as the negative norms impact on domestic courts’ legal response to mass atrocities cases. As observed by Shany, the establishment of the SCSL and ‘the limited measure of accountability it offered shielded the amnesty from significant criticism and challenges by national and international constituencies. As a result, local courts had almost completely refrained from addressing civil war-related atrocities,’⁸⁴⁵ and hardly tried any of the war time commissioners of heinous crimes.⁸⁴⁶ This research will argue that this may not be the case because there are notable exceptions to this, which are; the ‘two multi-accused trials held in 2005 and 2006 before the High Court in Freetown in which a total of 88 rebels who were not covered by the Lomé Amnesty were adjudicated and convicted for war-related crimes committed in 2000.’⁸⁴⁷ Nonetheless, the SCSL new judgments are not only for the law books and development of the Sierra Leonean judicial system, but for ‘Sierra Leone to move on’ as well.⁸⁴⁸ Today, the jurisprudence of other International Criminal Tribunals and hybrid courts have recognised and applied the principles of law of the SCSL model.

5.2 Summary and evaluation of the SCSL’s case law approach against the theories of justice.

The purpose of this section is to draw out the key findings from the previous case law and to try to discern an overall analytical conclusion. Three key areas come out of case law, namely: 1) SCSL decisions on child soldier recruitment and enlistments, 2) the legal approach and challenges in delineating between acts that constitute direct or active participation in hostilities, 3) the theories of justice perspective and or approach (procedural, corrective, retributive, and transitional) in these findings.

⁸⁴⁴ See International Centre for Transitional Justice (ICTJ): ‘International Experts gather in Freetown to discuss the legacy of the SCSL’ <<https://www.ictj.org/news/international-experts-gather-freetown-discuss-legacy-special-court-sierra-leone>> (Latest 20 July 2018)

⁸⁴⁵ Y Shany, ‘How can International Criminal Courts have a Greater Impact on National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation’ (2013) Volume 46 Israel Law Review 431, 439

⁸⁴⁶ S Horowitz, ‘How can International Criminal Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone’ (2013) Volume 46 Israel Law Review 339, 360

⁸⁴⁷ Ibid 339, 356

⁸⁴⁸ Ibid

The recruitment of children under 15 is first referred to expressly as a crime in the Rome Statute of the ICC of 17 July 1998. States parties are obliged to take all necessary measures to ensure that children under 15 are neither recruited into the armed forces nor take part in hostilities,⁸⁴⁹ as provided for in customary international law. The Geneva Conventions IV created the ‘protection of children under 15 as an undisputed norm of international humanitarian law.’⁸⁵⁰ Additionally, the SCSL Trial Chambers I and II made a significant ruling by affirming that the recruitment and use of child soldiers had already been accepted as a crime under customary international law before 1996, thus broadening the scope of child soldiering and recruitment participation as a significant substantive finding, as demonstrated below.⁸⁵¹

Against this backdrop, the SCSL’s legal approach to child soldiering and recruitment was significant in that it was based on a prohibition of *all forms* of participation in hostility, in contrast to a specific prohibition on direct or active participation in hostilities. The focus on direct or active participation has therefore proved problematic, due to difficulties in distinguishing between acts that contain ‘direct or active participation in hostilities and those that do not.’⁸⁵² One particular issue is ‘intermediate status - the grey area of certain support functions.’⁸⁵³

The first legal test was in the SCSL’s CDF trial of Hinga Norman’s case in 2004 for the recruitment and use of child soldiers. This was because Norman’s defence team argued that the war crime (recruitment and use of child soldiers) had not existed before 1996 and until the adoption of the ICC Rome Statute. Despite this legal argument posited by the defence, the SCSL Trial Chamber made a landmark ruling by stating that the recruitment and use of child soldiers had already been crystallised as a crime under customary international law before 1996.

The legacy and implication of the SCSL case law (the SCSL judgment on the AFRC case) was demonstrated in the ICC *Lubanga* case⁸⁵⁴ which hinges on procedural, retributive and corrective justice. The SCSL’s legal test in interpreting the principle

⁸⁴⁹ See ‘Special Court for Sierra Leone Prosecutor v Sam Hinga Norman’ (2004) Volume 43 International Legal Materials 1129, 1129-1149

⁸⁵⁰ Ibid

⁸⁵¹ K D Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles’ (2003) Volume 21 Berkeley Journals of International Law 288, 294

⁸⁵² S Sivakumaran, *The Law of Non-International Armed conflict* (OUP, 2012) 318

⁸⁵³ Ibid 319

⁸⁵⁴ *Prosecutor v Thomas Lubanga Dyilo*, Case No.1CC601/04601/06, Pre- Trial Chamber I, Decision on confirmation of Charges (29 January 2007) para 246 <<https://tinyurl.com/yd6s2b2l>> (Latest access 20 July 2018). Also see N H B Jørgensen, ‘Child Soldiers and the Parameters of International Criminal Law’ (2012) Chinese Journal of International Law 657- 663

on the individual elements of the crime of ‘conscripting’, ‘enlisting’ or ‘using’ child soldiers to participate actively in armed conflict was demonstrated in the ICC *Lubanga* case.⁸⁵⁵ That is to say, participation of children in hostilities amounts to putting their lives at risk. As mentioned above, the activities that can be listed as active participation include: the use of children at checkpoints, armed patrols, in combats, spying, sabotage, scouting or manning/guarding military objectives, human shields, couriers, and bodyguards for commanders. In its reasoning, the ICC Trial Chamber in the *Lubanga* case held that the general principle in determining whether an indirect role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger by becoming a potential target, following the SCSL judgment.⁸⁵⁶ Thomas Lubanga,⁸⁵⁷ founder of the Union of Congolese Patriots (UPC) in the DRC, was found guilty of war crimes relating to the use, enlistment and conscription of child soldiers (boys and girls less than 15 years of age) for active involvement in atrocities in 2002 and 2003. In convicting Lubanga on child soldier recruitment, the majority of the ICC Trial Chamber judges examined the issue of active participation by determining that ‘active’ participation in Article 8 (2)(e)(vii) of the Rome Statute was wider than ‘direct’ participation as it was ‘intended to import a wide interpretation to the activities and the roles that are covered by the offence.’⁸⁵⁸

The ICC Trial Chamber also ruled that the domestic housework performed by many girl soldiers was not considered dangerous enough to fall under the concept of ‘active use.’⁸⁵⁹ In addition, and during the ICC Trial, many witnesses gave evidence that the sexual abuse of child soldiers happened very frequently. In particular, ‘girl soldiers were held as sex slaves by different commanders (who) used them as their ‘wives.’’⁸⁶⁰ The majority of the ICC Trial Chamber considered these acts to be irrelevant in

⁸⁵⁵ For detailed commentaries on the *Lubanga* case see the following: D Hoile (ed), *Justice Denied: The reality of the International Criminal Court* (The Africa Research Centre, 2014) 252-255. Also see J D Mujuzi, ‘Misinterpreting the Statute? The International Criminal Court, the Sentence of Life Imprisonment and Other Emerging Sentencing Issues: A Comment on the Trial Chamber I Decision on the Sentence in Prosecutor V Thomas Lubanga Dyilo’ (2003) Volume 13 International Criminal Law Review 1037, 1339

⁸⁵⁶ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*, No. SCSL-04-16-T, Trial Chamber 11 (20 June 2007) <<https://tinyurl.com/y7cy5njg>> (Latest access 20 July 2018)

⁸⁵⁷ *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Trial Chamber, (14 March 2012) (*Lubanga* case) <<https://tinyurl.com/yauvaose>> (Latest access 20 July 2018)

⁸⁵⁸ Ibid

⁸⁵⁹ Ibid 822

⁸⁵⁹ M E Kurth, ‘The *Lubanga* Case of the International Criminal Court: A Critical Analysis of the Trial Chamber’s Findings on Issues of Active Use, Age, and Gravity’ (2013) Volume 5 Goettingen Journal of International Law 431, 439- 440

⁸⁶⁰ Ibid

connection to the charge of child soldiering.⁸⁶¹ This was perhaps unfortunate because the situation would have been different if the Prosecutor had also charged Lubanga with sexual slavery and rape in relation to Article 8 (2)(e)(vi) Rome Statute, as well as the judgment made in the RUF case (*Prosecutor v Sesay, Kallon and Gbao* (2009))⁸⁶², but the Prosecutor failed to do so.⁸⁶³ In addition, following the statute rules, judges of the ICC Trial Chamber decided not to proffer a proper definition on the legal interpretation⁸⁶⁴ on their own accord due to the fact that Article 74 (2) Rome Statute does not allow the ICC Trial Chamber to rule beyond what is brought before the Court by the Prosecutor.⁸⁶⁵ For example, Judge Odio Benito, dissenting, contested the findings and reasoning of the ICC Trial Chamber. She asserted that the ICC has an ‘obligation to produce a general definition of the crime of child soldiering and not limit itself to the scope of the charges brought before it.’⁸⁶⁶ According to her, this duty can be obtained from Article 21(3) Rome Statute, which mandated the ICC to apply the relevant sources of law (the *ICC Statute*, the *Elements of Crimes*,⁸⁶⁷ the *Rules of Procedure and Evidence*)⁸⁶⁸ in regards to accepted standards of international human rights. As Jorgensen observed, ‘both the ICC and SCSL Trial Chambers have indicated that the decision as to whether a particular activity counts as active participation will be made on a case-by-case basis.’⁸⁶⁹

However, on 1 December 2014, Thomas Lubanga Dyilo appealed both the conviction and the sentence, and the Prosecutor appealed the sentence.⁸⁷⁰ In each judgment, a majority of the Appeals Chamber completely rejected all grounds of Lubanga’s appeal case and endorsed the ICC Trial Chamber’s ruling because it ‘acted within its discretion.’⁸⁷¹ Despite the narrow scope of the charges brought to the ICC Trial

⁸⁶¹ Ibid

⁸⁶² *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, (2 March 2009) para 1623 <<https://tinyurl.com/ybs37z79>> (Latest access 20 July 2018)

⁸⁶³ M E Kurth, ‘The *Lubanga* Case of the International Criminal Court: A Critical Analysis of the Trial Chamber’s Findings on Issues of Active Use, Age, and Gravity’ (2013) Volume 5 Goettingen Journal of International Law 431, 440

⁸⁶⁴ Ibid

⁸⁶⁵ Ibid

⁸⁶⁶ *Prosecutor v Thomas Lubanga Dyilo*, ICC Pre-Trial Chamber Case No. ICC-01/04- 01/06, Judgment case (14 March 2012), Dissenting Opinion of Judge Odio Benito, *Prosecutor v Lubanga*, Judgment, 2-3, para 6

⁸⁶⁷ Rome Statute of the International Criminal Court, ICC, Elements of Crime, ICC-PIDS-LT-03-002/11_Eng (2011).

⁸⁶⁸ Rome Statute of the International Criminal Court, ICC, Rules of Procedure and Evidence, ICC-PIDS-LT-02-002/13_Eng (2013)

⁸⁶⁹ N H B Jørgensen, ‘Child Soldiers and the Parameters of International Criminal Law’ (2012) Chinese Journal of International Law 657- 71 (Latest access 20 July 2018)

⁸⁷⁰ *Prosecutor v Thomas Lubanga Dyilo*, Appeals Judgments, Case No. ICC-01/04-01/06 (December 2014) International Criminal Court <<https://tinyurl.com/ybvr5v37>> (Latest access 20 July 2018)

⁸⁷¹ Ibid

Chamber by the Prosecutor to the crime of child soldiering, the judgment and the sentencing of the SCSL's first trial that focused solely on child soldiering was seen by some commentators as a landmark ruling and a 'great victory' for child soldiers in the DRC.⁸⁷²

The *Prosecutor v Dominic Ongwen*⁸⁷³ case is another example of direct (active) and indirect participation of the use of child soldiers in armed conflict in Uganda. Ongwen's case of the ICC is unique and significant in the sense that this is the first ICC case where an indictee (Ongwen) is indicted with the same crimes as those done to him.⁸⁷⁴ Dominic Ongwen was himself abducted by the Lord's Resistance Army (LRA) at the age of 14 in 1998, forced to be a child soldier and then later became commander of the Sinia Brigade of the LRA in northern Uganda. As a commander, Ongwen played an instrumental role in the planning and execution, and directly involved in four attacks on civilians in the four camps in northern Uganda.⁸⁷⁵ It is alleged that, in accordance with Ongwen's orders, boys and girls were abducted, recruited and enlisted as child soldiers. Although the Rome Statute of the ICC recognises the age of 15 as the threshold for offences of conscription and use of child soldiers, evidence gathered by the Prosecutor suggests that Ongwen bears responsibility for crimes against children far younger than 15 years of age - even as young as 6 years old.⁸⁷⁶

The ICC severed the proceedings against Dominic Ongwen on 6 February 2015.⁸⁷⁷ On 2 December 2015, the ICC charged Dominic Ongwen seventy counts of war crimes and crimes against humanity; including crimes relating to the abduction of children and their use by the LRA as child soldiers, sex slaves or victims of forced marriage and to participate actively in hostilities from 2002 to 2005, in Sinia Brigade in northern Uganda.⁸⁷⁸ But in contrast to other cases on child soldiering, the easy part of the ICC's first 'Uganda case might be determining that the crimes charged were committed by

⁸⁷² M E Kurth, 'The *Lubanga* Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age, and Gravity' (2013) Volume 5 Goettingen Journal of International Law 431, 433

⁸⁷³ See 'Situation in Uganda: The Prosecutor v Dominic Ongwen ICC-02/04-01/15' (2017) International Criminal Court < <https://tinyurl.com/y8lwwvwn> > (Latest access 20 July 2018)

⁸⁷⁴ Ibid

⁸⁷⁵ Ibid

⁸⁷⁶ See Press Release: Ongwen trial opens at International Criminal Court (6 December 2016) (Latest access 26th May 2017)

⁸⁷⁷ Ibid

⁸⁷⁸ Ibid

the accused. The much harder part will be the legal but also largely moral dilemma for the judges of how much of a mitigating circumstance Ongwen's childhood should be.⁸⁷⁹ For example, in both the Lubanga and Katanga cases, the ICC based its decision on the SCSL jurisprudence.⁸⁸⁰ The ICC has had to determine on child soldiers only as 'victims that fit into a neat narrative of evil warlords forcing helpless children to fight for them. Ongwen will be a long and complicated case where there are no such easy explanations.'⁸⁸¹

Based on both case laws, textual and legal interpretation as highlighted above, one can posit that it is the SCSL model that has really made the difference in developing the substantive offence of child soldiering, as well as direct and indirect participation of children in armed conflict. In accordance with the SCSL interpretation, one can argue that 'direct participation' connotes a specific degree where-by an individual participates in an activity; whilst 'active participation' infers the degree of the individual's participation irrespective of his or her intensity of participation.⁸⁸² The broader interpretation of the concept of 'active use' of child soldiers to include activities such as scouting and spying constitutes a significant aspect of the SCSL's legacy. However, it is also important to note as stated above that other activities, particularly those associated with girls such as domestic labour and sexual slavery, remained outside the legal scope, with serious implications for the rights of girls and women.

Therefore, both the SCSL Trial Chamber, and the ICC Trial Chamber, which have confirmed this jurisprudential legacy, have made an important contribution to clarifying the legal definitions of the alleged crimes against child soldiers. It was also an indication of the impact of the SCSL jurisprudential legacy, and one based on procedural, retributive and corrective justice theory.⁸⁸³ This was clearly evident and

⁸⁷⁹ S van den Berg 'Defence tactics exposed in Ongwen case at ICC' (December 2016) International Justice Tribune para 10 <<https://tinyurl.com/ya665f3e>> (Latest access 20 July 2018)

⁸⁸⁰ See *Prosecutor v Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction, (31 May 2004) <<https://tinyurl.com/y8huhg3o>> (Latest access 20 July 2018). Also see *Prosecutor v Thomas Lubanga Dyilo*, Case No.1CC601/04601/06, Pre-Trial Chamber I, Decision on confirmation of Charges (29 January 2007) <<https://tinyurl.com/y85vbavj>> (Latest access 20 July 2018)

⁸⁸¹ Ibid

⁸⁸² The Additional Protocol I and II of Geneva Conventions, Articles 3 and 77 of AP I and Articles 4 (3)(c) of AP II of 1949 (1977)

⁸⁸³ Ibid

can be attested to by the convictions made in the CDF, AFRC and RUF cases, as well as the acquittal made in the CDF case as indicated above.

In conclusion, one can argue that, regardless of the legal gap and reasoning, the SCSL judgments provided significant jurisprudential legacy, based on procedural, retributive and corrective justice theory, particularly in respect of child soldiers.

5.3. The strengths and weaknesses of the SCSL's approach using the perspective of justice theories and interpretive community lens.

This section is about evaluating the strengths and weaknesses of the SCSL's approach using the principles of theories of justice and interpretive community lens.

Procedural Justice: As discussed in Chapter 3, procedural justice is defined as the 'perceived fairness of procedures that are used to obtain a given outcome.'⁸⁸⁴ Procedural justice is a formal legal approach that holds commissioners of serious crimes to account for their actions through prosecutorial, adversarial and retributive mechanisms.⁸⁸⁵

Arguably, the use of procedural justice applied by the SCSL in the CDF, AFRC and RUF cases on child soldiering was mainly aimed at safeguarding the principles of ICL and human rights compliance, as well as following the due process of the law. Procedurally, the SCSL was strictly bound in all its proceedings by its constitutive documents.⁸⁸⁶ The aim of these documents was to enable the trials to proceed fairly, expeditiously and effectively and in line with the rules in order to offer justice.

It has been said that in some cases or circumstances, procedural justice does not provide the accused persons with justice.⁸⁸⁷ This raises questions such as: 1) How successful was the SCSL in delivering justice in Sierra Leone? and 2) Has the SCSL

⁸⁸⁴ M Laxminarayan, 'Procedural Justice and Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type' (2012) 25 Soc Just Res 390, 391

⁸⁸⁵ W Lambourne, 'Transformative justice, reconciliation and peace building' in Kamari Maxine Clark (eds), *Transitional Justice Theories* (C U P, 2009) 20

⁸⁸⁶ For example, the SCSL Statute and Agreement by which it was created by a treaty between and the UN and the SLG. See SCSL Statute, Article 14: Interpretation of the Rules of Procedure and Evidence.

<<https://tinyurl.com/y8qoj7vw>> (Latest access 20 July 2018)

⁸⁸⁷ C Laucci, 'Digest of Jurisprudence of the Special Court for Sierra Leone' (Martinnus Nijhoff Publishers, 2003-2005) 112

been fair in its dispensing of justice? These questions will be addressed in the following paragraphs.

Despite the SCSL's perceived success, its operations and functions raised many criticisms in relation to how it offered justice and fairness for both victims and accused persons.⁸⁸⁸ This is due to the fact that the nuanced nature of SCSL's justice may make it too distinct to have any replication beyond Sierra Leone. For example, the SCSL's jurisdictional mandate to prosecute those who 'bear the greatest responsibility' puts the Court's judgments in a separate standard that may expose it to criticism by future defence lawyers in relation to presupposing the liability of the accused applying the doctrine of individual responsibility. The SCSL has also been criticised as not being fair in its dispensing of justice due to the limited number of indictments and convictions made. Amongst the criticisms levelled against it was the indictment of Hinga Norman (CDF leader and former Deputy Minister of Defence), while the former President Alhaji Tejan Kabbah was not indicted.⁸⁸⁹ Similarly, the non-prosecution of low-ranking offenders who were guilty of many serious crimes can be criticised.⁸⁹⁰

In contrast to the criticism above, my argument however is that the SCSL judgments, its nuance and legacy can be a useful model for replication. This is because the SCSL had to function within the framework of its procedural and jurisdictional mandate at the time, and in some cases had not obtained sufficient evidence to support both indictments and convictions of all the aforementioned involved. This assertion has been supported by the SCSL Prosecutor Hollis who maintained that if the SCSL had not found sufficient prescribed information and evidence to 'elevate such a crime to a crime against humanity or a war crime, the SCSL would not have been able to exercise jurisdiction over the possible offences.'⁸⁹¹ In order to determine whom the SCSL could effectively indict, 'there was a set of checks, which prosecutors had to meet for each form of liability.'⁸⁹² Arguably also, the SCSL's mandate was not to prosecute those who started the civil war in Sierra Leone, but it was meant to provide a criminal justice response to the grave breach of IHL perpetrated by those individuals who 'bear the

⁸⁸⁸ K Ainley, S Datzberger, R Friedman and C Mahony (eds), 'Ten Years On: Transitional Justice in Post-Conflict Sierra Leone' (2013) The Justice and Security Research Programme 3 <<https://tinyurl.com/ybh6gdyj>> (Latest access 20 July 2018)

⁸⁸⁹ Ibid 3, 13

⁸⁹⁰ Ibid 3, 11

⁸⁹¹ Ibid

⁸⁹² Ibid 3, 12

greatest responsibility’ for the commissioning of international crimes. It is therefore within this ‘framework that one should assess the work and the legacy of the SCSL.’⁸⁹³ However, the SCSL’s mandate also begs the question whether the accused were assumed to be guilty rather than innocent before prosecution.

Furthermore, the SCSL procedural judgments in the CDF, AFRC and RUF cases resulted in a number of convictions, along with some acquittals. The SCSL procedural judgments on child soldiering did assist in bringing about justice in post-war Sierra Leone. This is due to the fact that it could be claimed that both the victims and the accused were given a fair trial, regardless of the seriousness and degree of the crimes concerned. As observed by Judge Robertson, one of the SCSL’s key legal legacies was its creation of ‘standards of procedural fairness, in particular via a Defence Office to provide defendants with ‘equality of arms’ in adversarial trials.’⁸⁹⁴ However, one can argue that the primary jurisprudential legacy and success of the SCSL was the prosecution of those who ‘bear the greatest responsibility’ for the crimes committed during the conflict in Sierra Leone. The SCSL is a criminal court: ‘it is nothing more and it is nothing less,’⁸⁹⁵ as affirmed by Prosecutor Hollis. As stated in the earlier section, the judicial affirmation and legacy was clearly evidenced in 2004, when the SCSL determined in the Hinga Norman case that the ‘recruitment and use of children in armed conflict is a war crime under customary international law.’⁸⁹⁶

In conclusion, it can be argued that the procedural justice principle proffered by the SCSL model, as applied to the crime of child soldier recruitment, helped to underscore the necessity for international criminal justice to showcase the seriousness of crimes committed with a view to ensuring that justice is seen to be done.

⁸⁹³ Ibid

⁸⁹⁴ K Ainley, S Datzberger, R Friedman and C Mahony (eds), ‘Ten Years On: Transitional Justice in Post-Conflict Sierra Leone’ (2013) The Justice and Security Research Programme 3, 3 -18 <<https://tinyurl.com/ybh6gdyj>> (Latest access 20 July 2018). Also see Defence had been overlooked at Nuremberg, where prosecutors ran the court, and Offices of the Prosecutor were overly powerful at the ICTY and ICTR

⁸⁹⁵ Ibid 3, 14

⁸⁹⁶ See ‘Office of the Special Representative of the Secretary-General for Children and Armed Conflict’ (2013) Working Paper1,12 < <https://tinyurl.com/ybtq75x5>> (Latest access 30 March 2017)

Retributive Justice: Retributive justice is based on punishment.⁸⁹⁷ Punishment is expected as a response to wrongdoing or crime. When an offender breaks the law, justice demands that they forfeit something in return.⁸⁹⁸

It could be argued that, in the case of Sierra Leone, the application of this principle in the SCSL judgments on child soldiering helped to create a balance against an injustice carried out in the 11-year civil war. Retributive justice on child soldiering was also needed in order to hold to account those responsible for the commissioning of these grave crimes, and thereby helped to bring about justice in the community. Retributive justice was demonstrated in the high profile of persons convicted of child soldiering by the SCSL. Concerns were raised, however, over the relatively small number of people prosecuted, with many low-ranking commissioners of crimes not tried by the SCSL, and indeed this pragmatic approach could be seen as conflicting with the principle of retributive justice.

The SCSL Appeals Chamber made reference to the ICTY Appeals Chamber which stipulated that ‘it is well established that at the ICTY and ICTR, retribution and deterrence are the main objectives in sentencing.’⁸⁹⁹ It can be argued that the relatively limited SCSL prosecutions make it difficult to generalise about the certainty and severity of SCSL deterrence and punishment on child soldiering. Despite this, one can argue that even the limited SCSL prosecutions could now serve as deterrence and punishment within Sierra Leone in future, as well as beyond her borders which will create international impact or effect. However, as the concept is nuanced in ICL, it could be subject to debate and varied interpretations. Research evidence illustrates that it is difficult to prove or disprove whether both transitional and retributive (deterrence) work effectively.⁹⁰⁰

⁸⁹⁷ D Hoile (ed), *Justice Denied: The reality of the International Criminal Court* (The Africa Research Centre, 2014) 228 -229

⁸⁹⁸ J van Prooijen, J Coffeng and M Vermeer (eds), ‘Power and retributive justice: How trait information influences the fairness of punishment among power holders’ (2014) Volume 50 *Journal of Experimental Social Psychology* 190. See J Q Adams, ‘Retributive Pre-Punishment’ (2013) Volume 39 *Social Theory and Practice* 213, 213 - 222

⁸⁹⁹ *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Trial Chamber II, Judgement (18 May 2012) Para 13 < <http://www.rscsl.org/Taylor.html> > (Latest access 20 July 2018)

⁹⁰⁰ J Ku and J Nzelibe, ‘Do International Criminal Tribunals Deter or Exacerbate Humanitarian Law’ (2006) Volume 84 *Washington University Law Review* 777, 709 -798. Also see D L Rothhe and C W Mullins, ‘Beyond the Juristic Orientation of International The Relevance of Criminological Insight to International Criminal Justice: Criminal Law and its Control A Commentary’ (2010) Volume 10 *International Criminal Law Review* 97, 100-103

Corrective Justice: Corrective justice is based on the principle that prosecution, convictions and sentencing are necessary and beneficial elements in response to wrongdoing; and would send a message to future commissioners of crimes such as child soldier recruitment.

Although the number of people prosecuted was limited, applying the principle of correcting wrongs has helped the Sierra Leone community in its offering of justice. For example, one of the SCSL CDF convicts, Fofana - who was given conditional early release on 10 February 2015 (after serving two-thirds of his jail term of 15 years' imprisonment at Mpanga Prison in Kigali, Rwanda) then sent to Bo, Sierra Leone – was again arrested on 9 March 2016 after breaching his conditional release.⁹⁰¹ He was re-tried by the RSCSL and admitted 'violating the terms of his conditional early release agreement.'⁹⁰² Also, the fact that ICC has drawn on the SCSL jurisprudence in the *Lubanga* case on child soldiering constitutes procedural, corrective and retributive justice.

The fact that some argue that the SCSL should have tried a greater number of perpetrators can be deemed an endorsement of its functions and operations. Some still argue that the low number of defendants did not justify the cost and that the funds should have been put into proper use somewhere else. The *Lubanga* case demonstrated corrective justice because the 'voluntary or compulsory nature of the recruitment reflects an aspect of the *actus reus*.'⁹⁰³ In its reasoning, the ICC Trial Chamber in the *Lubanga* case made it clear that 'the offences of conscripting and enlisting are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group, with or without compulsion.'⁹⁰⁴ Nonetheless, one can conclude that, despite these criticisms, the application of corrective justice by the SCSL model primarily on its convictions and judgments made on child soldiering was apt and had impact.

Transitional Justice: As already stated in Chapter 2, and drawing from the findings of other sections and Chapter 2, transitional justice in general aims at 'providing for

⁹⁰¹ See 'Sierra Leone News: Special Court re-arrests CDF Director of War' Awoko (Friday 11 March 2016) <<http://awoko.org/>> (Latest access 20 July 2018)

⁹⁰² Ibid Also see Press Release, Residual Special Court for Sierra Leone Freetown, Sierra Leone (18 March 2016) <<http://www.rscsl.org/RSCSL-News.html>> (Latest access 20 July 2018)

⁹⁰³ N H B Jørgensen, 'Child Soldiers and the Parameters of International Criminal Law' (2012) Vol. 11 Chinese Journal of International Law 657, 688

⁹⁰⁴ Ibid

individual criminal accountability, deterrence, and punishment, and establishing a common truth about the past which can carry the society forward in a process of healing and reconciliation.’⁹⁰⁵ Also, post-conflict communities face fundamental challenges that often include how to address the lasting legacy of their dark past, and what kind of transitional justice they wish to pursue. Having in place some type of mechanism of transitional justice is crucial in addressing the task of building sustainable peace by advancing justice and securing reconciliation. The kinds of mechanisms that post-conflict communities use to address widespread and systematic violence and human rights abuses are dependent on many factors, including history, culture and expectations, the nature of the extant legal system, the political, social, economic and specific needs of the community.⁹⁰⁶ For example, the ICTR was established by the UN in 1994 and the Gacaca laws and courts in Rwanda were created by an act of Parliament in 2001 and closed in 2012, all in response to genocide crimes and human rights violations committed during civil war. Also, the punishment of perpetrators (restorative justice) must be directed towards nation-building and restorations of relations. All in all, the Gacaca courts are primarily understood to have contributed to discovering the ‘truth’ about the genocide crimes committed and holding individuals to account.⁹⁰⁷ Similarly, in South Africa transitional justice mechanisms were established through the TRC in order to bring about political compromise, granting amnesty for the truth about crimes committed and for the creation of national reconciliation and peace, and political stability in the country.⁹⁰⁸

Notwithstanding, it is significant to state that transitional justice mechanisms will depend on the individual context of each country, which tends to shape its own specific approach. This is due to the fact that different transitional communities choose different approaches and implement them in varied ways.⁹⁰⁹ Some scholars maintain that ‘political compromises necessarily determine the formation, mandates, and

⁹⁰⁵ E M Evenson, ‘Truth and Justice in Sierra Leone: Coordination between Commission and the Court’ (2000) Volume 104 Columbia Law Review 730. Also see R Teitel, *Transitional Justice* (OUP, 2002) 27 and 213-218. Also see C L Griswold, *Forgiveness: A Philosophical Exploration* (CUP, 2007) 1-98, 110, 134 and 167

⁹⁰⁶ P Clark, *The Gacaca Courts Post-Genocide Justice and Reconciliation Rwanda Justice without Lawyers* (CUP, 2010) 29

⁹⁰⁷ N Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (OUP, 2015) 3-4

⁹⁰⁸ P Clark, *The Gacaca Courts Post-Genocide Justice and Reconciliation Rwanda Justice without Lawyers* (CUP, 2010) 31

⁹⁰⁹ K Ainley, R Friedman and C Mahony (eds), *Evaluating Transitional Justice Accountability and Peace building in Post-Conflict Sierra Leone* (Palgrave Macmillan, 2015) 35

operations of courts and truth commissions, consequently limiting their effectiveness.’⁹¹⁰

In relation to the Sierra Leone scenario, transitional justice was illustrated through the establishment of the Truth and Reconciliation Commission (TRC) signed through the Lomé Peace Accord in 1999.⁹¹¹ The aim was to address the visible legacies of crimes and human rights concerns in the communities through peace and reconciliation after the atrocities of the civil war committed in the country.⁹¹² The TRC was also a mechanism of ‘restorative justice, tied to democratization, peace-building and the reintegration of ex-combatants...’⁹¹³ through a ‘non-punitive, educational process, which promoted democracy and social justice.’⁹¹⁴ Although both institutions (TRC and SCSL) had individual mandates and complemented each other in the post-conflict development process, they appear not to have always successfully cooperated in full, due to tension between them.⁹¹⁵ There have been glaring dissensions between the SCSL and the TRC because the SCSL has been criticised for not encouraging prosecutions in the national courts of Sierra Leone for post-Lomé atrocities that were not applicable by the amnesty agreement. This ultimately created an effect on justice theories perspective in relation to fairness and proper dispensing of justice in post-conflict society. Notwithstanding that, the procedural, retributive, corrective and transitional justice principles were combined into one process in order to ensure fair justice in the Sierra Leone community and have proved successful.⁹¹⁶ This was necessary given the kind of crimes committed, particularly those involving children. Society needed to move on, and providing individuals with a platform to tell their stories helped Sierra Leone to carry out a process of healing, peace and reconciliation.⁹¹⁷ Transitional justice in Sierra Leone demonstrated both the ‘perils and

⁹¹⁰ E M Evenson, ‘Truth and Justice in Sierra Leone: Coordination between Commission and the Court’ (2000) Volume 104 Columbia Law Review 730

⁹¹¹ The Lomé Peace Accord (July 1999) <<https://tinyurl.com/y9zhqer4>>. Also see L Connolly, ‘Justice and peacebuilding in post-conflict situations: An argument for including gender analysis in a new post-conflict model’ (1992-2012) Occasional Paper Series: Volume 2 The African Centre for the Constructive Resolution of Disputes (ACCORD) 1, 4-5 (Latest access 20 July 2018)

⁹¹² K Ainley, S Datzberger, R Friedman and C Mahony (eds), ‘Ten Years On: Transitional Justice in Post-Conflict Sierra Leone’ (2013) The Justice and Security Research Programme 65

⁹¹³ Ibid

⁹¹⁴ Ibid 62

⁹¹⁵ W Schabas ‘Amnesty, the Sierra Leone Truth and Reconciliation and Commission and the Special Court for Sierra Leone’ (2004) Volume 11 University of California, Davis 145, 145-165

⁹¹⁶ See The Lomé Peace Accord (July 1999) <<https://tinyurl.com/y9zhqer4>> (Latest access 20 July 2018)

⁹¹⁷ Sierra Leone has been ranked as the top ten most peaceful countries in Africa. See ‘The Top Ten Most Peaceful Countries in Africa 2015’ (2015) Africa Ranking <<https://tinyurl.com/ycp3rcv5>> (Latest access 20 July 2018)

potential of transitional justice rooted in development and the generation of future opportunity.’⁹¹⁸ Transitional justice could be seen as particularly relevant in relation to crimes such as child soldiering where cultural and family norms have been transgressed.

Interpretive community perspective: In terms of interpretive community lens, the SCSL has been criticised for the limited numbers of commissioners of international crimes tried and convicted, as well as the negative norms impact on domestic courts’ legal response to mass atrocities cases.⁹¹⁹ As observed by Shany, the establishment of the SCSL and ‘the limited measure of accountability it offered – shielded the amnesty from significant criticism and challenges by national and international constituencies. As a result, local courts had almost completely refrained from addressing civil war-related atrocities,’⁹²⁰ and tried hardly any of the war-time commissioners of heinous crimes.⁹²¹

However, the only notable exceptions are the ‘two multi-accused trials held in 2005 and 2006 before the High Court in Freetown in which a total of 88 rebels who were not covered by the Lomé Amnesty were adjudicated and convicted for war-related crimes committed in 2000.’⁹²² The reasons for the trial were: 1) Sierra Leonean law does not contain international crimes, so the defendants (low-level fighters) were charged with national crimes,⁹²³ 2) some local practitioners maintained that the ‘national proceedings in Sierra Leone not only lack references to SCSL norms but they also lack references to SCSL jurisprudence more generally,’⁹²⁴ 3) the development of criminal law in the Sierra Leonean justice system is discouraged (no improvement to its procedural or substantive criminal norms) as national courts do not make reference to new jurisprudence when it relates to human rights discourses,⁹²⁵ and 4) some lawyers and local judges have little knowledge of SCSL

⁹¹⁸ K Ainley, S Datzberger, R Friedman and C Mahony (eds), ‘Ten Years On: Transitional Justice in Post-Conflict Sierra Leone’ (2013) The Justice and Security Research Programme 72

⁹¹⁹ Y Shany, ‘How can International Criminal Courts have a Greater Impact on National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation’ (2013) Volume 46 Israel Law Review 431, 435

⁹²⁰ Ibid 431, 439

⁹²¹ S Horowitz, ‘How can International Criminal Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone’ (2013) Volume 46 Israel Law Review 339, 360

⁹²² Ibid 339, 356

⁹²³ Ibid 339, 357

⁹²⁴ Ibid 339, 359

⁹²⁵ Ibid

jurisprudence⁹²⁶ and 5) the SCSL has had no normative influence on national criminal proceedings.⁹²⁷

Despite these claims, the SCSL model may still have an impact on legal reforms both nationally and internationally.⁹²⁸ This is because two of its prosecutors (including a Sierra Leonean national) have been lobbying and advocating for the Sierra Leonean government to include the ICC Statute in national law. If such reforms prove successful and international criminal law norms are incorporated into Sierra Leonean law, the SCSL model could have a significant impact on the national justice system as well as legitimacy and lessons can be learnt,⁹²⁹ meaning it will create a comprehensive legal response to mass atrocities and send a signal to both national and international actors that perpetrators of such grave international crimes will be held to account, thereby creating long-lasting political stability and justice in the country.

Conclusion

The research can conclude by arguing that theoretically (within the context of the theories of justice), and despite all the criticisms made against the SCSL in relation to its operations, fairness and dispensation of justice, its developed **jurisprudential legacy** has proved successful and is now serving as a benchmark for future courts. Also, the SCSL decisions on child soldier recruitment have been successful in their overarching aim of rendering a measure of justice for some of the worst atrocities in Sierra Leone, as a number of prominent former group leaders were convicted and sentenced for such crimes. The SCSL judgments represent the first legal jurisprudential legacy created by a hybrid court on war crimes of recruitment, such as child soldier enlistment. For instance, and as already stated above, in the *Lubanga* case as well as other cases, the ICC Trial Chamber drew upon the SCSL's jurisprudential legacy for the indictment and conviction of the recruitment, enlistment and conscription of child soldiers.

⁹²⁶ Ibid

⁹²⁷ Ibid 339, 538- 359. Also see Y Shany, 'How can International Criminal Courts have a Greater Impact on National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation' (2013) Volume 46 Israel Law Review 431, 439

⁹²⁸ Y Shany, 'How can International Criminal Courts have a Greater Impact on National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation' (2013) Volume 46 Israel Law Review 431, 435

⁹²⁹ Ibid 431, 452

Based on procedural, retributive, corrective and transitional justice theories, research evidence has shown that up until the trials, convictions and judgments made by the SCSL, international criminal law contained only 28 categories of international crimes, dating from 1815 to 1999.⁹³⁰ It is important to note that despite the existence of stronger laws, advocacy, UNSC resolutions, domestic and international legislations on the prohibition of the use of children under the age of 15, national armies and warring factions continue to recruit and use children in armed conflict.⁹³¹ Apparently, none of the provisions and treaties criminalised the use of child soldier recruitment and enlistment except the SCSL and Rome Statute. Also, the provisions are mostly contained within Human Rights Law and arguably have very little strength until incorporated into domestic law.⁹³² For example, in Sierra Leone, the effect that the SCSL judgment will have on the implementation of HRL may appear less assured than the impact it has already had on its jurisprudence and legacy globally.⁹³³ As put by the former presiding judge of the SCSL Trial Chamber II, ‘there has been a general resistance from local lawyers to introducing concepts from human rights treaties into domestic cases.’⁹³⁴ As a result, there had never been any convictions for child soldier recruitment within the framework of procedural, retributive and normative justice until the creation of the SCSL in 2002. Since the SCSL’s convictions and judgments, new categories of international crimes and legality have been added in international criminal law, including the recruitment and use of child soldiers (the CDF, AFRC and RUF cases).⁹³⁵

Finally, the SCSL’s focus on trying a limited number of accused persons on child soldiering, despite the commission of massive crimes, was appropriate given its mandate, time frame and funding restrictions. In addition, the SCSL was able to complete cost effective trials in a short period, and in a focused and efficient manner. The SCSL’s jurisprudence and decisions have been judged by some commentators to

⁹³⁰ M C Bassiouni, ‘The history of Universal Jurisdiction and its Place in International Law’ in S Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, 2006) 46, M C Bassiouni, *International Criminal Law Conventions and their Penal Provisions* (Ardsley Park, N Y Transitional Publishers, 1997) 20-21. For a general overview of categories of international crimes, see G Werle, (ed), *Principles of International Criminal Law* (2 edn, T M C Asser Press, 2009)

⁹³¹ Ibid

⁹³² M Staggs, ‘Second Interim Report on the Special Court for Sierra Leone: “Bringing Justice and ensuring lasting Peace”: Some reflections on the Trial Phase at the Special Court for Sierra Leone’ (2006) U C Berkeley War Crimes Studies Centre 1, 24

⁹³³ Ibid

⁹³⁴ Ibid

⁹³⁵ See the Special Court for Sierra Leone: Residual Special Court Sierra Leone (RSCSL) (2010) <<http://www.rscsl.org>> (Latest access 20 July 2018)

be fundamental, robust, relevant and visible to the people of Sierra Leone and the international community. The SCSL judgments have not only created case law and set a precedent for the ICC, the ICL and other tribunals, but have also demonstrated how a court and legal system should work, especially in respect of war crimes, crimes against humanity, witness protection and legal defence that will be used in future courts and tribunals. For example, the SCSL's hybrid model has been broadly accepted by both Sierra Leone and the international community, and its jurisprudential legacy has been drawn on or followed by the ICC and other tribunals. Additionally, the SCSL judgments and their symbolic significance have been welcomed by many as effective and efficient, and were a successful contribution to an expansion of international criminal justice on child soldiering. The SCSL judgments, within the theories of justice, should be welcomed as contributing to a broader interpretation and legal definition of child soldiering. There is every prospect that the legal landscape on child soldiering, including definitions and jurisprudence and legacy, will continue to develop in the future.

Chapter 6: The implications of the SCSL for International Criminal Law: jurisprudential, legitimacy and institutional effects with a particular focus on forced marriage

Introduction: Section 1

In the previous chapter, the thesis explored the jurisprudence of the SCSL model through its judgments with a particular focus on child soldiers. In section 1 of this Chapter, we turn our attention to the issue of forced marriage, and in section 2), the thesis will evaluate and analyse the *Taylor case* that is based on aiding and abetting; again applying the theories of justice on both cases. As already indicated in Chapter 5, the two case studies have been particularly chosen due to the fact that the SCSL model case law is the first instance again, in terms of International Criminal Law recognition and inclusion of the crime of recruitment and enlistment of child soldiers and forced marriage. The jurisprudence of the SCSL model has now been drawn on by other International Criminal Tribunals and hybrid courts, the case law of which will be cited later on in this Chapter.

The SCSL was the first hybrid court involving forced marriage, and as such it offered a first interpretation of the key features characterising this crime. Arguably, the justice theories can help us better understand the contribution of the SCSL, and the extent to which judgments provided a helpful expansion of International Criminal Law's understanding of forced marriage (and other inhumane acts) as crimes against humanity.⁹³⁶ The definition of the theories of justice are explained in full in Chapter 2 and reviewed in Chapter 5, so will not be repeated here.

This section will examine the jurisprudence of the SCSL model through its decisions made in the CDF, AFRC and RUF cases on forced marriage.⁹³⁷ It will also explore the legal analysis and reasoning on which the case law was developed against the lens of justice theories already highlighted in Chapter 5.

⁹³⁶ See the Special Court for Sierra Leone: Residual Special Court Sierra Leone (RSCSL) (2010) <<http://www.rscsl.org>> (Latest access 24 July 2018)

⁹³⁷ L A Barria and S D Roper, *The Development of Institutions of Human Rights: A Comparative Study* (Palgrave Macmillan, 2010) 149-153

6.1 Background: Historical background on charges pertaining to forced marriage and the development of International Criminal Law and legal standards

This section looks at the historical background to charges pertaining to forced marriage and more specifically, its development and recognition under International Criminal Law. It was estimated that around 257,000 women and girls may have been subjected to ‘sexual violence’⁹³⁸ (a term used to describe any violence, physical or psychological, carried out through sexual means or by targeting sexuality) during the civil war in Sierra Leone.⁹³⁹

According to International Law, ‘using rape as a weapon of war is a war crime. Despite this legal protection, armies in dozens of global conflicts have used rape as a tactic of war with impunity.’⁹⁴⁰ This assertion is supported by the former UN Secretary General’s Special Representative on Sexual Violence, Bangura who stated that the systematic use of sexual violence and rape is now a defining and deliberate tactic of war and political economy.⁹⁴¹

During the civil war in Sierra Leone, thousands of women and girls were abducted by rebels, taken into the bush and forced to marry their captors. Heinous and widespread physical and sexual violence was directed against women.⁹⁴² Within the so-called bush marriages, women and girls were drugged, raped, abused, forced to fight, and forced

⁹³⁸ Gender-based violence includes rape and attempted rape, and such acts as forcing a person to nudity in public, coercing two victims to perform sexual acts on one another or harm one another in a sexual manner, mutilating a person’s genitals or a woman’s breasts, and sexual slavery. See ‘The Office of the Prosecutor: Policy Paper on Sexual and Gender-based Crimes’ (June 2014) The International Criminal Court (ICC) <<https://tinyurl.com/h9lcf5m>> (Latest access 25 July 2018)

⁹³⁹, ‘War-related Sexual Violence in Sierra Leone: A Population-based Assessment’: (June 2002) Physicians for Human Rights, With the Support of the United Nations Assistance Mission in Sierra Leone 1, 3-4 <<https://tinyurl.com/yd7dtrus>> (Latest access 25 July 2018)

⁹⁴⁰ See ‘Stop Rape in War’ (2017) Physicians for Human Rights para 1 <<https://tinyurl.com/y9dg9xw4>> (Latest access 25 July 2015)

⁹⁴¹ C Byron, D Turns, C Warbrick and D McGoldrick (ed), ‘The preparatory Commission for the International Criminal Court’ (2001) Volume 50 The International and Comparative Law Quarterly 420, 426. See Z Bangura, ‘Faith in Islam & Faith in Women: Why Gender Justice is Key to an Islam Without Extremes’ International Crises Group The Future of Conflict’ Cocorioko, The Voice of the People (4 November 2015) paras 1 and 10 <<https://tinyurl.com/yauxwu3a>> (Latest access 25 July 2018). Ban Ki moon, UN Secretary General stated that ‘Sexual and gender-based violence is the most extreme form of the global and systemic inequality experienced by women and girls. It knows no geographic, socio-economic or cultural boundaries. Worldwide, one in three women will suffer physical or sexual violence at some point in her life, from rape and domestic violence to harassment at work and bullying on the internet.’ See UN Secretary General’s message on International Day for the Elimination of Violence against Women (November 2014) para 1 <<https://tinyurl.com/y8vbbynu>> (Latest access 25 July 2018)

⁹⁴² For a detailed accounting of the violence committed against women and girls in the Sierra Leone war: See ‘‘We’ll Kill You If you Cry’: Sexual Violence in the Sierra Leone Conflict’ (2003) Volume 15 Human Rights Watch 1, 25 - 52 <<https://tinyurl.com/ycvtngkg>> (Latest access 25 July 2018). Also see *Prosecutor v Brima, Kamara, and Kanu*, Case No. SCSL-04-16, Judgment (20 June 2007) para 4, 14, 15 and 16 <<https://tinyurl.com/y7cy5njg>> (Latest access 25 July 2018)

to work. They were also forced into pregnancy and sexual slavery and forced to give birth, or to abort their babies.⁹⁴³ According to Bangura, ‘an estimated 65,000 women and girls were raped during eleven years of civil war’⁹⁴⁴ in Sierra Leone and the ‘shame was particularly acute in conservative Muslim and traditional communities.’⁹⁴⁵ Within the framework of armed conflict and International Criminal Law and as also codified in the Statutes of both ICTY and ICTR, ‘gender-based crimes’ - for example rape,⁹⁴⁶ have been prosecuted as war crimes and specifically as crimes against humanity and genocide,⁹⁴⁷ but forced marriage⁹⁴⁸ had never been identified or recognised as a separate crime against humanity until the SCSL became the first court to charge, prosecute and convict defendants in the CDF⁹⁴⁹, AFRC⁹⁵⁰ and RUF⁹⁵¹ cases with the crime of forced marriage.⁹⁵²

In order to understand how the charge of forced marriage came to be included in the proceedings before the SCSL, it is important to understand the evolving recognition of gender-based crimes and forced marriage, and how this influenced the SCSL proceedings. Talks held at the World Conference on Women in Copenhagen (1980) and Nairobi (1985) acknowledged and recognised domestic violence as a problem to equality, and an unacceptable offence to human dignity.⁹⁵³ In 1985, the UN General

⁹⁴³ J F Kamara, ‘Preserving the Legacy of the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone.’ (2009) Volume 22 Leiden Journal of International Law 761, 761-777

⁹⁴⁴ Z Bangura, ‘Faith in Islam & Faith in Women: Why Gender Justice is Key to an Islam Without Extremes’ International Crises Group The Future of Conflict’ Cocorioko, The Voice of the People (4 November 2015) para 16 <<https://tinyurl.com/yauxwu3a>> (Latest access 25 July 2018)

⁹⁴⁵ Ibid

⁹⁴⁶ F Pickup, S Williams and C Sweetman (ed.), *Ending Violence Against Women: A Challenge for Development and Humanitarian Work* (Oxfam GB, 2001) 1 <<https://tinyurl.com/yc56u8f7>> (Latest access 25 July 2018). Also see C Sweetman (ed.), *Violence Against Women* (Oxfam GB, 1998) 3

⁹⁴⁷ C Byron, D Turns, C Warbrick and D McGoldrick (ed), ‘The preparatory Commission for the International Criminal Court’ (2001) Volume 50 The International and Comparative Law Quarterly 420, 425-426, see ‘‘We’ll Kill You If you Cry’: Sexual Violence in the Sierra Leone Conflict’ (2003) Volume 15 Human Rights Watch 1, 2 <<https://tinyurl.com/ycvtngkg>> (Latest access 25 July 2018). Also see M Frulli ‘Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a ‘New’ Crime against Humanity’ (2008) Volume 6 Journal of International Criminal Justice 1033, also see, ‘What the International Criminal Court has Achieved and can Achieve for Victims/Survivors of Sexual Violence’ (2009) 16 International Review of Victimology 183 - 209

⁹⁴⁸ See *Prosecutor v Brima, Kamara, and Kanu*, Case No. SCSL-04-16- T, Trial Chamber Judgment, (20 June 2007) para 575 -576 < <https://tinyurl.com/y9d6jlvq>> (Latest access 25 July 2018)

⁹⁴⁹ H M Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-based Crimes at the International Criminal Tribunals* (OUP, 2014) 127-128

⁹⁵⁰ Ibid Also see *Prosecutor v Brima, Kamara and Kanu*, Case No. SCSL-04-16-A, Appeals Chamber Judgment (22 February 2008) (AFRC case)

⁹⁵¹ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber Judgment (2 March 2009) (RUF case) <<https://tinyurl.com/ybs37z79>> Latest access 25 July 2018), see *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-A, Appeals Chamber Judgment (26 October 2009) (RUF case) <<https://tinyurl.com/yd32e7ln>> (Latest access 25 July 2018)

⁹⁵² C C Jalloh, *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013) 248. Also see H M Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-based Crimes at the International Criminal Tribunals* (OUP, 2014) 127-128

⁹⁵³ C Sweetman (ed), *Violence Against Women* (Oxfam GB, 1998) 1-2

Assembly passed its first resolution on violence against women, recommending concerted efforts within and outside the UN system in order to curb violence against women.⁹⁵⁴ Nonetheless, it was the World Conference on Human Rights in Vienna in 1993 which brought the issue of violence against women to the international scene. In 1993,⁹⁵⁵ the UN adopted the Declaration on the Elimination of Violence against Women, which advanced the definition and recommended ways of combating it.⁹⁵⁶ Based on the above submissions, ‘every country has acknowledged the existence of gender-based violence, and it is now agreed to be one of the major obstacles to all three of the goals of the Decade for Women.’⁹⁵⁷ This legal approach is warranted in order to ensure that those found wanting under prohibitions of law are aware of the criminalisation and consequences for their actions and behaviours. It is a prerequisite for criminal rules to be detailed and precise so as to make clear the elements of the *actus reus* and requisite *mens rea* of the crime.⁹⁵⁸

Based on Askin’s article, gender-based violence was reflected in very few in the earliest prosecutions for international crimes after World War II in trials within the International Military Tribunals of Nuremberg (IMTN) and the Far East.⁹⁵⁹ However, although these trials demonstrated willingness to charge and convict some of those who were responsible for the widespread and systematic rape of civilians, it ignored the Japanese military camps that forcibly held over 200,000 women in sexual slavery.⁹⁶⁰

As already mentioned earlier, ICTY and ICTR have addressed (through successful prosecutions) crimes relating to systematic and widespread atrocities including gender-based violence and sexual violence. For instance, in the judgments of cases of ICTY and ICTR (1998), defendants were charged and convicted on the grounds of

⁹⁵⁴ UNGA A/RES/48/104, 20 December 1993. (Declaration on the Elimination of Violence against Women) <<https://tinyurl.com/d758k8z>> (Latest access 25 July 2018)

⁹⁵⁵ Ibid

⁹⁵⁶ C Sweetman (ed.), *Violence Against Women* (Oxfam GB, 1998) 18

⁹⁵⁷ Ibid See N Heyzer, ‘Working towards a world free from violence against women: Unifem’s contribution’ (1998) Volume 6 Gender and Development, Oxfam UK 17-28 <<http://dx.doi.org/10.1080/741922830>> (Latest 25 July 2018)

⁹⁵⁸ A Cassese, *International Criminal Law* (2nd edn, OUP, 2008) 41

⁹⁵⁹ K D Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring ‘Obstacles’ (2003) Volume 21 Berkeley Journal of International Law 288

⁹⁶⁰ See Coalition for Women’s Human Rights in Conflict Situations (22 May 2003), presented by the Coalition Testifies on Gender Crimes before the Sierra Leone Truth and Reconciliation Commission

<http://www.womensrightscoalition.org/site/advocacyDossiers/sierraLeoneTR/index_en.html> (Latest access 25 July 2018); R G Saidel, *The Jewish Women of Ravenbrück Concentration Camp* (Madison: University of Wisconsin Press, 2004) 212-214; see S M Hedgepeth and R G Saidel (ed), *Sexual Violence Against Jewish Women During the Holocaust* (Waltham: Brandeis University Press, 2010); see Patricia V Sellers, ‘Wartime Female Slavery: Enslavement?’ (2011) Volume 44 Cornell International Law Journal 115, 117

rape and sexual violence. In the ICTR case, *Prosecutor v Akayesu*, the ICTR emphasised that rape and sexual violence were an integral part of the process of destruction of the Tutsi ethnic groups.⁹⁶¹ ICTY cases included the *Prosecutor v Delalic et al*, the *Prosecutor v Tadic case*⁹⁶² (involving the sexual abuse of males), and the *Prosecutor v Furundzija case*⁹⁶³ (in which the ICTY concluded that aiding and abetting outrages upon personal dignity, including rape, amounts to war crime). All four judgments concluded that rape and other forms of gender-based violence contain acts of crimes against humanity, genocide, violations of the laws or customs of war, or serious breaches of the 1949 Geneva Conventions.⁹⁶⁴ The defendants in all cases were found guilty of gender-based violence, convicted and sentenced. Also, in the 2001 ICTY judgment case, the *Prosecutor v Miroslav Kvocka et al*,⁹⁶⁵ the Trial Chamber, in its definition of rape, included gender-based violence as a crime. The Trial Chamber concluded that gender-based violence is not limited to rape but includes such crimes as sexual mutilation and forced abortion.⁹⁶⁶ The ICTY ruling acknowledged that sexual violence may consist of more than one form of abuse, and allows the inclusion of additional forms of sexual violence, including sexual mutilation and in particular enslavement for sexual purposes, as crimes against humanity.⁹⁶⁷

The SCSL was confronted with the issue of determining how this act of forced marriage ought to be legally defined or classified and how to hold perpetrators criminally responsible. ‘Gender-based violence was not only used as a tool to wage terror among the civilian population, ‘it further served military and supply purposes: rape and sexual slavery helped to maintain the morale of the fighting forces in a long-lasting and cruel guerrilla war.’’⁹⁶⁸ It was from the IMT, ICTY and ICTR that the first procedural investigation and prosecution of gender-based violence began. Despite this, it was the SCSL that developed the jurisprudence on the prosecutions of forced

⁹⁶¹ *Prosecutor v Jean-Paul Akayesu*, case No. ICTR-96-4-T, 2 September 1998, judgment and Opinion. <<http://unictr.irmct.org/en/cases/ictr-96-4>> (Latest access 25 July 2018)

⁹⁶² *Prosecutor v Tadić*, case No. IT-94-1, Trial Chamber (7 May 1997) and Tadić (IT-94-1) Appeals Chamber (27 February 2001) <<http://www.icty.org/case/tadic/4>> (Latest access 25 July 2018)

⁹⁶³ *Prosecutor v Anto Furundzija*, case No. IT-95-17/I-T, (10 December 1998) <<https://tinyurl.com/y76oohv6>> (Latest access 25 July 2018)

⁹⁶⁴ M Lattimer and P Sands (ed), *Justice for Crimes Against Humanity* (Hart, 2003) 155

⁹⁶⁵ *Prosecutor v Miroslav Kvocka et al* case No. IT-98-30/1-T (2 November 2001) <<https://tinyurl.com/yafgcum>> (Latest access 25 July 2018)

⁹⁶⁶ Ibid

⁹⁶⁷ Ibid

⁹⁶⁸ J F Kamara, ‘Preserving the Legacy of the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone’ (2009) Volume 22 Leiden Journal of International Law 761, 761-777

marriage which has been interpreted to fall within the category of other inhumane acts under crimes against humanity.⁹⁶⁹ Also, the TRC recommend reforms in Sierra Leone's legal, judicial and police systems in order to make it feasible for women to report cases of sexual and domestic violence.⁹⁷⁰ The TRC also suggested for the 'repeal of all statutory and customary laws that discriminate against women, including in marriage, inheritance, divorce and property ownership. It recommends that the government campaign against the customary practice whereby a victim of rape is obliged to marry the rapist.'⁹⁷¹

Given the above, and in my view, one can draw conclusion that today, gender-based violence is one of the main social forces generating and regenerating gender inequality worldwide. Gender-based violence has now become a central policy issue discussed not just in the perspective of gender equality policy but related to policies on human rights, crime prevention, development, child protection, health, cross border migration and trafficking and conflict and post conflict intervention. Thanks to the relentless efforts of the committed and determined advocates, diplomats, jurists civil societies, NGOs, International Law now treats gender-based violence as a prosecutorial crime against the mental and physical integrity of the victim. Also, with the promulgation of the Statutes of both ICC⁹⁷² and SCSL, ⁹⁷³ and the jurisprudence of the SCSL hybrid court, there is now a robust law in the archives allowing the prosecution and conviction of gender crimes as war crimes and crimes against humanity.⁹⁷⁴

⁹⁶⁹ See the Special Court for Sierra Leone: Residual Special Court for Sierra Leone (2013) <<http://rscsl.org/>> (Latest access 25 July 2018)

⁹⁷⁰ N Ben-Ari and E Harsch, 'Sexual violence, an 'invisible war crime'' (2005) Africa Renewal para 22 <<https://tinyurl.com/y9yf7pk6>> (Latest access 25 July 2018)

⁹⁷¹ Ibid

⁹⁷² See the Rome Statute of the ICC, Articles 7 and 8 of (1998 – 2000) and entered into force on (1 July 2002) <<https://tinyurl.com/yaay87o3>> (Latest access 25 July 2018)

⁹⁷³ See the Statute of the SCSL, Article 2 and 3 of (2000) <<https://tinyurl.com/y8qoj7vw>> (Latest access 25 July 2018)

⁹⁷⁴ See the Special Court for Sierra Leone: Residual Special Court for Sierra Leone (2013) <<http://rscsl.org/>> (Latest access 25 July 2018)

6.2 The implication for the development of ICL case law and its institutional effects on forced marriage (the CDF, AFRC and RUF cases)

The research will now examine the development of the SCSL case law in the sections below.

6.2.1 The CDF case, *Prosecutor v Fofana and Kondewa*

In the indictments in the CDF case (*Prosecutor v Fofana and Kondewa*), there were no charges made on gender-based crimes by the Prosecutor. Even though the Prosecutor took leave of the SCSL Trial Chamber to amend the CDF indictment in order to include charges pertaining to forced marriage under ‘an inhumane act’ as crimes against humanity, rape, sexual slavery, and the war crime of outrages upon personal dignity, the majority of the SCSL Trial Chamber judges refused to consider this plea. This was due to lack of sufficient evidence initially presented by the Prosecutor that did not reflect the degree of wrongfulness and real gravity of the charges alleged to have been committed by the perpetrators, and would not have helped in charging and entering a conviction as well as delivering a procedural justice. This is in sharp contrast to the AFRC and RUF cases where the defendants were charged for gender-based crimes.⁹⁷⁵ The SCSL judges’ refusal of the Prosecutor’s request to include charges of gender-based crimes and forced marriage in the CDF case has caused legal ramifications and ambiguities irrespective of the fact that such crimes were common in CDF-held places during the civil war in Sierra Leone.⁹⁷⁶ Additionally, even though gender-based violence was prevalent during the civil war, and two of these cases (the AFRC and RUF) had plenty of evidence, in the CDF case, the SCSL Trial Chamber ruled that the ‘Prosecution had not proved the necessary elements to convict on crimes against humanity, and did not enter convictions on these counts.’⁹⁷⁷ The above scenario illustrates that the SCSL judges did not ‘adequately address gender-based crimes which can still be misunderstood, misinterpreted and mischaracterised.’⁹⁷⁸ Also, it is highly likely that because the CDF government militia

⁹⁷⁵ H M Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-based Crimes at the International Criminal Tribunals* (OUP, 2014) 127-128

⁹⁷⁶ Ibid 130-131

⁹⁷⁷ *The Prosecutor v Sam, Fofana and Kondewa*: ‘Residual Special Court Sierra Leone (RSCSL)’ (2010) <<http://www.rscsl.org/CDF.html>> (Latest access 25 July 2018)

⁹⁷⁸ V Oosterveld and A Marlowe, ‘Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu: Case No. SCSL-04-16-T: Special Court for Sierra Leone, Trial Chamber II, June 20, 2007; Prosecutor v Moinina Fofana and Allieu Kondewa: Case No. SCSL-04-14-T: Special Court for Sierra Leone, Trial Chamber I’ (2007) Volume 101 *American Journal of International Law* 856. Also see H M Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-based Crimes at the International Criminal Tribunals* (OUP, 2014) 131

forces were fighting on the side of the government, the judges may have deemed it necessary by not entering an indictment and conviction.⁹⁷⁹

However, one can argue that the SCSL ruling can be described as procedural, corrective and transitional justice. This was evidenced when the SCSL judges had initially refused the Prosecutor's decision not to amend the CDF indictment to include charges relating to forced marriage under 'an inhumane act' as crimes against humanity and war crimes. The ruling had demonstrated a degree of fairness in their assessment and treatment of evidence to both the accused and witnesses. Also, one can posit that, as the concept of achieving justice does happen in varied forms, the SCSL's decision is appropriate in relation to justice for political stability and a 'forward-looking-justice' community.⁹⁸⁰

6.2.2 The AFRC case, Prosecutor v Brima, Kamara and Kanu

The issue of gender-based crime was discussed in the first judgment released by the SCSL in the AFRC Case (*Prosecutor v Brima, Kamara and Kanu*).⁹⁸¹ In the indictment against the three accused members of the AFRC, four counts were alleged under the heading 'Sexual Violence': rape, 'sexual slavery and any other form of sexual violence', other inhumane acts (forced marriage), and 'in addition or in the alternative' to the above mentioned counts, the war crime of outrages upon personal dignity.⁹⁸²

In relation to crimes against humanity, the SCSL Trial Chamber found that the list of gender-based crimes⁹⁸³, containing 'rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence'⁹⁸⁴ was exhaustive, while the crime of 'other inhumane acts' was found by the Trial Chamber to be a 'residual clause'; and it reached a conclusion that it 'must logically be restrictively interpreted as applying only to acts of a non-sexual nature amounting to an affront to human dignity.'⁹⁸⁵ After

⁹⁷⁹ The *Prosecutor v Sam, Fofana and Kondewa*: 'Residual Special Court Sierra Leone (RSCSL)' (2010) <<http://www.rscsl.org/CDF.html>> (Latest access 25 July 2018)

⁹⁸⁰ M S Williams, R Nagy, and J Elster (ed), *Transitional Justice* (New York University Press, 2012) 101-103

⁹⁸¹ *Prosecutor v Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Trial judgement (20 June 2007) para 697 <<https://tinyurl.com/yc9pq8q9>> (Latest access 25 July 2018). Also see The Special Court for Sierra Leone: Residual Special Court Sierra Leone (RSCSL) (2010) <<http://www.rscsl.org/AFRC.html>> (Latest access 25 July 2018). See N A Goodfellow, 'The Miscategorization of 'Forced Marriage' as a Crime against Humanity by the Special Court for Sierra Leone' (2001) Volume 11 International Criminal Law Review 831, 832-833

⁹⁸² See Further Amended Consolidated Indictment, Case No. SCSL-2004-16-PT (18 February 2005) <<https://tinyurl.com/yczj7xfc>> (Latest access 25 July 2018)

⁹⁸³ See SCSL Statute, Article 2(g) (2002)

⁹⁸⁴ Ibid

⁹⁸⁵ *Prosecutor v Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Trial judgement (20 June 2007) para 697 <<https://tinyurl.com/yc9pq8q9>> (Latest access 25 July 2018). Also see The Special Court for Sierra Leone:

hearing the evidence, the majority of the Trial Chamber reached the decision that they were not satisfied that ‘the Prosecution is capable of establishing the elements of a non-sexual crime of forced marriage independent of the crime of sexual slavery.’⁹⁸⁶ The majority of the Trial Chamber judges then concluded that forced marriage was legally subsumed by the crime of sexual slavery and dismissed the count for redundancy.⁹⁸⁷ This finding was criticised for its failure to recognise and acknowledge the explicit element of the act of forced marriage which has been labelled as a ‘multi-layered’ crime which includes non-sexual elements.⁹⁸⁸

Moreover, in respect of the finding by the SCSL Trial Chamber that forced marriage was subsumed by the crime of sexual slavery, the count alleging ‘sexual slavery and other forms of sexual violence’ was struck out for being duplicated.⁹⁸⁹ Thus, by default, the SCSL Trial Chamber considered the evidence of sexual slavery (encompassing evidence of ‘forced marriage’) under the final alleged sexual crime, the war crime of outrages upon personal dignity. The Prosecutor was successful under this count. The SCSL Trial Chamber also stated that ‘sexual slavery is an act of humiliation and degradation so serious as to be generally considered an outrage upon personal dignity.’⁹⁹⁰

Based on the above reasoning, one can infer that the law, in its legal norms and practice lags the human experience and touch, and nowhere is this more important than in relation to sexual violence and gender-based crimes. This was evidenced in the jurisprudence of the SCSL AFRC judgment which recognised and acknowledged the gender dimensions of sexual violence, as well as forced as forms of criminality, including Judge Doherty’s dissenting opinion, in which she found forced marriage to be a distinct crime from the crime of sexual slavery.⁹⁹¹ Justice Doherty wrote a Partially Dissenting Opinion in which she disagreed with the conclusion that acts of forced marriage are subsumed by the crime of sexual slavery and, accordingly, could

Residual Special Court Sierra Leone (RSCSL) (2010) <<http://www.rscsl.org/AFRC.html>> (Latest access 25 July 2018)

⁹⁸⁶ Ibid para 704

⁹⁸⁷ Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn. Beck, Munchen, 2008) 211

⁹⁸⁸ F Micarla ‘Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a ‘New’ Crime against Humanity’ (2008) Volume 6 Journal of International Criminal Justice 1036

⁹⁸⁹ *Prosecutor v Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Trial judgement (20 June 2007) paras 713-714 <<https://tinyurl.com/yc9pq8q9>> (Latest access 25 July 2018)

⁹⁹⁰ Ibid para 719 <<https://tinyurl.com/yc9pq8q9>> (Latest access 25 July 2018)

⁹⁹¹ Ibid paras 582-596

not constitute any (other inhumane act).⁹⁹² Justice Doherty further stated thus: ‘I am satisfied on the basis of the testimony of the Prosecution expert witness that the use of the term ‘wife’ is indicative of forced marital status which had lasting and serious impacts on the victims.’⁹⁹³ She concluded that the evidence of forced marriage satisfied the requirements of the crime against humanity of (other inhumane acts).⁹⁹⁴ The SCSL Appeals Chamber rejected the SCSL Trial Chamber majority’s presentation on forced marriage and took a position in concert with that of Justice Doherty and the Prosecution.⁹⁹⁵ The SCSL Appeals Chamber in the AFRC case overruled the SCSL Trial Chamber’s findings in relation to both of the counts of sexual slavery and forced marriage as an (other inhumane act). With regards to the former, the SCSL Appeals Chamber endorsed that, while the impugned count did not breach the rule on duplicity, the remedy should have been to strike out the rest of the count and leave only sexual slavery.⁹⁹⁶

Taking the latter into account, the SCSL Appeals Chamber found that the SCSL Trial Chamber had made a mistake in law by concluding that the list of gender-based crimes enumerated in Article 2(g) of the Statute prohibited the finding that any other crimes of a sexual or gendered nature could be found to contain (other inhumane acts).⁹⁹⁷ The SCSL Appeals Chamber considered the nature of the act of forced marriage and recognised its unique elements, in particular the ‘forced conjugal association,’ and stated that ‘forced marriage is not predominantly a sexual crime.’⁹⁹⁸ The SCSL Appeals Chamber then overruled the Trial Chamber’s finding that ‘forced marriage’ was subsumed within the crime of sexual slavery.⁹⁹⁹ Additionally, the SCSL Appeals Chamber concluded that ‘forced marriage’ could be considered to contain the crime against humanity of ‘other inhumane acts.’¹⁰⁰⁰

⁹⁹² Ibid paras 582-596. Partly Dissenting Opinion of Justice Doherty on Count 7 (sexual slavery) and Count 8 (forced marriages) ‘I find that the label of ‘wife’ to a rebel caused mental trauma, stigmatized the victims and negatively impacted their ability to reintegrate into their communities.’ para 51 <<https://tinyurl.com/yc9pq8q9>> (Latest access 26 July 2018)

⁹⁹³ Ibid para 51

⁹⁹⁴ Ibid paras 51 and 71

⁹⁹⁵ *Prosecutor v Brima, Kamara and Kanu*, Case No. SCSL-2004-16-A, AFRC Appeals Chamber Judgment (22 February 2008) para 195 <<https://tinyurl.com/yafhuppp>> (Latest access 26 July 2018). Also see V Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties’ (2011) Volume 2 International Humanitarian Legal Studies 127, 135

⁹⁹⁶ Ibid paras 105 and 109. Also see C C Jalloh (ed), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013) 250-151

⁹⁹⁷ Ibid para 186

⁹⁹⁸ Ibid para 73

⁹⁹⁹ Ibid para 195

¹⁰⁰⁰ Ibid paras 197-202

Nevertheless, irrespective of the findings that the SCSL Trial Chamber had made a mistake, the Appeals Chamber declined the opportunity to enter convictions for the crimes of sexual slavery and ‘other inhumane acts - forced marriage.’¹⁰⁰¹ It reached a decision that, since the acts which contained these crimes were embedded in the conviction for outrages upon personal dignity, there was no miscarriage of justice.¹⁰⁰² Again, the SCSL Trial Chamber determination on forced marriage on the AFRC can be understood within the framework of procedural justice in that the judges found that there was insufficient evidence and dismissed the charge in its entirety. The SCSL Appeals Chamber took a different approach in this case on the legal characterisation and nature of forced marriage, even though other perpetrators (RUF case) were prosecuted and convicted of this crime.

To conclude, there appears to be systemic ‘blind spots’ resulting in both direct and indirect gender-based discrimination amongst prosecutors within the justice theories and the incomplete integration of these issues within legal concepts and liability regimes. In practice, these ‘blind spots’ may in future lead to an insufficient assessment of evidence for gender-based violence and forced marriage, which could lead to few prosecutions for such heinous crimes. Again, within the theories of justice perspective, the judges’ differing approaches and reasoning may affect justice negatively and could create a lack of legal certainty.

6.2.3 The RUF case, Prosecutor v Sesay, Kallon and Gbao

In relation to the RUF case, the crime of forced marriage was heard again, first in the SCSL Trial Chamber and later in the Appeals Chamber.¹⁰⁰³ The RUF case was the first to convict the accused specifically for acts of forced marriage as the crime against humanity of (other inhumane acts).¹⁰⁰⁴ In its judgment case, the Trial Chamber concluded that women taken as ‘wives’ were victims of ‘grave suffering and serious injury to their physical and mental health’ which included ‘the lasting social stigma which hampers their recovery and reintegration in society.’¹⁰⁰⁵ As a result, the crime is subject to an inhumane act. The SCSL RUF judgment is vital because the SCSL

¹⁰⁰¹ Ibid Para 202

¹⁰⁰² Ibid para 110

¹⁰⁰³ Ibid para 677 (Disposition Justice Boutet dissented on this finding with respect to the one accused, Gbao) Also see V Oosterveld, ‘The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments’ (2011) Volume 44 Cornell International Law Journal 49, 56-66

¹⁰⁰⁴ Ibid 49, 56-66

¹⁰⁰⁵ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber 1 Judgment (2 March 2009) para 1296 <<https://tinyurl.com/ybs37z79>> (Latest access 26 July 2018)

hybrid court upheld its earlier recognition of forced marriage as an independent criminal act, distinct from other gender-based crimes and, for the first time, held the defendant criminally liable for such a crime. In addition, and drawing from the AFRC judgment case, the SCSL Trial Chamber endorsed the view that acts of forced marriage contained the war crime of outrages against personal dignity.¹⁰⁰⁶ Thus, the RUF SCSL Trial Chamber set a precedent in ICL by convicting individuals accused of forced marriage. These convictions were upheld on appeal by the SCSL Appeals Chamber.

In summary, the two judgments (AFRC and RUF cases) made by the SCSL addressed the issue of forced marriage. The jurisprudence of these judgments started with the AFRC Trial Chamber's¹⁰⁰⁷ objection to the charge of forced marriage on the grounds that the crime could not be differentiated from that of sexual slavery. The SCSL Appeals Chamber overturned this ruling, highlighting that the trauma and stigma caused by a 'forced conjugal association' was serious enough to contain a separate, distinguishable crime against humanity of forced marriage.¹⁰⁰⁸

However, unlike the SCSL AFRC trial, the SCSL RUF judgment demonstrated the first ever international convictions on forced marriage as a crime against humanity (an inhumane act). The SCSL RUF judgment has therefore illustrated an insight in International Criminal Law's legal definition of forced marriage.

Despite some doubts raised by commentators in relation to forced marriage: being miscategorised as a crime against humanity as 'there was no examination of legality specific to forced marriage that went beyond the legality of the residual category of 'other inhumane acts' as a crime against humanity',¹⁰⁰⁹ the research can argue that in the context of procedural, retributive, corrective as well as traditional justice theories, and based on the judgments made by the SCSL on forced marriage, the interpretations of the judges in these cases have increasingly assisted in the development of the jurisprudence and a legal framework in this area. Additionally, in the SCSL Appeals Chamber ruling, it 'agrees with the Prosecution that the notion of "Other Inhumane Acts" enshrined in Article 2 (i) of the SCSL Statute constitutes part of customary

¹⁰⁰⁶ Ibid para 1298

¹⁰⁰⁷ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*, SCSL Case No. SCSL-04-16-T), Trial Chamber Judgment, (20 June 2007) <<https://tinyurl.com/yc9pq8q9>> (Latest access 25 July 2018)

¹⁰⁰⁸ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*, SCSL Case No. SCSL-04-16-A, Appeals Chamber Judgment, (22 February 2008) <<https://tinyurl.com/yd4hzhj>> (Latest access 26 July 2018)

¹⁰⁰⁹ N A Goodfellow, 'The Miscategorization of 'Forced Marriage' as a Crime against Humanity by the Special Court for Sierra Leone' (2001) Volume 11 International Criminal Law Review 831, 847

international law.’¹⁰¹⁰ Also, the research can further argue that the value of retributive justice can either be intrinsic or instrumental. For example, the measures of retributive justice, notably ‘punishment of wrongdoers... to victims are easily justified on intrinsic grounds.’¹⁰¹¹ Punitive punishments (retributive justice) of wrongdoers are sometimes needed as ‘a signal to the future that will dissuade potential dictators or insurgents from trying to grab power.’¹⁰¹² As a result of this, the SCSL jurisprudence will now greatly assist to ‘promote learning and the preservation of institutional knowledge gained from experience’,¹⁰¹³ and also aid the evolution of a nuanced understanding of the definition and the application of forced marriage within ICL and ICC as well as future tribunal trials.

6.3 Summary and evaluation of the SCSL’s case law approach against the theories of justice

As indicated in Chapter 5, the aim of this section is to bring out the major findings from the previous case law, analyse its application and draw a final conclusion. Three major areas come out of case law, namely: 1) the SCSL decisions made on forced marriage, 2) the divergences in reasoning and opinion relating to forced marriage: one would endeavour to explore the inquiry below on the contradictory and contesting perspective, and 3) the application of theories of justice (procedural, corrective, retributive, and transitional) in these judgments.

One major example that shows the divergence in views about forced marriage is sexual slavery. Some of the categories in forced marriage are similar to sexual slavery.¹⁰¹⁴ Sexual slavery and forced marriage constitute an element whereby the offender coerces the victim and deprives the victim of physical liberty.¹⁰¹⁵ Evidence of gender-based crime is required to try and convict the offender for sexual slavery where ‘the perpetrator caused such person or persons to engage in one or more acts of a sexual

¹⁰¹⁰ *Prosecutor v Brima, Kamara and Kanu*, SCSL Case No-2004-16-A, Appeals Chamber Judgment (22 February 2008) para 198 <<https://tinyurl.com/yd4hzhj>> Latest access 26 July 2018)

¹⁰¹¹ M S Williams, R Nagy, and J Elster (ed), *Transitional Justice* (New York University Press, 2012) 80

¹⁰¹² *Ibid* 80

¹⁰¹³ See ICC, the Office of the Prosecutor of the International Criminal Court (ICC): *Policy Paper on Sexual and Gender-based Crimes June 2014* <<https://tinyurl.com/h9lcf5m>> (Latest access 26 July 2018)

¹⁰¹⁴ F Nguyen, ‘Untangling Sex, Marriage, and Other Criminalities in Forced Marriage (2014) Volume 6 Gottingen Journal of International Law 13, 20. Also see V Oosterveld, ‘The Special Court for Sierra Leone’s Consideration of Gender-based Violence: Contributing to Transitional Justice?’ (2009) Volume 10 Hum Rights Review 73, 73-98

¹⁰¹⁵ See Article 7 (1) (g)-2 International Criminal Court (ICC), *Elements of Crimes* (2010) <<https://tinyurl.com/y9fat44w>> (Latest access 5 February 2016)

nature.’¹⁰¹⁶ Although a gender-based crime is not a condition to ‘criminalize forced marriage, it almost always happens.’¹⁰¹⁷ The most interesting legal aspect of the AFRC determination on forced marriage was its contradictory findings and reasoning adduced by the SCSL Appeals Chamber on 22 February 2008 in which it tried to rectify this anomaly as already explained above.¹⁰¹⁸ The SCSL Appeals Chamber refused to follow the SCSL Trial Chamber’s decision and definition of forced marriage on the grounds that the SCSL Trial Chamber’s reasoning and judgments ‘collapse evidence of that crime into the war crime of outrages upon personal dignity.’¹⁰¹⁹ The reasoning of the SCSL Trial Chamber did not adequately differentiate the various categories of the crime of forced marriage from sexual slavery.¹⁰²⁰

In Justice Doherty’s dissenting opinion, she agreed with the prosecution and concluded that the categories of forced marriage meet the prescribed condition of (other inhumane acts) as a crime against humanity.¹⁰²¹ Also on appeal, the SCSL Appeals Chamber agreed with Justice Doherty’s dissenting opinion and overturned the SCSL Trial Chamber’s decision on the forced marriage charge. The SCSL Appeals Chamber reasoned that, ‘contrary to the majority view of the trial chamber, forced marriage was distinct from the crime of sexual slavery under the category of (Other Inhumane Acts), which are recognized as crimes against humanity under customary international law.’¹⁰²² The SCSL Appeals Chamber, in handing down its verdict on forced marriage, reasoned with the Prosecutor’s argument on legality by expressing the following: ‘The Prosecution submits that the crime charged under Count 8 is ‘Other Inhumane Acts,’ which forms part of customary international law, and therefore, does not violate the principle of *nullum crimen sine lege*.’¹⁰²³ The SCSL Appeals Chamber further affirmed its reasoning by stating that it ‘agrees with the Prosecution that the notion of ‘Other Inhumane Acts’ contained in Article 2 (i) of the

¹⁰¹⁶ Ibid

¹⁰¹⁷ Ibid

¹⁰¹⁸ V Oosterveld, ‘The Special Court for Sierra Leone’s Consideration of Gender-based Violence: Contributing to Transitional Justice?’ (2009) Volume 10 Hum Rights Review 73

¹⁰¹⁹ Ibid 73, 84-85

¹⁰²⁰ M O’Brien, ‘Don’t kill them, let’s choose them as wives: the development of the crimes of forced marriage, sexual slavery and enforced prostitution in international criminal law’ (2015) The International Journal of Human Rights 1, 5

¹⁰²¹ V Oosterveld, ‘Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-based Crimes’ (2009) Volume 17 American University Journal of Gender, Social Policy and Law 407, 415-416

¹⁰²² J Gong-Gershowitz, ‘Forced Marriage: A New’ Crime Against Humanity?’ (2009) Volume 8 North western Journal of International Human Rights 53

¹⁰²³ *Prosecutor v Brima, Kamara and Kanu* SCSL Case No 2004-16-A, Appeals Chamber, Judgment case (22 February 2008) (AFRC case) para 197 <<https://tinyurl.com/yd4hzhj>> Latest access 26 July 2018)

Statute forms part of customary international law.’¹⁰²⁴ The SCSL Appeals Chamber then looked at the ‘tripartite test that an act or omission must satisfy to qualify as an ‘other inhumane act.’’¹⁰²⁵

As a result of this test, the issue of legality, in the Appeals Chamber’s reasoning, was ‘implicit in the examination of whether the act satisfies the ‘other inhumane act’ test. In satisfying itself that forced marriage fell within the ‘other inhumane acts’ category of criminal conduct it considered legality satisfied.’¹⁰²⁶ The SCSL Appeals Chamber also ruled and acknowledged that forced marriage can involve other international crimes such as enslavement, rape and abduction and torture.¹⁰²⁷

This is in contrast to the *Prosecutor v Fofana and Kondewa* (CDF case) of 2 August 2007¹⁰²⁸ where the SCSL Trial Chamber was silent on crimes perpetrated against girls and women¹⁰²⁹, even though on 28 May 2008 the SCSL Appeals Chamber judgment attempted to address this.¹⁰³⁰ In their reasoning, the judges on the SCSL Appeals Chamber of the AFRC case and the RUF case Trial judgment made a clear distinction on the following categories of forced marriage: 1) that forced marriage is not necessarily sexual in nature; non-consensual sex is usually an element but does not have to be, 2) that forced marriage includes the deprivation of liberty; non-consensual sex; compulsion of a person by force, threat of force, or coercion, to serve as a conjugal partner; and the subsequent relationship of exclusivity which includes disciplinary breaches of that exclusivity, and 3) that forced marriage accounts to severe suffering or physical, mental or psychological injury to the victim.¹⁰³¹

In terms of SCSL legacy claims, the ICC and other courts, for example the ECCC’s cases on forced marriage below, are glaring examples. In less than one year after the SCSL cases, its legacy in International Criminal Law on gender-based crimes,

¹⁰²⁴ Ibid para 198

¹⁰²⁵ N Azadi Goodfellow, ‘The Miscategorization of ‘Forced Marriage’ as a Crime against Humanity by the Special Court for Sierra Leone’ (2001) Volume 11 International Criminal Law Review 831, 848

¹⁰²⁶ Ibid

¹⁰²⁷ M Bergsmo, A B Skre and E J Wood, (ed), *Understating and Proving International Sex Crimes* (No. 12 FICHL Publications Series, 2012) 33-35

¹⁰²⁸ *Prosecutor v Moinina Fofana and Allieu Kondewa*, SCSL Case No-04-14-A, CDF Appeals Judgment, 28 May 2008.

¹⁰²⁹ S K Michelle, and S Shanee ‘When We Wanted to Talk About Rape’: Silencing Sexual Violence at the Special Court for Sierra Leone.’ (2007) Volume 1 International Journal of Transitional Justice 355, 361-362

¹⁰³⁰ M Bergsmo, A B Skre and E J Wood, (ed), *Understating and Proving International Sex Crimes* (No. 12 FICHL Publications Series, 2012) 33-35

¹⁰³¹ V Oosterveld, ‘Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-based Crimes’ (2009) Volume 17 American University Journal of Gender, Social Policy and Law 407, 427. Also see M O’Brien, ‘Don’t kill them, let’s choose them as wives: the development of the crimes of forced marriage, sexual slavery and enforced prostitution in international criminal law’ (2015) The International Journal of Human Rights 1,1-25

rape and forced marriages continued to develop at a rapid speed. Drawing on the SCSL judgments and jurisprudence on forced marriage, where the Prosecutor had argued that the ‘coercive nature and imposition of the status of marriage serves as the means from which these individual crimes can be perpetrated, making the act of forced marriage more than the sum of its parts’¹⁰³², recent cases in three similar situations have been brought before the ICC, such as: the Sudanese region of Darfur¹⁰³³, the *Katanga* and *Ngudjolo Chui as well as the Ntaganda* cases (discussed below) in the DRC,¹⁰³⁴ and northern districts of Uganda with the LRA.¹⁰³⁵ It is claimed that ‘the forced marriages that took place in these conflicts, especially in Congo and Uganda, bear a great resemblance to the bush marriages in Sierra Leone.’¹⁰³⁶ Rebel groups abducted women and girls and forced them into relationships referred to as ‘marriages’ with fighting forces. Within these marriages, both girls and women were treated as slaves.¹⁰³⁷ For example, in relation to *Prosecutor v Bosco Ntaganda* whose trial opened on 2 September 2015, he was accused of 13 counts of war crimes and 5 crimes against humanity committed in Ituri (DRC) including rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities.¹⁰³⁸ The Appeals Chamber of the ICC tendered its public hearing on 15 June 2017.¹⁰³⁹ In its judgment, the ICC rejected the appeal of Ntaganda against the decision of Trial Chamber VI which ruled that it has jurisdiction over counts 6 and 9 (alleged war crimes of rape and sexual slavery of child soldiers).¹⁰⁴⁰

¹⁰³² See Case No. SCSL-2004-16-AR73 (26 May 2006), correspondence of Melissa Pack, Office of The Prosecutor, Special Court for Sierra Leone <<https://tinyurl.com/ya27w64m>> (Latest access 26 July 2018)

¹⁰³³ See Darfur Consortium, ‘Abductions, sexual slavery and forced labour in Darfur’ (2009) An African and International Civil Society for Darfur 1, 8 <<https://tinyurl.com/y77zdn87>> (Latest access 26 July 2018)

¹⁰³⁴ UN Doc. A/HRC/7/6/Add.4 (28 February 2008), *Yakin Ertürk*, ‘Addendum Mission to the Democratic Republic of the Congo, UN Human Rights Council’: Report of the Special Rapporteur on violence against women, its causes and consequences’ (28 February 2008) 1, 42 <<https://tinyurl.com/y8swqku3>> (Latest access 26 July 2018), see *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, (30 September 2008), Decision on the confirmation of charges. <<https://www.icc-cpi.int/drc/katanga>> (Latest access 26 July 2018), see *Prosecutor v Katanga and Ngudjolo Chui*, ICC-01/04-01/07-T-43 (21 July 2008) Confirmation <<https://tinyurl.com/yb6rp98t>> (Latest access 26 July 2018)

¹⁰³⁵ K Carlson and D Mazurana, ‘Forced Marriage within the Lord’s Resistance Army, Uganda’ (2008) Feinstein International Centre paras 1- 2 <<https://tinyurl.com/y7quwaoz>> (Latest access 326 July 2018). Also see Statement by the Chief Prosecutor on the Uganda Arrest Warrants, (14 October 2005) <<https://tinyurl.com/y7cveaho>> (Latest access 26 July 2018)

¹⁰³⁶ J Anan *et al* (ed), ‘The state of female youth in Northern Uganda’ Findings from the Survey of War-Affected Youth (SWAY) Phase 11’ (2008) UNICEF 1, 42 <<https://tinyurl.com/y8sruxf7>> (Latest access 26 July 2018)

¹⁰³⁷ I Haenen, ‘The Parameters of Enslavement and the Act of Forced Marriage’ (2013) International Criminal Law Review 895, 895-915

¹⁰³⁸ See Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Bosco Ntaganda, No. ICC- No.: ICC-01/04-02/06 (26 May 2017) <<https://tinyurl.com/yccqkale>> (Latest access 26 July 2017)

¹⁰³⁹ Ibid

¹⁰⁴⁰ Ibid

It should be noted that on 3 January 2017, the ICC Trial Chamber decision related only to the Chamber's mandate to judge the alleged conduct and was without prejudice to the guilt or innocence of the accused which would be considered at the end of the trial.¹⁰⁴¹ The Defence appealed the decision stating that the war crimes of rape and sexual slavery '*could not* pertain to acts committed by members of an armed group against other members of the *same* armed group'.¹⁰⁴² In their argument, the Defence stated that the Chamber's conclusion results in a 'substantial and unjustified extension of the scope of war crimes law.'¹⁰⁴³

Judge Monageng, presiding judge in the appeal, delivered a summary of the judgment by explaining that, according to the Appeals Chamber, International Humanitarian Law 'not only governs actions of parties to the conflict in relation to each other but also concerns itself with protecting vulnerable persons during armed conflict and assuring fundamental guarantees to persons not taking active part in the hostilities.'¹⁰⁴⁴ International Humanitarian Law therefore does not constitute a general rule that explicitly excludes members of an armed group from protection against crimes perpetrated by members of the same armed group.¹⁰⁴⁵ The Chamber also mentioned that, for each war crime, it must be established that the conduct in question 'took place in the context of and was associated with an armed conflict.'¹⁰⁴⁶ In a unanimous decision, the ICC Appeals Chamber overruled the Defence's appeal. This is because the Appeals Chamber found no error in law in the ICC Trial Chamber's conclusion.¹⁰⁴⁷ The Ntaganda case discussion in the judgment on jurisdiction decision may coincidentally also offer something today and for future judgments on forced marriage as well as child soldiers.

In conclusion and in terms of justice theories, one can categorically posit that this ruling also demonstrates both procedural, corrective and transitional justice lens.

In the ECCC cases, forced labour and forced sexual activity were not necessarily an element of the forced marriage. Within the SCSL context or legacy, it only factored forced marriage to be sexual slavery, taking into account 'one particular set of facts, a narrow contextual concept of what forced marriage is, rather than contemplating the

¹⁰⁴¹ Ibid

¹⁰⁴² Ibid

¹⁰⁴³ Ibid

¹⁰⁴⁴ Press release: 'Ntaganda Case: ICC Appeals Chamber confirms the Court's jurisdiction over two war crimes' (June 2017) International Criminal Court < <https://tinyurl.com/yaju3sst> > (Latest access 26 July 2018)

¹⁰⁴⁵ Ibid

¹⁰⁴⁶ Ibid

¹⁰⁴⁷ Ibid

possibility that forced marriage may take place under different circumstances.’¹⁰⁴⁸ In the *Prosecutor v Chea et al*¹⁰⁴⁹ in the ECCC case in Cambodia, the situation on forced marriage differed in some ways from the SCSL cases. In the SCSL cases, the victims who were all women and girls were forced into sexual and domestic slavery, whilst in the ECCC case in Cambodia; neither party gave consent to the marriage.¹⁰⁵⁰ The indictment originally constitutes the crime against humanity of ‘other inhumane acts’ through forced marriage. This was based on the significant number of forced marriages that took place under the Khmer Rouge regime. Unfortunately, these crimes have not been seen as significant, despite being committed on a widespread and systematic scale: ‘This is evidenced by a lack of a general strategy in some prosecution offices of any focus on sexual violence.’¹⁰⁵¹ As a consequence, despite the fact that the ECCC had the potential to produce some extremely interesting jurisprudence similar to the SCSL AFRC case, and would have improved on the current definition of forced marriage, the ECCC prosecutors failed to do so by dropping some of the charges from the indictment, which included the charges relating to forced marriage as a result. In my view, this may be due to the lack of sufficient evidence that warranted not charging the accused.

However, the Trial Chamber of the ECCC has issued a new severance decision which stated that forced marriage nationwide will be included in the trial Case 002/02 against Khieu Samphan and Nuon Chea.¹⁰⁵² Charges related to genocide, forced marriages and rape, treatment of Buddhists, internal purges, targeting of former Khmer Republic officials, four security centres, three worksites and one group of adjacent cooperatives will form the basis for Case 002/02.¹⁰⁵³

Rape (nationwide) outside the context of forced marriages is also included in the scope. Nonetheless, the Trial Chamber departed from its original findings in case 001, ruling that rape is a listed crime against humanity.¹⁰⁵⁴ Instead, they will follow the SCSL case law to consider rape as an ‘other inhumane act’ and not as a listed crime

¹⁰⁴⁸ J Anan *et al* (ed), ‘The state of female youth in Northern Uganda’ Findings from the Survey of War-Affected Youth (SWAY) Phase 11’ (2008) UNICEF 1, 11 <<https://tinyurl.com/y8sruxf7>> (Latest access 26 July 2018)

¹⁰⁴⁹ *Prosecutors v Chea et al*, Case No. 002/19-09-2007-ECCC-OCIJ, (15 September 2010) Closing Order (Indictment) <<https://tinyurl.com/y82pqpuv>> (Latest access 27 July 2018)

¹⁰⁵⁰ Ibid

¹⁰⁵¹ Ibid 1, 13

¹⁰⁵² See ‘Co-Investigating Judges order the severance of Im Chaem from Case 004’ (2016) para 1 <<https://tinyurl.com/y82zz6q5>> (Latest access 27 July 2018)

¹⁰⁵³ Ibid

¹⁰⁵⁴ See Closing statements in case 002/02 conclude (23 June 2017) para 1 <<https://tinyurl.com/ycpnrsze>> (Latest access 27 July 2018)

under crimes against humanity.¹⁰⁵⁵ The Trial Chamber of the ECCC concluded on 23 June 2017, nine days of closing statements in Case 002/02 against Nuon Chea and Khieu Samphan.¹⁰⁵⁶ On 8 January 2015, evidentiary hearings in the trial were heard with opening statements and concluded on 11 January 2017. The trial was the subject of great public interest, with 82,780 persons attending the hearings. The Chamber will withdraw for deliberations.¹⁰⁵⁷

Additionally, the ECCC also provides updates on the status of the Duch Case and 003/004 Cases, as well as personnel changes and plans for the court's completion.¹⁰⁵⁸ In the case of Im Chaem, Case 004, the International Co-Investigating Judge charged Im Chaem on March 2015 in absentia amongst others with the following alleged crimes:¹⁰⁵⁹ the crimes against humanity of murder, extermination, enslavement and other inhumane acts at the Phnom Trayoung security centre; and the crimes against humanity of murder, enslavement, imprisonment, and other inhumane acts at the Spean Sreng worksite.¹⁰⁶⁰ With the filing of these charges, the internal rules of the ECCC permit Im Chaem, through her lawyers, to have access to the case file and to participate in the investigation, thus accelerating its progress.¹⁰⁶¹ This will allow the investigation to proceed with full respect of the rights of all parties and to conclude within a reasonable time with the issuance of a closing order.¹⁰⁶² This is welcome news because the inclusion of forced marriage and rape will help to promote gender equality and improve access to justice for female survivors and victims, thereby contributing to preventing gender-based violence. Within the perspective of the ECCC judgement cases, they represent procedural, corrective and transitional justice perspectives.

In addition, on 12 July 2010, the ICC Pre-Trial Chamber issued a second arrest warrant containing genocide charges against the President of Sudan, Omar al-Bashir, relating to events in the Darfur region (in this case, rape) and gender-based crimes,¹⁰⁶³ but he is yet to be brought before the ICC for prosecution of rape and sex crimes.

¹⁰⁵⁵ See 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia' (2010) Open Society Justice Initiative 1, 2 and 11 <<https://tinyurl.com/y76usrzv>> (Latest access 27 July 2018)

¹⁰⁵⁶ Ibid

¹⁰⁵⁷ Ibid

¹⁰⁵⁸ See the Co-Investigating Judges have ordered the severance of the proceedings against Im Chaem from Case 004 and the creation of a new case file, 004/01 paras 1 and 2 <<https://tinyurl.com/y9skcddk>> (Latest access 27 July 2018)

¹⁰⁵⁹ The International Co-Investigating Judge Charges Im Chaem in absentia in Case 004 (March 2015) <<https://tinyurl.com/y77cpa2k>> (Latest access 27 July 2018)

¹⁰⁶⁰ Ibid

¹⁰⁶¹ Ibid

¹⁰⁶² Ibid

¹⁰⁶³ *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09. (4 March 2009). First Warrant Arrest for Omar Hassan Ahmad Al Bashir, *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09,(7 July 2010),

Furthermore, the conflicting reasoning and judgments are also reflected in varied reasoning and discourse among some scholars and commentators. For example, Nguyen asserted that labelling forced marriage under the category of (other inhumane acts) of crimes against humanity is not good enough. She further states that ‘while the SCSL established a courageous precedent in recognizing forced marriage as a crime against humanity, labelling the crime as an ‘other inhumane act’ has allowed forced marriage to remain in greater obscurity compared to other international crimes.’¹⁰⁶⁴ For forced marriage to be acknowledged and recognised as an international crime, it should be embedded in the Rome Statute of the ICC as a distinct category under ‘crimes against humanity.’¹⁰⁶⁵ In addition, it should also be recognised as a *jus cogens* prohibition – so that through these mechanisms¹⁰⁶⁶, a ‘ban on forced marriage will become part of customary international law and close the current lacuna under International Criminal Law.’¹⁰⁶⁷ Oosterveld indicated that the ‘four judgments considered together, raise the spectre that the Special Court could potentially fail to make a significant progressive contribution to gender-sensitive transitional justice.’¹⁰⁶⁸ This is because the ‘multi-layered complexity of gender-based crimes like forced marriage, which may include sexual and non-sexual aspects,’¹⁰⁶⁹ ‘can serve as evidence of crimes against humanity, including seemingly gender-neutral crimes.’¹⁰⁷⁰ Gong-Gershowitz argued that forced marriage should be recognised explicitly as a specific form of sexual slavery,¹⁰⁷¹ while Belair agreed and also indicated that sexual slavery could also happen in the form of customary marriage, ‘if and when a women’s sexual autonomy is breached.’¹⁰⁷² Viseur Sellers maintained that forced marriage

Second Arrest Warrant of Al Bashir. See S Ford, ‘The ICC and the Security Council: How much support is there for ending Impunity’ (2016) Volume 26 *Indianan International and Comparative Law Review* 31, 31- 40. Also see V Oosterveld, ‘Atrocity Crimes Litigation Year-In-Review’ (2010): A Gender Perspective (2011) Volume 9 *Journal of International Human Rights* 326, 335

¹⁰⁶⁴ F Nguyen, ‘Untangling Sex, Marriage, and Other Criminalities in Forced Marriage (2014) Volume 6 *Gottingen Journal of International Law* 13, 43

¹⁰⁶⁵ Ibid

¹⁰⁶⁶ For a detailed commentary on the principles of *jus cogens* (peremptory norms), see A Orakhelashvili, *Peremptory Norms In International Law* (OUP, 2008) 7-127

¹⁰⁶⁷ F Nguyen, ‘Untangling Sex, Marriage, and Other Criminalities in Forced Marriage (2014) Volume 6 *Gottingen Journal of International Law* 13, 44

¹⁰⁶⁸ V Oosterveld, ‘The Special Court for Sierra Leone’s Consideration of Gender-based Violence: Contributing to Transitional Justice?’ (2009) Volume 10 *Hum Rights Review* 73

¹⁰⁶⁹ Ibid

¹⁰⁷⁰ V Oosterveld, ‘Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-based Crimes’ (2009) Volume 17 *American University Journal of Gender, Social Policy and Law* 407, 409-410

¹⁰⁷¹ J Gong-Gershowitz, ‘Forced Marriage: A New” Crime Against Humanity?’ (2009) Volume 8 *North western Journal of International Human Rights* 53, 65

¹⁰⁷² K Bélair, ‘Unearthing the Customary Law Foundations of “Forced Marriages” During Sierra Leone’s Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women’s Rights in Post-Conflict Sierra Leone’ (2006) Volume 15 *Columbia Journal of Gender and Law* 551

should neither be put in the ‘sexual slavery’ or ‘other inhumane acts’ category, but should be seen as a crime of enslavement.¹⁰⁷³

However, the determinations above add to the SCSL jurisprudence on gender-based violence against women, and to how the case law has developed in this area and can now be replicated. In this regard, I would argue that that divergences in legal and analytical arguments advanced by these scholars and commentaries, around the classification of forced marriage as a distinct category under crimes against humanity, other inhumane acts, sexual slavery or a crime of enslavement were not helpful in providing a better and proper definition on forced marriage - thus creating an uncertainty and potential legal gap in the field of ICL.

Based on the justice theories lens (procedural, retributive, corrective and transitional justice), the judgments of forced marriage are fundamental in relation to women’s access to justice in Sierra Leone, their jurisprudential legacy, impact and institutional effects (including both national law and ICL). Women’s rights are constituted, contained and promoted by customary and International Law; as well as Human Rights Law. Forced marriage clearly contravenes these laws, and ongoing disagreement on the classification of the offence has led to confusion and a lack of clarity, which could potentially distract from the core need to hold people to account for the crime itself. In addition, Women’s rights are human rights, and as a consequence, they should not be violated and or that classified into any broad concept. No matter the circumstances in which a woman finds herself, she should not be held against her will or forced into any form of marriage without her express consent. Forced marriage in my opinion should not only be recognised and acknowledged as a *jus cogens* prohibition, but should be banned and embedded in Customary International Law in order to close the contention in definition and the potential legal gap in ICL.

In conclusion, despite legal disagreements on the definition and labelling of forced marriage, prosecutions, conviction, jurisprudential legacy; the development demonstrate how far the SCSL judgments have gone in addressing the issue and definition of forced marriage. The AFRC and RUF cases did therefore contribute in showcasing the recognition and acknowledgement of forced marriage and (other inhumane acts) as crimes against humanity within the framework of International

¹⁰⁷³ P Viseur Sellers, ‘Wartime Female Slavery: Enslavement?’ (2011) Volume 44 Cornell International Law Journal 115, 135

Criminal Law. It also illustrates that further measures which could be found in later ICC judgments are needed in order to affirm and build on these achievements. The SCSL will now be a model for the ICC and future tribunals as well as hybrid courts to address forced marriage and its relation to war crime and crimes against humanity (other inhumane acts). The SCSL judgment is fundamental and may have significant impact on the activities of both International Criminal Law and the International Criminal Court, as the practice of forced marriage had been not properly labelled by pre-existing categories of sexual crimes by previous tribunals. As forced conjugality results in particular psychological and moral suffering for the victims, it is argued that this serious practice may be more appropriately treated as a separate crime. The SCSL model has also taken a fundamental step in establishing and qualifying an offence (forced marriage as a crime against humanity and other inhumane acts) which acknowledges crimes involving gender-based violence in Sierra Leone.

Also, the labelling of the term ‘forced marriage’ captures a specific harm or set of harms not captured by other terms within International Criminal Law.’¹⁰⁷⁴ Forced marriage case law has now been developed and widely affirmed from ‘legally unacknowledged harmful experience into an acknowledged wrong requiring legal redress.’¹⁰⁷⁵ Finally, and within justice theories perspective, the SCSL judgment has gained some recognition as a legacy and for its efforts to provide protection to women and girls who are victims of forced marriage.

6.4. The strengths and weaknesses of the SCSL’s approach using the perspective of justice theories and interpretive community lens.

This section is about evaluating the strengths and weaknesses of the SCSL’s approach using the perspective of justice theories and interpretive community lens.

Procedural Justice: The use of Procedural Justice judgment applied by the SCSL in the RUF case has greatly helped to create best practice principles and norms for the prosecution and conviction of gender-based crimes of forced marriage. Also, the SCSL RUF procedural judgment on forced marriage did assist in bringing about justice in post-war Sierra Leone. This is as a result of the fact that both the accused

¹⁰⁷⁴ V Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone: Legal ‘Advances and Conceptual Difficulties’ (2011) Volume 2 International Humanitarian Legal Studies 127, 138

¹⁰⁷⁵ Ibid 127, 139

and victims were seen to have been given a fair judgment irrespective of the grave crimes committed.

Corrective Justice: The SCSL CDF case (*Prosecutor v Fofana and Kondewa*) demonstrated a clear lack of definition on gender-based violence and also impeded gender discriminatory legal frameworks and social norms, gender bias in the delivery of justice and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women. Despite this, the government took measures in the form of both corrective and procedural justice. For example, women's access to justice being a significant aspect of conflict prevention, conflict resolution, and the maintenance of peace and security, the Sierra Leone government has improved gender parity by legislating laws against gender discrimination such as: 1) discrimination in family and property rights, addressed through reforms in the Domestic Violence Act, 2007¹⁰⁷⁶, 2) the Devolution of Estates Act, 2007¹⁰⁷⁷, 3) the Registration of Customary Marriage and Divorce Act, 2009¹⁰⁷⁸, 4) the Sexual Offences Act, 2012, 5) the establishment of the Legal Aid Board under the Legal Aid Act, 2012¹⁰⁷⁹ which aimed at providing affordable Legal Aid services for the disadvantaged; today, there are Legal Aid Offices in almost every District of the country, and 6) the Sierra Leone Parliament passed a Constitutional Amendment on 5 July 2017 which conferred citizenship to children born outside of the country to Sierra Leonean mothers.¹⁰⁸⁰ It should be noted that, prior to this, only children born to Sierra Leonean fathers outside of the country were eligible for citizenship.¹⁰⁸¹ This is a clear demonstration of the impact of gender parity at best before the law in incorporating gender equality specifically and for all in general, as well as showcasing procedural, corrective and transitional justice perspectives that will combat impunity at the national level by creating effective national mechanisms to deliver justice, peace, reconciliation and reparation (where applicable) to victims in the judicial system in Sierra Leone.

¹⁰⁷⁶ The Discrimination in family and property rights have been addressed through reforms in the Domestic Violence Act, 2007 <<http://www.sierra-leone.org/Laws/2007-20p.pdf>> (Latest access 27 July 2018)

¹⁰⁷⁷ The Devolution of Estates Act, 2007 <<http://www.sierra-leone.org/Laws/2007-21p.pdf>> (Latest access 27 July 2018)

¹⁰⁷⁸ The Registration of Customary Marriage and Divorce Act, 2009 <<http://www.sierra-leone.org/Laws/2009-01.pdf>> (Latest access 18 July 2017)

¹⁰⁷⁹ The Legal Aid Board Act, 2012 <<http://www.sierra-leone.org/Laws/2012-06.pdf>> (Latest access 27 July 2018)

¹⁰⁸⁰ See, 'Background Note on Gender inequality and Statelessness Children (2004)' The UN Refugee Agency (UNHRC) <<http://www.unhcr.org/4f5886306.pdf>> (Latest access 18 July 2018)

¹⁰⁸¹ Ibid

Retributive Justice: The retributive nature of the judgment can be seen in both the conviction and sentencing. In executing its judicial mandate, the SCSL has contributed in many ways to Sierra Leone's transition from anarchy to justice and peace, and its move toward a more successful future, as well as presenting significant lessons for transitional retributive justice elsewhere. This is because retributive justice may call for not only transitional justice, peace and reconciliation but also for procedural and corrective justice.

Transitional Justice: In terms of Transitional Justice in Sierra Leone, this was demonstrated in two principal transitional justice institutions: the TRC and SCSL.¹⁰⁸² The simultaneous operations of both the TRC and SCSL brought new attention to the advantages of both the restorative and retributive theories.¹⁰⁸³ As Schabas puts it, 'Sierra Leone is a successful model of the 'two-track approach...' where 'both institutions co-exist and provide a forum for victims offering them recognition, redress and a sense that justice has been done.'¹⁰⁸⁴ For SCSL, this was evidenced in the SCSL judgments made in the CDF, AFRC and RUF cases. This was in complete contrast to the South Africa that followed a unique 'third way' under the creation of the Truth and reconciliation Commission (TRC) headed by Archbishop Tutu.¹⁰⁸⁵ According to Archbishop Tutu, the TRC was sometimes able to reach the truth and brought about a peace and reconciliation process after the conflict 'when the judicial system had been unable to...' ¹⁰⁸⁶

Finally, the principal legacy of the SCSL model, its fundamental contribution to procedural, retributive, corrective and transitional justice in Sierra Leone, and its primary success, is that it delivered justice, peace, reconciliation and its fulfilled jurisdictional mandate in prosecuting those individuals responsible for the commission of the crimes of forced marriage. This will create an impact on International Criminal Law and the ICC in future.

Interpretive Community: In relation to the interpretive community perspective, the SCSL has been criticised for the limited numbers of perpetrators of international crimes tried and convicted, as well as the negative norms impact on domestic courts'

¹⁰⁸² A S J Park, 'Community-based restorative transitional justice in Sierra Leone' (2010) Volume 13 Contemporary Justice Review 95, 97

¹⁰⁸³ Ibid 95, 96-97

¹⁰⁸⁴ W Schabas 'The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone' (2003) Volume 25 Human Rights Quarterly 1035, 1604

¹⁰⁸⁵ D Tutu, *No Future Without Forgiveness* (Rider, 2000) 1 and 121

¹⁰⁸⁶ Ibid

legal response to mass atrocities cases. As Shany commented, the establishment of the SCSL and ‘the limited measure of accountability it offered shielded the amnesty from significant criticism and challenges by national and international constituencies. As a result, local courts had almost completely refrained from addressing civil war-related atrocities’¹⁰⁸⁷, and hardly tried any of the war time offenders of heinous crimes.¹⁰⁸⁸ The only notable exceptions are the ‘two multi-accused trials held in 2005 and 2006 before the High Court in Freetown in which a total of 88 rebels who were not covered by the Lome’Amnesty were adjudicated and convicted for war-related crimes committed in 2000.’¹⁰⁸⁹ Nonetheless, today, the jurisprudence of other International Criminal Tribunals and hybrid courts have recognised and applied the principles of law of the SCSL model.

Conclusion

The SCSL judgments represent the first legal jurisprudence made by a hybrid court on forced marriage as a crime against humanity and other inhumane acts.

In terms of impact, the SCSL judgments and its jurisprudence analysed in this Chapter against the justice theories alluded to above, and their contributions to the development of International Criminal Law, have been fundamental, specifically in recognising, interpreting and labelling forced marriage as other inhumane acts under ‘crimes against humanity.’ On the negative side, although the judgments did contribute in the innovative approach to a standard definition and labelling of forced marriage within the context of crimes against humanity, it remains contested and therefore, unclear and uncertain.¹⁰⁹⁰

However, the reasoning and legal analysis made by the SCSL in relation to forced marriage as a crime against humanity and the achievements of the SCSL model judgment can be seen as a landmark ruling in International Criminal Law. The interpretation of certain war crimes and crimes against humanity by the SCSL’s jurisprudence has already influenced the case law of the ICC. This has been well acknowledged and recognised by some scholars and commentators as mentioned

¹⁰⁸⁷ Y Shany, ‘How can International Criminal Courts have a Greater Impact on National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation’ (2013) Volume 46 Israel Law Review 431, 439

¹⁰⁸⁸ S Horowitz, ‘How can International Criminal Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone’ (2013) Volume 46 Israel Law Review 339, 360

¹⁰⁸⁹ Ibid 339, 356

¹⁰⁹⁰ N A Goodfellow, ‘The Miscategorization of ‘Forced Marriage’ as a Crime against Humanity by the Special Court for Sierra Leone’ (2001) Volume 11 International Criminal Law Review 831

above.¹⁰⁹¹ The SCSL judgment also assisted in the redress of gender-based violence in ICL. The SCSL model judgments through the theories of justice lens (procedural, corrective, retributive and transnational justice) remain one of the most significant contributions to refining International Criminal Justice both in Sierra Leone and within the international community. Finally, the SCSL judgments illustrate how its jurisprudence could be further developed at the ICC and other tribunals or hybrid courts in future.

Section 2: The conviction and judgment of the former Liberian president Charles Taylor: Legal framework, practice, impact and implications in International Criminal Law

Introduction

This section sets out the trial, determination, conviction and judgment made against Charles Taylor, on charges relating to aiding and abetting war crimes, crimes against humanity and other serious International Humanitarian Law violations. The analysis and conclusions are based on the case law of the SCSL, as well as against the backdrop of theories of justice. This case law is important because it illuminates prosecutorial practice, impact, implications and contributes to the research arguments on the varied reasoning of judges, their neutrality and procedural justice.¹⁰⁹² As already stated in section 1, the Taylor case law analysis also fits into the research thesis, mirroring the theories of justice perspective.¹⁰⁹³

The SCSL judgment in the *Prosecutor v Charles Taylor case*¹⁰⁹⁴ (prosecuted in the Hague due to security concerns)¹⁰⁹⁵ made on 26 April 2012 was the first example of a sitting African head of state being indicted, tried, convicted and sentenced in the hybrid court. In the Appeal judgment in September 2013¹⁰⁹⁶ Charles Taylor was found

¹⁰⁹¹ V Oosterveld, 'The Special Court for Sierra Leone's Consideration of Gender-based Violence: Contributing to Transitional Justice?' (2009) Volume 10 Hum Rights Review 73, 84-85

¹⁰⁹² See chapters 1, 6, 7, 8 and 9 for detailed analysis

¹⁰⁹³ See chapter 2 specifically and all other chapters for the application of justice theories and interpretive community lens

¹⁰⁹⁴ *Prosecutor v Charles Taylor*, Case No. SCSL-03-01-T, Trial Chamber 11 (26 April 2012) (Taylor case)

¹⁰⁹⁵ C C Jalloh, 'Special Court for Sierra Leone Dismisses Taylor Motion Against Change of Venue' (June 2006) Volume 10 Insights para 1-15 <<https://tinyurl.com/y7tz9k5j>> (Latest access 16 September 2018)

(Latest access 13 September 2018), see The Hague Justice Portal, 'Taylor, Charles' Academic Reach para 3 <<https://tinyurl.com/ybq9w6up>> (Latest access 16 September 2018)

¹⁰⁹⁶ *Prosecutor v Charles Taylor*, Case No. SCSL-03-01-A, Appeals Chamber (26 September 2013) (Taylor appeals case)

individually responsible¹⁰⁹⁷ and guilty beyond reasonable doubt in connection with 11 counts of war crimes, crimes against humanity, aiding and abetting, and sentenced to 50 years' imprisonment.¹⁰⁹⁸ By way of providing the necessary factual background for judging Taylor's personal guilt, the Trial Chamber in its judgment enumerated the key events that took place in Sierra Leone from the end of November 1996 until the end of the civil war in January 2002.¹⁰⁹⁹ These acts were commissioned within the wider context of the armed conflict in Sierra Leone that began on 23 March 1991, a period when the RUF waged a war from the east of the country which borders with Liberia.¹¹⁰⁰

An overview

This section explores and analyses the procedural, retributive justice, the interpretative community principle as well as the jurisprudence (case law) relating to Charles Taylor within the SCSL.¹¹⁰¹ The section argues that the *Taylor* case and the evidential procedure used could be a model for potential replication in persecuting world leaders who may be found culpable for commission of war crimes and crimes against humanity.

Charles Taylor, the former President of Liberia, was indicted on 7 March 2003¹¹⁰² on 17 counts, later amended to 11 counts.¹¹⁰³ On 4 June 2003, the SCSL Prosecutor Crane announced the indictment of Taylor who was charged with 'bearing the greatest responsibility' for war crimes, crimes against humanity and serious violations of international humanitarian law in Sierra Leone since 30 November 1996. On 16 June 2006, the Security Council, under Chapter VII powers adopted Resolution 1688 that authorised the transfer of Taylor to The Hague.¹¹⁰⁴ The President of the SCSL then

¹⁰⁹⁷ Statute of the Special Court for Sierra Leone, Article 6 (1) (2002), see *Prosecutor v Charles Taylor: Summary of charges* <<https://tinyurl.com/y8lgj33d>> (Latest access 16 September 2018)

¹⁰⁹⁸ See Eleventh annual report of the President of the Special Court for Sierra Leone (December 2013) <<http://www.rscsl.org/Documents/AnRpt11.pdf>> (Latest access 16 September 2018)

¹⁰⁹⁹ See The Hague Justice Portal, 'Taylor, Charles' Academic Reach para 2 <<https://tinyurl.com/ybq9w6up>> (Latest access 16 September 2018)

¹¹⁰⁰ Eleventh annual report of the President of the Special Court for Sierra Leone (December 2013) <<http://www.rscsl.org/Documents/AnRpt11.pdf>> (Latest access 16 September 2018)

¹¹⁰¹ For complete quotation by Prosecutor Hollis, see Special Court for Sierra Leone: Residual Special Court for Sierra Leone: 'Prosecutor Hollis Welcomes the Historic Final judgment in the Charles Taylor case' <<http://www.rscsl.org/Press-OTP.html>> (Latest access 15 September 2018)

¹¹⁰² *Prosecutor v Charles Taylor*: indictments, Case No. SCSL -3-01, (7 March 2003)

¹¹⁰³ *Prosecutor v Charles Taylor*: Second indictment amendment, Case No. SCSL -03-01 PT, (29 March 2007)

¹¹⁰⁴ *Prosecutor v Taylor*, Case No. SCSL-03-01-PT, (19 June 2006)

served an order that mandated the judicial response to the decision.¹¹⁰⁵ On 30 June 2006, the trial was transferred to The Hague for security reasons.¹¹⁰⁶

However, the decision to transfer Taylor to the Hague away from the seat of the SCSL in Freetown seemed to have ‘dealt a serious blow to the legitimacy of the SCSL among Sierra Leoneans, as many wished to have closer and easier access to the trial.’¹¹⁰⁷ The legitimacy (meaning here the perceptions, SCSL’s legal rights and acceptance by the populace) left a little stain on the relatively clean sheet of the SCSL.¹¹⁰⁸ Amnesty International (AI) reinforced this point by stating that ‘moving the trial would have the negative effect of distancing the justice process from the Sierra Leonean people who have suffered directly as a result of the crimes for which Charles Taylor is indicted.’¹¹⁰⁹ AI also recognised and acknowledged that the conduct of trials in Sierra Leone could have guaranteed that justice was witnessed by the population who were ‘affected by the crimes and acts as a deterrent to future crimes.’¹¹¹⁰ Dicker, director of Human Rights Watch’s International Justice Program also had this to say, ‘now that Taylor is in The Hague, there is a real risk that his trial will feel distant and less meaningful to the people most affected by the crimes...’¹¹¹¹ This is because SCSL ‘will need to ensure the trial is accessible to people in Sierra Leone and across West Africa.’¹¹¹² (Chapter 1 discussed and analysed this in detailed).

On 26 April 2012, the Trial Chamber convicted Taylor of aiding and abetting the commission of serious crimes including rape, murder, and destruction of civilian property by the RUF and AFRC groups in Sierra Leone, dating back from 30 November 1996 to 18 January 2002. Taylor was further found guilty of helping to plan attacks on three towns, including the diamond district of Kono and the country’s capital Freetown, in late 1998 to early 1999. The SCSL Trial Chamber sentenced Taylor to 50 years for his role in the Sierra Leonean conflict in May 2012.

¹¹⁰⁵ *Prosecutor v Taylor*, Case No. SCSL-2003-01-PT, (9 March 2007), see C C Jalloh, ‘Special Court for Sierra Leone Dismisses Taylor Motion Against Change of Venue’ (2006) Volume 10 ASIL Insights: American Journal of International Law para 9 <<https://tinyurl.com/y7tz9k5j>> (Latest 16 September 2018)

¹¹⁰⁶ See Introductory chapter 1 for detailed discourse on this

¹¹⁰⁷ S Kendall and M Staggs, ‘Interim report on the Special Court for Sierra Leone’ (2005) University of California Berkeley War Crimes Studies Centre 2, 32-34

¹¹⁰⁸ See Human Rights Watch, ‘Trying Charles Taylor in The Hague: Making Justice Accessible to Those Most Affected’ (16 June 2006) paras 2- 24 <<http://www.refworld.org/docid/44c7607b4.html>> (Latest 16 September 2018)

¹¹⁰⁹ See ‘Special Court for Sierra Leone Issues for consideration regarding the location of the trial of Charles Taylor’ (2006) Amnesty International 1, 3, 4 - 6

¹¹¹⁰ Ibid 1, 3

¹¹¹¹ Human Rights Watch, ‘Charles Taylor: Hague Trial Must Be Accessible to West Africans’ (June 2006) para 5 <<https://tinyurl.com/y9ukbvt9>> (Latest access 16 September 2018)

¹¹¹² Ibid

As mentioned above, the Prosecutor charged Taylor was with 11 counts of crimes against humanity and war crimes. The Prosecutor, in presenting his submission, had earlier argued that Taylor was liable for each of these counts in relation to JCE I liability. The Prosecutor used the evidence to determine Taylor's guilt under two different doctrines: 1) responsibility for planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation or execution of the crimes;¹¹¹³ and 2) superior responsibility arising from his failure to prevent or punish unlawful acts by his subordinates.¹¹¹⁴ The Prosecutor further argued that in each of the charged crimes, Taylor intended to gain both political and physical control of Sierra Leone and its diamonds. The Prosecutor also argued that Taylor 'intended some of the crimes, and that others were foreseeable consequences of the common purpose, triggering both JCE I and JCE III liability. Under its alternative theory, the Prosecution has contended that Taylor and the JCE plurality intended the crimes of acts of terror, conscription, enlistment, and use of child soldiers, enslavement of civilians, and pillage.'¹¹¹⁵ But given the change in the common purpose it must prove, a close examination of the charges against Taylor was necessary to demonstrate how they may fit into purpose of terrorizing the Sierra Leonean population.¹¹¹⁶ However, the Prosecutor in his final argument failed to prove and convince the Trial Chamber that all eleven counts were intended as means to terrorize, or alternatively, that some were intended as a means to terrorize and others were a natural and foreseeable consequence of that terrorization, under of crimes under JCE I and JCE III.¹¹¹⁷

Additionally, and in relation to aiding and abetting, the SCSL Prosecutor in his submission had alleged that Taylor was also in control and command of rebel warring groups in Sierra Leone and that he was an active participant in a joint criminal enterprise with the rebel factions. The SCSL Prosecutor further alleged that Taylor

¹¹¹³ SCSL Statute Article 6 (1), see *Prosecutor v Charles Taylor*, Case No. SCSL-03-01-T, Judgement (30 May 2012) paras 454-487

¹¹¹⁴ SCSL Statute Article 6 (3)

¹¹¹⁵ *Prosecutor v Charles Taylor*, Case No. SCSL-03-01-327, (3 August 2007). 'Prosecution notification of filing of amended case summary

¹¹¹⁶ For example, someone may have had the intent to kill a civilian while committing murder, but this murder could also be considered an act of terrorizing the civilian population if it was done with the primary goal of spreading fear. This will be harder to prove with crimes such as enslavement, sex-based crimes, or the use of child soldiers, which may not have been perpetrated with the sole aim of spreading fear to the civilian population of Sierra Leone.

¹¹¹⁷ *Prosecutor v Charles Taylor*, Case No. SCSL-03-01-327, (3 August 2007). This argument in the alternative relegates the majority of the counts to the 'extended form' of JCE liability, the most far-reaching form of the doctrine.

planned, ordered, and instigated the perpetrations of serious crimes during the civil war conflict in Sierra Leone.

In their argument, Taylor's defence team submitted that Taylor was a peacemaker and had helped to bring about peace in Sierra Leone because he had supported peace initiatives in the region.²²⁰ The judges objected the defence argument that Taylor was a peacemaker. They stated that while Taylor may have publicly supported the peace process in the region, he privately undermined the negotiations by continuing to provide the RUF with financial, operational, and moral support. However, the judges did not accept the prosecutor's claim that Taylor had effective command and control over the RUF rebels, finding him only responsible for aiding and abetting their activities as well as planning attacks. This is due to the fact that in order to find Taylor guilty under a doctrine of command responsibility, the SCSL needed to find that Taylor had effective control over those who committed these heinous crimes. It must be stated that the SCSL's rejection of the 'peacemaker' argument alienated some of Taylor's followers in Sierra Leone and Liberia, and the defence arguments infuriated victim groups as well. This is evidenced in the comments made by various individuals in the later part of this chapter and in chapter 1.

Despite all the stated allegations, Taylor maintained his innocence throughout the trial proceedings. The SCSL Trial Chamber, in handing down their verdict on 26 April 2012, ruled that while Taylor was guilty of aiding and abetting the crimes committed in Sierra Leone, with regards to a joint criminal enterprise there was not sufficient evidence to prove that Taylor participated in a joint criminal enterprise with the rebels or that he exercised control over them. The SCSL Trial Chamber further ruled that while Taylor was guilty of planning attacks on specific towns in Sierra Leone, the evidence did not substantiate a finding that would support the claim that he ordered or instigated these crimes, nor had superior responsibility for enlistment of child soldiers or forced marriage. As a result, the Trial Chamber did not find Taylor guilty under the joint criminal enterprise principles.

The Prosecutor initially recommended that Taylor serve an 80 year jail sentence term. The Prosecutor based his argument on the fact that the sentence would be commensurate with the 'gravity of crimes and the specific conduct of the accused.' However, on 30 May 2012, the SCSL Trial Chamber found Taylor guilty of aiding and abetting for the commissioning of serious crimes in Sierra Leone and the planning of attacks on various towns in late 1998 and January 1999 and him sentenced to 50 years'

imprisonment. Consequently, both the Prosecution and Defense filed notices of appeal on 19 July 2012.

The SCSL reasoning and analysis

On 1 October 2012, both the Prosecution and the Defence filed appeals against the Trial Chamber's conviction and sentencing decisions against Taylor. The Prosecutor's four objectionable grounds of appeal against the findings of the SCSL Trial Chamber included the following: 1) the Trial Chamber's failure to hold Taylor responsible for ordering and instigating the commission of crimes; 2) the Chamber's failure to hold Taylor responsible for crimes committed in certain settings in five districts on the ground that they fell outside the scope of the indictment; 3) that in the SCSL Trial Chamber 'erred' both fact and in law in their findings¹¹¹⁸; and 4) the Trial Chamber's decision to sentence Taylor to a single term of 50 years.

Taylor's defense team countered by appealing the finding of guilt and the sentence on 42 grounds. The defense argued that the Trial Chamber erred both in law and in fact in the conviction and sentencing of Taylor in April 2012. The defence lawyers included numerous grounds of appeal, including amongst others: 1) the judge's findings that Taylor was involved in planning attacks on Kono, Makeni, and Freetown in late 1998 and early 1999; 2) the Chamber's finding that Taylor assisted in the commission of crimes by providing medical assistance to rebel forces in Sierra Leone; 3) that Taylor helped in the perpetration of crimes by providing a guesthouse for RUF rebels in Liberia; 4) that Taylor's jail term of 50 years was 'manifestly unreasonable'; 5) that the judges erred in their failure to consider Taylor's expression of sympathy as grounds of mitigation; 6) Taylor's voluntary departure from the Liberian presidency in 2003; 7) Taylor's age, as he already was 64 years old that at the time of his conviction; 8) that there were irregularities in the proceedings based on the statement made by the Alternate Judge El-Hadj Malick; 9) that there had been no deliberations among the judges; 10) and that Justice Julia Sebutinde's involvement in the proceedings after she had already become a judge of the International Court of Justice was irregular.

¹¹¹⁸ *Prosecutor v Charles Taylor*, Case No. SCSL-03-01-T, Trial Chamber (7 April 2009)

In addition, Taylor's defense team submitted a separate application objecting to Justice Sow's statement made on 26 April, and asking the Appeals Chamber judges to voluntarily withdraw Justice Sow's submission; and that in the event that the Appeals Chamber judges did not withdraw voluntarily those grounds, that the request for disqualification be determined by a separate panel of judges. The defense team felt that if the same judges were to address the issue, then they might be a bias and unfair outcome for their client.¹¹¹⁹ Based on these and many other grounds, Taylor's the defense team requested the Appeals Chamber to declare the sentence against Taylor null and void. The Appeals Chamber rejected both the grounds of appeal and the claims made by Taylor's defense team.

Appeals Chamber upheld the appeal from the prosecution on the following grounds: 1) the Appeals Chamber amended the Disposition for planning liability by deleting Kono District under Counts 1-8 and 11¹¹²⁰; 2) it reasoned that 'the Trial Chamber erred in law in finding that aiding and abetting liability generally warrants a lesser sentence than other forms of criminal participation';¹¹²¹ 3) the Appeals Chamber declared that the '*actus reus* of aiding and abetting liability is established by assistance that has a substantial effect on the crime, not by the particular manner in which such assistance is provided'¹¹²² and so the Appeals Chamber objected to the specific-direction requirement adopted by the *Perisic* Appeal Judgment; and 4) The Appeals Chamber reasoned that Taylor's sentence was not only fair and reasonable, but also that his allegations of the process being unfair and irregular were 'unsupported, ingenious, and ludicrous.'¹¹²³ Justice King said that the Trial Chamber had 'thoroughly evaluated the evidence according to its credibility,' that they 'properly applied the law according to the rules and statute of the Court,' and that Taylor was 'fully held liable for his own conduct.'¹¹²⁴

Given the above reasons and on 26 September 2013, SCSL Appeals Chamber upheld Charles Taylor's conviction that was initially made by the SCSL Trial Chamber on 26 April 2012 for aiding and abetting the commission of crimes by RUF and AFRC rebels

¹¹¹⁹ *Prosecutor v Charles Taylor*, Case No. SCSL-03-01-A, Appeals Chamber (26 September 2013)

¹¹²⁰ *Ibid* para 574

¹¹²¹ *Ibid* para 670

¹¹²² *Ibid* para 670

¹¹²³ *Ibid* para 482

¹¹²⁴ *Ibid*

in Sierra Leone. The SCSL Appeals Chamber sentenced him to a single term of fifty years. This brought to an end the judicial proceedings in the Taylor case within the SCSL, and closure for the Sierra Leone people who were able to see that justice had been done. Taylor is currently serving his sentence in a UK prison. On 25 March 2015, Taylor requested that he would like to serve his 50 years' sentence in Rwanda on the grounds that the 'detention in Britain violates his rights because the visa process will make it nearly impossible for his family to visit. He also complained about the conditions of his detention.'¹¹²⁵ The SCSL denied Taylor's request to serve his 50-years' sentence for war crimes in Rwanda, rather than Britain.

The most interesting legal aspect of the SCSL Trial Chamber and Appeals Chamber conviction of Charles Taylor was the refusal to follow the ICTY Appeals Chamber's reasoning in *Prosecutor v Momčilo Perisic* case.¹¹²⁶ Within this case, a decision made by the ICTY had required 'specific direction.' Judges at the ICTY said in order to aid and abet a crime, a suspect has to have 'specifically directed' aid toward committing crimes. This had set a higher threshold or bar in the establishment of responsibility on aiding and abetting purposes. It was not surprising when the SCSL Trial Chamber in the Taylor case vehemently disagreed with this assertion. After the SCSL Appeals Chamber had independently reviewed the Second World War jurisprudence and the decisions of the ICTY *Prosecutor v Momčilo Perisic* case, as well as state practice, and the Inter-national Law Commission's Draft Code of Crimes (ILC Draft Code);¹¹²⁷ the SCSL Appeals Chamber reasoned that 'specific direction' is not an *actus reus* requirement for aiding and abetting under customary international law.¹¹²⁸

The SCSL Trial Chamber had reasoned that the '*actus rus*' of aiding did not require such 'specific direction,'¹¹²⁹ and that Taylor's conduct had a 'substantial impact' on both AFRC/RUF commission of crimes in Sierra Leone. In addition, Taylor's support was found to have been a condition *sine qua none* of the RUF in the perpetration of

¹¹²⁵ See the Guardian, 'Court tells former Liberian president to serve war crimes sentence in Britain Associated Press in Sierra Leone' The Guardian (Wednesday 25 March 2015) para 3 <<https://tinyurl.com/ybcq5t4k>> (Latest access 16 September 2018)

¹¹²⁶ For detailed commentary on this, see *Prosecutor v Momčilo Perisic*, Case No. IT-04-81, The Hague (6 September 2011)

¹¹²⁷ Draft Code of Crimes against the Peace and Security of Mankind with commentary 1992 (UN 2005) <<http://legal.un.org/ola/>> (Latest access 16 September 2018)

¹¹²⁸ *Prosecutor v Charles Taylor*, Case No. SCSL-03-01-A, Appeals Chamber (26 September 2013) (Taylor appeals case) paras 474 - 475

¹¹²⁹ Ibid

serious crimes.¹¹³⁰ That is the planning of the RUF and AFRC attacks constituted part of the invasion of Freetown in which the SCSL Trial Chamber convicted *Taylor* of aiding and abetting crimes committed in Sierra Leone while he was President in Liberia.

On reasoning, the Appeals Chamber distinguished *Perisic* on the grounds that the *Perisic* Appeals Chamber was “‘applying internally binding (ICTY) precedent,’ not customary international law.”¹¹³¹ The SCSL Appeals Chamber further reasoned that the key to guilt in aiding and abetting a crime is that a suspect’s participation encouraged the commission of crimes and had a greater impact effect on the crimes actually being committed – but not the particular manner in which a suspect was involved. The SCSL Appeals Chamber judges were not convinced by the ICTY findings that ‘specific direction’ is a tool for aiding and abetting.

The SCSL ruling was both symbolic and a historical land mark in the sense that within the context of emergence of international criminal law and SCSL’s jurisprudence, the judgement reinforced the fact that ‘aiding and abetting can be established where there is a substantial effect as opposed to a specific direction on the crimes.’¹¹³² The Appeal Chambers made reference to the ICTY Appeals Chamber which stipulated that ‘it is well established that at the ICTY and ICTR, retribution and deterrence are the main objectives in sentencing.’ Also, a ‘substantial effect’ analysis has demonstrated that future hybrid courts and tribunals hold a significant discretion to ‘decide on a case-by-case basis whether in the particular circumstances the assistance should or should not properly be regarded as criminal.’¹¹³³ Looking at it from justice theories lens, this thesis will argue that, the rejection of *Perisic* case by the SCSL is fundamental to its legacy in the sense that it could be used as template by the ICC in dispensing fair standard of justice to those responsible for serious international crimes under its jurisdiction.

However, thesis can also state that, the impact of the *Taylor* case, though significant, would be difficult to predict at this stage because judgment was only made in

¹¹³⁰ *Prosecutor v Charles Taylor*, Case No. SCSL-03-01-T, Trial Chamber 11 (26 April 2012) paras 6913-6914

¹¹³¹ *Ibid* para 476

¹¹³² *Prosecutor v Charles Taylor*, Case No. SCSL-03-01-A, Appeals Chamber (26 September 2013) (*Taylor Judgement appeals case*) para 853

¹¹³³ See International Criminal Law- Accessory Liability Special Court for Sierra Leone Rejects ‘Specific Direction’ Requirement for Aiding and Abetting Violations of International Law- *Prosecutor v Taylor*, Case No. SCSL-03-1A, Judgement (26 September 2013) Volume 127 Harvard Law Review 1847, 1853

September 2013. It could probably take years, if not decades, before other hybrid courts or international tribunals follow the SCSL *Taylor* case law. In addition, despite this historical landmark ruling in Taylor's case, the conviction and sentence by the SCSL hybrid court generated mixed reactions.¹¹³⁴ For example, in Liberia, 'most Liberians seem to be taking the view of Taylor as something of a monster who, if he had not been convicted of war crimes, might have returned to Liberia – a prospect that would surely reverse the strides the country has taken in the last decade.'¹¹³⁵ This claim was supported by Thomas-Greenfield who maintains that: 'the best we can do for Liberia is to see to it that Taylor is put away for a long time.'¹¹³⁶ He furthered that the US should not wait for the SCSL's final verdict but that, 'all legal options should be studied to ensure that Taylor cannot return to destabilise Liberia.'¹¹³⁷

Nonetheless, this thesis can submit that there is no sufficiently convincing evidence showing that this was the case. Also, even 'without delving into the issue of Taylor's mindset at the time he was acting, it is unlikely that Taylor's aiding and abetting conviction would be sufficient to attribute his actions to the state of Liberia,'¹¹³⁸ or reverse the enormous gains Liberia had already made in the last decade.

The Prosecutor of the SCSL, Hollis, welcomed the appeal judgment and took time to travel to both Sierra Leone and Liberia where she held outreach activities explaining the judgment to local populations. This initiative was vital to the people of Sierra Leone. Hollis had this to say: 'the final decision affirms Mr. Taylor's responsibility for grave crimes which caused untold suffering to many thousands, if not tens of thousands, of victims in Sierra Leone...judgement brings some measure of justice to those victims who suffer so horribly because of Charles Taylor.'¹¹³⁹ The former Sierra Leone Information Minister, Kargbo, had stated that, 'most Sierra Leoneans believe

¹¹³⁴ E Thompson, 'Public Reaction in Sierra Leone to the Judgement Charles Taylor' (2 August 2012) International Justice Monitor paras 1- 8 <<https://tinyurl.com/ydfwmwn2>> (Latest access 15 September 2018)

¹¹³⁵ Eleventh annual report of the President of the Special Court for Sierra Leone (December 2013) <<http://www.rscsl.org/Documents/AnRpt11.pdf>> (Latest access 15 September 2018). Also see Special Court for Sierra Leone: Residual Special Court for Sierra Leone: The Special Court for Sierra Leone: Outreach and Public Affairs Office 'Appeals Chamber Upholds Charles Taylor's Conviction, 50 Year Sentence' Freetown, Sierra Leone (26 September 2013) <<http://rscsl.org/OPA.html>> (Latest access 15 September 2018)

¹¹³⁶ C Cheng, 'Charles Taylor trial highlights ICC concerns' (27 April 2012) Opinion Al Jazeera English para 9 <<https://tinyurl.com/yb8xay2r>> (Latest access 15 September 2018)

¹¹³⁷ Ibid

¹¹³⁸ K A Hardtke, 'The actions of one, the responsibility of a Nation: Charles Taylor's Conviction by the Special Court for Sierra Leone and its impact on State Responsibility claims against Liberia' (2014) Volume 31 Wisconsin International Law Journal 910, 931

¹¹³⁹ See Special Court for Sierra Leone: Residual Special Court for Sierra Leone: 'Prosecutor Hollis Welcomes the Historic Final judgment in the Charles Taylor case' <<http://www.rscsl.org/Press-OTP.html>> (Latest access 15 September 2018)

that without Charles Taylor in power in Liberia, there would not have been a war in Sierra Leone...it is my strong conviction that everything that happened to Sierra Leone is down to Charles Taylor.’¹¹⁴⁰ But others believe that Taylor was a ‘victim, not a villain’, and saw the judgement as a victor’s justice.¹¹⁴¹ In addition, both Falk and Cheng, International Scholars have criticised the trial of Taylor. Falk argued that Western powers chose to prosecute only war criminals who criticised Western interests, but he went on to add that with Taylor’s conviction: ‘a strong message was sent to tyrants and warlords around the world yesterday. International law may be slow, but even those in the higher ranks of power can be held to account for atrocities committed against the innocent.’¹¹⁴² Whilst Cheng advanced that, ‘politicisation of the trial and the degree to which the trial has been funded by Western states, though she added that the conclusion of Taylor’s trial represented a ‘milestone for the pursuit of international justice.’¹¹⁴³

Given the above, the SCSL’s Taylor case did not only show some measure of justice and brought closure for the affected victims, but reinforced its legitimacy, reflected its strength to complete trials in a speedy manner, thus leaving a lasting legacy for Sierra Leone; international tribunals and hybrid courts to probably follow this model in the future.¹¹⁴⁴ Taylor’s conviction and sentencing has not only brought an end to many years of judicial proceedings and impunity but has also set a precedent and proved that no head of state or leader could commit grave violations of war and crimes against humanity without being held to account. Also, the conviction of Taylor for ‘atrocities such as crimes against humanity nevertheless provides valuable evidence that would be extremely useful to the injured state if it chose to seek additional reparation for the harms suffered.’¹¹⁴⁵ The SCSL *Taylor* case further re-enforced the ICC’s principle of individual criminal accountability and justice delivery. The *Taylor* case shows holding high office ‘shall in no case exempt a person from criminal

¹¹⁴⁰ A Little, ‘Can Charles Taylor verdict heal the horrors of war?’ BBC News (Freetown 25 April 2012) paras 6 and 11 <<https://tinyurl.com/ybvg5pkv>> (Latest access 15 September 2018)

¹¹⁴¹ See the Charles Taylor verdict and its impact on his country (The New York Amsterdam News 6-9 May 2012)

¹¹⁴² R Falk, ‘Opening the other eye: Charles Taylor and selective accountability (1 May 2012) Opinion Al Jazeera English paras 8 -10 <<https://tinyurl.com/y7kc4rba>> (Latest access 15 September 2018)

¹¹⁴³ C Cheng, ‘Charles Taylor trial highlights ICC concerns’ (27 April 2012) Opinion Al Jazeera English para 10 <<https://tinyurl.com/yb8xay2r>> (Latest access 15 September 2018)

¹¹⁴⁴ See chapters 1, 7, 8 and 9 for further discussion and analysis on this

¹¹⁴⁵ K A Hardtke, ‘The actions of one, the responsibility of a Nation: Charles Taylor’s Conviction by the Special Court for Sierra Leone and its impact on State Responsibility claims against Liberia’ (2014) Volume 31 Wisconsin International Law Journal 910, 933

responsibility’¹¹⁴⁶ ‘nor lead to a reduction of sentence.’¹¹⁴⁷ The equivalent procedures of the ICC and the SCSL, and the comparable evidence used in *Taylor* will allow the approach to be replicated in future tribunals.

Conclusion

In conclusion, it is helpful to review the *Taylor* case law within the framework of theories of justice and to explore the various judgment in terms of procedural, retributive, normative and transitional justice theories. An interpretative community lens highlights how the collective will of the Sierra Leone government and the Sierra Leonean people, civil society and the international community not only stayed their course in the transition of Sierra Leone from conflict to the restoration of the rule of law, but fundamentally contributed to justice in Sierra Leone.¹¹⁴⁸ The SCSL AFRC, RUF, CDF, *Taylor* trials and judgments represent one of the world’s most successful legal jurisprudence (case laws) within International Criminal Law and justice.

The *Taylor* judgment drew on procedural, retributive justice theories and based on the norm that prosecution, convictions and sentencing are necessary and beneficial elements in response to wrongdoing; and would send a message to potential offenders. However, it is important to note that although Taylor was indicted for child soldier recruitment and forced marriage, he was not convicted for these crimes. This is supported by Falk who had this to say: ‘it may further impress liberal commentators that fair legal procedures and diligent judicial oversight led to Taylor’s acquittal with respect to the more serious charges of “command responsibility” or “joint criminal enterprise.”’¹¹⁴⁹ Clearly, this reasoning by the judges differs from the ARFC, CDF and RUF cases where convictions and sentencing were made against the defendants for such heinous international crimes.¹¹⁵⁰

Given the above, one can posit that such a ruling by the SCSL *Taylor* case proved that reasoning, rulings and determinations of judges could vary on a case-by-case basis. As a result of this, the determination by judges of the SCSL *Taylor* case might have

¹¹⁴⁶ Rome Statute of the International Criminal Court, U.N. Doc.2187 U.N.T.S. 90, entered into force (1 July 2002)

¹¹⁴⁷ K Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W.W. Norton & Company Ltd., 2011) 119

¹¹⁴⁸ E Thompson, ‘Public Reaction in Sierra Leone to the Judgement Charles Taylor’ (2 August 2012) International Justice Monitor paras 1- 8 <<https://tinyurl.com/ydfwmwn2>> (Latest access 13 September 2018)

¹¹⁴⁹ R Falk, ‘Opening the other eye: Charles Taylor and selective accountability (1 May 2012) Opinion Al Jazeera English para 2 <<https://tinyurl.com/y7kc4rba>> (Latest access 13 September 2018)

¹¹⁵⁰ See chapters 5 and 6 for detailed discourse and analysis

the potential implication to limit the SCSL legal definition and jurisprudence on child soldier recruitment and forced marriage. Nonetheless and within justice theories framework, one can conclude that the SCSL trial and judgment on Taylor was and is still fundamentally significant to domestic and international justice systems, and to other hybrid and criminal tribunals dealing with similar charges. Although no tribunal and hybrid courts have followed the SCSL case law, it is hoped that the jurisprudence will influence decisions with similar indictments and prosecutions in the future. This would ultimately make a significant contribution to International Criminal Law.

Chapter 7: General Conclusion

In researching this thesis, the central investigative question has been: How successful was the SCSL in delivering justice in Sierra Leone? In answering this question, and from the perspective of theories of justice, one can state that the SCSL was successful in serving various aspects of justice in Sierra Leone.

The research has argued that the success of the SCSL model can be analysed and understood through the robust application of theories of justice, namely: Firstly, procedural justice, defined as the ‘perceived fairness of procedures that are used to obtain a given outcome,’ and by which decisions are made. Procedural Justice also concerns the due process of the law. Secondly, retributive justice, which means punishment is warranted as a response to a past event, crime or wrongdoing (that is: those who committed serious international crimes should face criminal trials and be punished once adjudged and found guilty). Retributive Justice also infers the value of legality or rule of law thereby bringing a full closure to the matter between or amongst groups.

Retributive Justice also helps to deter those who might be inclined to perpetrate such heinous international crimes in the future; thirdly, corrective justice, concerned with the repair or correction of wrongs or wrongful losses through compensatory terms; and fourthly, transitional justice, advanced as a set of legal and non-legal approaches or fields of inquiry that have been carried out by different countries in an effort to address the legacies of systematic and widespread human rights abuses in order to end the culture of impunity and establish peace, reconciliation and the rule of law and democracy.

The research also adopted the approach of interpretive community lens in order to determine whether justice has been done and seen to be done. This tool has been used in the past by both Henderson and Johnson. The interpretive community lens in this perspective represents two community sets: primary (the 15 members of the UNSC) and secondary (civil society and NGOs, courts and judges). Through the combined methodological approach and background research and data gathering carried out, I developed an analytical framework through which to assess the success of the SCSL

model in dispensing justice; to look at the implications of its unique hybridity; and to consider the extent to which it is replicable in other contexts.

To recap, the concept of International Criminal Justice (ICJ) emerged as a response to atrocities committed during World Wars I and II, and encompasses the development of International Criminal Law. The first visible sign of holding individuals responsible for actions that could be seen as international crimes emerged after World War II in 1945 to 1949 in Nuremberg, Germany when indictments, prosecutions and convictions of war crimes and crimes against humanity were adjudged.

In addition, a number of permanent and *ad hoc* International Criminal Tribunals – for example, the ICTY in 1993, the ICTR in 1994, and the hybrid courts for Sierra Leone, Cambodia, East Timor and Lebanon – were created by the UN to address war crimes, crimes against humanity and genocide, also resulting in the further development of the International Criminal Justice system. Further to that, the creation of the Rome Statute of the ICC on 17 July 1998 is a court that also has jurisdiction in addressing the most heinous international crimes committed in order to bring about International Criminal Justice in the world. The ICC and these tribunals and courts will continue to be central to the development of both International Criminal Law and its jurisprudence in the coming years.

Given the above and in pursuit of UN Resolution 1315 (2000) of 14 August 2000, the SCSL model was established in July 2002 primarily as a hybrid criminal court consisting of both national and international staff, and was empowered to prosecute those who ‘bear the greatest responsibility’ for serious international crimes and dispense justice for victims of the 11 year civil war. Through the SCSL Statute, the SCSL mandate was to charge and prosecute those individuals responsible for the commission of serious violations of International Humanitarian Law and Sierra Leonean law.

As already indicated in earlier chapters, the SCSL model had achieved a number of unprecedented firsts: 1) it was the first hybrid court created by bilateral agreement between the UN and a country in the territory where crimes were committed; 2) it prosecuted, convicted and sentenced perpetrators of the war crimes of child soldier recruitment and enlistment, and forced marriage under (other inhumane acts) as crimes against humanity, and other serious violations of International Humanitarian Law; 3) the first to consist of both national and international judges and staff; 4) the first to be

funded by voluntary contributions from interested countries; and 5) the first to indict a sitting African head of state, Charles Taylor.

The special characteristic features of the SCSL model are quite unique. The SCSL model was distinct and innovative and has had a significant impact in the field of International Criminal Law. For example, the degree of the SCSL hybrid administration, legal sources, judicial and prosecutorial teams – which permitted the court to draw on domestic expertise – gives the SCSL its legitimacy. Also, drawing on the SCSL new judgments and jurisprudence has created a legacy which is something of symbolic importance and this may have contributed to its apparent success in achieving justice and helping to build stability. Arguably, countries facing the same issues as Sierra Leone could learn much from the special characteristics of the SCSL model: the location in the country where the crimes were committed, and the innovative Outreach Programme which focused on improving domestic understanding of the court's function, as well as voluntary funding mechanisms, thus advancing the state of International Criminal Justice while strengthening the country's domestic legal system.

Impact and legacy of the SCSL

Within theories of justice concept (procedural, corrective, retributive and transitional justice), the SCSL judgments were unique and represent a significant step in the field of the ICL and the ICC. For example, the SCSL judgments were the first to charge and convict perpetrators of crimes of child soldier recruitment and forced marriage under war crimes, and (other inhumane acts) crimes against humanity.

In terms of its legacy, the SCSL hybrid model and its case law and decisions will help to incorporate **best practices** into the Sierra Leone national justice system and so ensure **justice for all**. As such, they had a fundamental role in the legal development of Sierra Leone, representing an important step towards the creation of a functioning legal system and a greater respect for legal process and for the role of an independent judiciary in the country. The SCSL model was not only truly a hybrid tribunal, but left a legacy that was very successful because it generated a landmark in the history of International Criminal Law, representing a new (national and international) hybrid model, the second generation of International Criminal Justice.

Additionally, the SCSL judgments through justice theories (procedural, retributive, corrective and transitional justice) have overall been successful in achieving its

mandate established through the SCSL Statute. Amongst the SCSL legacies achieved so far are: 1) it recognised and acknowledged victims' rights to justice, thereby reinforcing and strengthening the practice of the rule of law in the judicial system and law books in Sierra Leone and beyond, as well as assisting the country to go forward, 2) it has helped to create a reliable, sound and authoritative historical archive for the kind of crimes committed in the Sierra Leone civil war and lastly, 3) the SCSL new judgments have made a vital contribution to both national and international jurisprudence and can be used by other tribunals in the future. The SCSL hybrid court has already influenced the later practice of the ICC. The transfer of the SCSL to the RSCL after its formal closure was a particularly significant feature, and a key part of its legacy. The SCSL hybrid model, which closed down its operation in 2013, is the first example of a Residual court mechanism that can be found in Sierra Leone. The legacy of the SCSL, its fundamental contribution to procedural, retributive, corrective and transitional justice in Sierra Leone, and its primary success, is that it delivered justice, peace, and reconciliation and fulfilled its jurisdictional mandate in prosecuting those individuals responsible for the commission of crimes of both child soldiering and forced marriage. The case law already created by the SCSL will ultimately impact International Criminal Law and the ICC in future.

However, some concerns have been expressed about the proceedings and conduct of the SCSL.¹¹⁵¹ For example, at the start, the SCSL was faced with robust challenges in prosecuting perpetrators of war crimes and crimes against humanity. For instance, the late Hinga Norman (Deputy Defence Minister) challenged the competency, legitimacy, jurisdiction and mandate of the SCSL to indict him on such crimes, although the judges of the SCSL upheld the legal mandate of the SCSL operations. Also, the SCSL was expected to have an impact on the Sierra Leonean people but some commentators have argued that this is not the case. For example, the narrow mandate does not reflect the wide-scale human rights violations in the conflict.

Some commentators¹¹⁵² also argue that the impact of the SCSL on Sierra Leonean law was less than expected, due to the relatively low numbers of Sierra Leonean nationals involved. Nevertheless, the research will argue that the combination of Sierra Leonean prosecutors and staff with international lawyers and staff has greatly assisted in

¹¹⁵¹ For detail commentary and reference point on this argument, see chapters 4 and 5 respectively

¹¹⁵² See chapters 1, 5 and 6 for cross-reference purposes

building capacity and knowledge in the judicial system. The SCSL has been also successful in relation to managing public perceptions.¹¹⁵³ It is popularly seen as a people's court, and it has built a bond with the Sierra Leonean community.¹¹⁵⁴

The impact of the SCSL prosecutions and judgments can be judged the most significant contribution to the SCSL model, international community and International Criminal Justice, generating case laws with significant impact on the ICC and ICL. The idea of prosecuting those who 'bear the greatest responsibility' was broadly welcomed and accepted by Sierra Leone. This can be classed as a transitional justice mechanism which falls in line with local practices of 'forgiving and forgetting' through the reintegration of large numbers of offenders of crimes into society.

Within the context of procedural and retributive justice one can argue that the key legal developments that occurred at the SCSL were mostly focused on issues of child soldiering and forced marriage. As the SCSL transforms into a Residual Special Court, it is likely that cases similar to the ones stated above will increase and therefore expand this field of International Criminal Law jurisprudence. SCSL judgments and jurisprudence also proved that individuals responsible for heinous crimes committed in the civil war can be held to account.

The application of the theories of justice and interpretive community lens has helped us better understand the contribution of the SCSL's model and its success, and the extent to which the judgments provided a helpful expansion of International Criminal Law's understanding of war crimes of child soldier recruitment, enlistment and conscription in armed conflict and forced marriage (and other inhumane acts) as crimes against humanity. The incorporation of the theories of justice perspective has illustrated the SCSL model's contribution to justice and through original analysis increased legal understanding of the SCSL's impact.

Again, although the SCSL model has had some criticisms and is far from being perfect - for example, it took time to get started and had problems with voluntary funding contributions -one can argue using the justice theories perspectives that the hybrid model has had quite remarkable success in relation to its case law and legal legacy. The SCSL has also demonstrated to the international community that it is feasible to

¹¹⁵³ See, chapters 5 and 6 for another cross-reference point and or citation relation to this analysis

¹¹⁵⁴ Ibid

establish a hybrid model court that can indict accused persons, conduct and complete investigations, carry out fair prosecutions and ensure that international standards of justice are met.

This thesis will argue that efforts to achieve any broad consensus that justice has been served face a critical challenge because of the competing perceptions of what justice and injustice could mean for different people, the criminal trials in post-conflict state building in Sierra Leone have contributed to relative peace and reconciliation, and to stability through justice, and offer much that can be replicated. Also, one can argue that the validity of the success of the SCSL model was not only based on its practical ability to bring perpetrators to justice through criminal trials, but also the acceptability of the outcome of these trials and convictions to both the victims and the majority of the Sierra Leonean population as well.

Moreover, the SCSL judgments, from the theories of justice perspective, on child soldier recruitment and forced marriage have been successful in rendering a measure of justice for some of the worst atrocities in Sierra Leone, and should be welcomed as contributing to a broader interpretation and legal definition on child soldiering and forced marriage. There is every prospect that the legal ruling on child soldiering and forced marriage, including definitions and jurisprudence legacy, will continue to develop in the future. This is because the judgments have not only created case law for both the ICC and the ICL, but have also demonstrated how a court and legal system should work, especially in respect of war crimes, crimes against humanity, witness protection and legal defence that will be used in future courts and tribunals. In order to support this claim, the ICC Trial Chamber and other hybrid courts have drawn from the SCSL's jurisprudential legacy for the indictment and conviction of the recruitment, enlistment and conscription of child soldiers as well as forced marriage. For example, in the DRC *Lubanga* and the Uganda *Ongwen* cases, indictment and conviction were made for the recruitment, enlistment and conscription of child soldiers, whilst in the *Katanga* and *Ngudjolo Chui*, the *Ntaganda* cases in the DRC and the ECCC *Prosecutor v Chea et al* cases in Cambodia, as well as the Uganda *Ongwen* case, some indictments and determinations were based on forced marriage.

Since then, the Sierra Leone government has played a key role in enacting legislation making sexual violence a criminal offence. Special units were created at police stations

to investigate and prosecute crimes of sexual violence. For example, women's access to justice being a significant aspect of conflict prevention, conflict resolution, and the maintenance of peace and security, the Sierra Leone government has improved gender parity by legislating laws against gender discrimination. These new legislations have already been listed and discussed in previous chapters.

Based on the development of this case law, the research will posit that Sierra Leone is a leading example of how to protect women during and after conflict. This is a clear demonstration of the impact of gender parity at best before the law in incorporating gender equality specifically and for all in general, as well as showcasing procedural, corrective and transitional justice perspectives that will combat impunity at the national level by creating effective national mechanisms to deliver justice, peace, reconciliation and reparation (where applicable) to victims in the judicial system in Sierra Leone.

Summary

In summary, I have used the working hypothesis so far developed above to demonstrate that: 1) the SCSL was effective in delivering justice; 2) that this success was due in large part to its unique hybridity; 3) that aspects of this hybridity can be usefully replicated in other contexts and make a useful contribution to International Criminal Law as well as justice; and 4) that the interrogation of the SCSL jurisprudence through an analytical framework which includes the theories of justice and interpretive community lens offers new insights into the impact, success and legacy of the SCSL and contributes to International Criminal Law scholarship.

Selected Bibliography

UN AND NON-UN RESOLUTIONS

UN Doc. S/RES/125704 (3 May 1993)

UNSC 955 S/RES/955 (November 1994)

UN SCOR, 3453 mtg. UN Doc. S/RES/955 (1994)

UN Doc. S/RES/995 (November 1994) United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda.

UNSC S/RES/1166 (13 May 1998)

UNSC S/RES/1329 (2000) of 30 November (2000)

UN Doc. S/RES/1315 (2000) on the situation in Sierra Leone

UN Doc. S/RES/2000/915 (4 October 2000)

UN Doc. S/RES/1315 (2000) on the situation in Sierra Leone (2000)

United Nations General Assembly A/55/305-S/2000/809 (21 August 2000)

UNTAET Regulations 2000/11 (6 March 2000) and 2000/15 (6 June 2000)

UNTAET Regulation 2000/16 of June 2000 on the organisation of the Prosecution Service in East Timor

UNTAET Regulation No. 2000/25 on Amending Regulation No. 1999/3, UNTAET/REG/2000/25 (3 August 2000)

(UNTAET) Regulation 2000/11 (6 March 2000) UNTAET/REG/2000/11, as amended by UNTAET Regulation 2001/25 (14 September 2001)

UN Doc. S/RES/1503 (2003)

United Nations Security Council, S/RES/1593 (2005)

UN Security Resolution 1664 (29 March 2006)

UN Doc S/RES/1757 (2007)

UN Doc S/RES/1757 (2007), Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, adopted by the Security Council at its 5685th Meeting on (30 May 2007)

United Nations General Assembly Resolution 60/147 United Nations (2008)

UN Doc. S/RES/1966 (2010)

LEGAL INSTRUMENTS

Charter of the International Military Tribunal (IMT) for the Far East, Article 1 (1946)

T.I.A.S. No. 1589, 4 Bevans 20 (as amended 4 Bevans 27 April 26, 1946)

Convention on the Elimination of All Forms of Discrimination against Women (1979)

The Courts of England and Wales and Senior Courts Act (1981)

Statute of International Criminal Tribunal Rwanda (ICTR) Article 6 (1994)

Statute of International Criminal Tribunal for the former Yugoslavia, Article, 9 (1993)

Statute of the International Criminal Tribunal of Yugoslavia (ICTY) Articles 2, 3, 4 and 5 (1993)

Statute of the International Criminal Tribunal of Rwanda (ICTR) Articles 2, 3, and 4 (1994)

Statute of International Criminal Tribunal for Rwanda (ICTR), Articles 10 and the International Criminal Tribunal for Rwanda (ICTR) Statute, Rules of Procedures and Evidence of ICTR, (June 1995)

Statute of International Criminal Tribunal Rwanda (ICTR) Article 6 (1994)

Peace Agreement Between the Government of Sierra Leone and the Rebel United Front of Sierra Leone, (7 July 1999)

Establishment of an International Criminal Court - overview Truth and Reconciliation Commission Act of 2000 (2000)

The Rome Statute of the International Criminal Court (2002)

The Special Court Agreement, 2002 (Ratification) Act (2002)

Statue of the Special Court for Sierra Leone (2002)

Statute of the Special Court for Sierra Leone (SCSL) Articles 2, 3, 4 and 5 (2002)

Establishment of a Special Court for Sierra Leone (16 January 2002) (hereinafter Special Court Agreement)

Statement by His Excellency Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone at the formal opening of the Courthouse for the SCSL (6 March 2004)

Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) for the persecution of crimes committed during the period of Democratic Kampuchea, with inclusion of amendments as promulgated on (27 October 2004)

Independent Expert report submitted by the late Antonio Cassese, 'Report on the Special Court for Sierra Leone Submitted by the Independent' (12 December 2006)

Agreement between the Kingdom of the Netherlands and the United Nations concerning the Headquarters of the Special Tribunal for Lebanon (21 December 2007)

Residual Special Court for Sierra Leone Statute Article 15 of (2010) Special Court for Sierra Leone: Residual Special Court Sierra Leone (2010)

Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Residual Special Court for Sierra Leone (2010)

UN Human Rights General Comments Article 7 of the Covenant No. 20 in relation to Article 7 of International Covenant on Civil and Political Rights.

Extraordinary African Chambers (EAC) (2 September 2013) Special Court for Sierra Leone: Residual Special Court for Sierra Leone, Freetown and The Hague (2014) Rome Statute of the International Criminal Court (ICC) of adopted 17 July 1998 and entered into force (1 July 2002)

United Nations Economic and Social Council (ECOSOC). United Nations, General Assembly E/RES/2012/24 (6 September 2012) 13th Africa-EU Ministerial Troika Meeting, Addis Ababa (14 October 2009)

The International Centre for Transitional Justice (ICTJ), 'What is Transitional Justice?'

Statute of the Special Court for Sierra Leone (2000) established by an agreement between the United Nations and the Government of Sierra Leone pursuant to SC Res. 1315, 14 August 2000 (enacted on 16 January 2002), Article 1(1) (hereinafter 'SCSL Statute')

International Centre for Transitional Justice (ICTJ) (November 2010). Sierra Leone's submission to the Universal Periodic Review of the UN Human Rights Council 11th Session: (May 2011)

Statute of the Special Court for Sierra Leone, Article 1(2000)

Statute of the Extraordinary African Chambers (EAC) Article 1 (2 September 2013)

BOOKS

Alston P and Goodman R, *International Human Rights: The Successor To International Human Rights in Context: Law, Politics and Morals* (OUP, 2013)

Al-Feel A A, 'Books Reviews': (2007) in Romano Cesare P R, Nolkaemper André and Kleffner J K, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004)

Aguirre D, *The Human Right to Development in a Globalized World* (Ashgate, 2008)

Bangura M A, 'Delivering International Criminal Justice at the Special Court for Sierra Leone: Home Much Is Enough?' in Charles C Jalloh (ed), *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007)

Barria L A and Roper S D, *The Development of Institutions of Human Rights: A Comparative Study* (Palgrave Macmillan, 2010)

Barnes J (ed), *The Complete Works of Aristotle: The Revised Oxford Translation* (Vol. 2 Princeton University Press, 1991)

Bassiouni M C, *Crimes against Humanity in Introduction to International Criminal Law* (Martinus Nijhoff Publishers, 1999)

Bassiouni M C, *Post Conflict Justice (International And Comparative Criminal Law Series)* (Martinus Nijhoff Publishers, 2002)

Bassiouni, M C, *The Statute Of The International Criminal Court: A Documentary History* (Transnational Publishers, 1998)

Bassiouni M C, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (CUP, 2011)

Bassiouni M C, *International Criminal Law* (Vol.1, 3rd edn, Martinus Nijhoff Publishers, 2008)

Bassiouni M C, *The Statute of The International Criminal Court: A Documentary History* (Transnational Publishers, 1998)

Bassiouni M C, *Introduction to International Criminal Law: Second Revised Edition* (Martinus Nijhoff Publishers, 2013)

Bassiouni M C, *The Statute of the International Criminal Court: A Documentary History* (Transitional Publishers, Inc., 1998)

Bassiouni M C, *Introduction to International Criminal Law* (Ardsley, Transnational Publishers, 2003)

Bassiouni M C, *International Criminal Law Conventions and their Penal Provisions* (Ardslay Park, N Y Transitional Publishers, 1997)

Benedicte-Dembour Marie and Kelly Tobias (ed), *Paths to International Justice Social and Legal Perspectives* (CUP, 2007)

Bertodano De, 'East Timor: Trials and Tribulations' in Cesare P R Romano *et al* (ed), *Internationalized Criminal Courts: Sierra Leone East Timor, Kosovo, and Cambodia* (OUP, 2004)

Boister N and Cryer R (ed), *Documents on the Tokyo International Military Charter, Indictment and Judgements* (OUP, 2008)

Boyle A and A M (ed), *International and Comparative Law Quarterly* (Vol.52 Part 2, OUP, 2003)

Buckley-Zistel Susanne, Koloma Beck Teresa, Braun Christian and Mieth Friederike (ed), *Transitional Justices Theories* (Routledge, 2010)

Brants C, 'Universal crimes, universal justice? The Legitimacy of the international response to genocide, crimes, against humanity and war crimes' in Crawford Adam (ed), *International Comparative Criminal Justice and Urban Governance: Convergence and Divergence in Global, National and Local Settings* (CUP, 2011)

Brants C, Antoine H and Dina S, *Images and Memories* (Ashgate, 2013)

Brants Chrisje, 'Universal crimes, universal justice? The Legitimacy of the international response to genocide, crimes, against humanity and war crimes' in Crawford Adam (ed), *International Comparative Criminal Justice and Urban Governance: Convergence and Divergence in Global, National and Local Settings* (CUP, 2011)

Bundu Abass, *Democracy by Force? A study of international military intervention in the conflict in Sierra Leone from (1991-2000)* (Universal Publisher, 2011)

Carter LE, 'International Judicial Trials Commissions, and Gacaca: Developing a Framework for Transitional Justice from the Experiences in Sierra Leone and Rwanda' in Charles C Jalloh (ed), *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007)

Clark T M, 'Assessing the Special Court's Contribution to Achieving Transitional Justice' in Charles C Jalloh (ed), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013)

Clark P, 'Grappling in the Great Lakes: The challenges of international justice in

Rwanda, the Democratic Republic of Congo and Uganda' in Hilary Charlesworth, Jeremy Farrall (ed), *The Role of International Law in Rebuilding Societies after Conflict Great Expectations* (CUP, 2014)

Connor O D J A, *Critical History of Western Philosophy* (The Free Press, New York, 1985)

Cottingham J (ed), *Western Philosophy: An Anthology* (Blackwell Publishers, 1996)

Cassese A, *International Criminal Law* (3rd edn, OUP, 2013)

Corradetti C, Eisikovits N and Rotondi J V, (ed), *Theorizing Transitional Justice* (Routledge, 2016)

Cryer R, Friman H, Robinson D and Wilmshurst E, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP, 2010)

Evans M D, *International Law Documents* (10th edn, OUP, 2010)

De Vos C, Kendall S, Stahn C (ed), *Contested Justice: The Politics and Practice of International Criminal Court* (CUP, 2015)

Ditttrich V E, 'Legacies in the Making: Assessing the Institutional Legacy Endeavour of the Special Court for Sierra Leone' in Charles C Jalloh (ed), *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007)

Duthie R and Seils P, *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (International Centre For Transitional Justice, New York 2017)

Ford S, 'How Is the Special court's Outreach Section'? in Charles Jalloh (ed), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013)

Freeman A V, *The International Responsibility of States for Denial of Justice* (Longmans, Green and CO, New York, 1938)

Gberie L, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone* (Bloomington, IN: Indiana University Press, 2005), Ozonnia Ojielo, 'Beyond the TRC: Governance in Sierra Leone' in L Gberie (ed), *Rescuing a Fragile State* (Waterloo Wilfrid Laurier University Press, 2009)

Gberie L, 'A New Perspective on the War in Sierra Leone' in Zubairu Wai, *A Critique of Epistemologies of African Conflicts: Violence, Evolutionism and the War in Sierra Leone* (New York: Palgrave, 2012) (Vol.2 The Journal of Sierra Leone Studies, 2nd edn, 2013)

Hamilton V L and Sanders J, *Everyday Justice Responsibility and the Individual in Japan and United States* (Yale University Press, 1992)

Henderson C, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (Ashgate, UK, 2010)

Jalloh C C, *Consolidated Legal Texts of the Special Court for Sierra Leone* (Brill Academic Publishers, Boston, MA, USA, 2007)

Jalloh C C (ed), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013)

Jones J R W and Powles S, *International Criminal Practice* (3rd edn, OUP, 2003)

Jodoin S and Cordonier S M-C (ed), *Sustainable Development, International Criminal Justice, and Treaty Implementation* (CUP, 2013)

Lee R S (ed), *The International Criminal Court: the making of the Rome Statute: issues, negotiations and result* (Martinus Nijhoff, 1999)

Kamara A K, *A concise history of Fourah Bay College 1827-2003* (Winnipeg, Canada, 2017)

King K L and Meernik J D, 'Assessing the Impact of the International Criminal Tribunal of the former Yugoslavia: Balancing International and Local Interests While Doing Justice' in Bert Swart, Alexander Zahar and Göran Sluiter (ed), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP, 2011)

Khan K A A, Buisman C and Gosnell C (ed), *Principles of Evidence in International Criminal Justice* (OUP, 2010)

Kelsall T, 'Culture under Cross-Examination International Justice and the Special Court for Sierra Leone' in Kittichaisaree K, *International Criminal Law* (OUP, 2001)

Knight K, *Aristotelian Philosophy: Ethics and Politics from Aristotle to MacIntyre* (Polity Press, 2007)

Kritz N J, *Transitional Justice: General Considerations* (Vol.1, US Institute of Peace Press, 1995)

Knight K, *Aristotelian Philosophy: Ethics and Politics from Aristotle to MacIntyre* (Polity Press, 2007)

Korhonen O, 'The 'state-building enterprise': Legal doctrine, progress narratives and managerial governance Brett Bowden' in Hilary Charlesworth, Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict Great Expectations* (CUP, 2014)

Kritz N J, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. 11, US Institute of Peace Press, 1995)

Kritz N J, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Vol. 1, General Considerations* (US Institute of Peace Press, 2004)

Lambourne W, 'Transformative justice, reconciliation and peace building' in Kamari Clark M (eds), *Transitional Justice Theories* (CUP, 2009)

Luban D, O'Sullivan Julie R and Stewart D P (ed), *International and Transitional Criminal Law* (Aspen Publishers, USA, 2010)

Maser W, *Nuremburg* (The Chancer Press, 1979)

Mettraux G, *International Crimes and the AD HOC Tribunals* (OUP, 2006)

Mettraux G, (ed), *Perspectives on the Nuremburg Trial* (OUP, 2008)

Mettraux G, *International Crimes and the AD HOC Tribunals* (OUP, 2006)

Mehigan J, 'Book Review' in Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected jurisdictional Issues* (Hart, 2012)

Merwe H van der, 'Delivering justice during transition: Research challenges' in H van der Merwe V B and A R C (ed), *Assessing the impact of transitional justice: Challenges for empirical research* (Washington, DC: United States Institute of Peace Press, 2009)

Mochochoko P and Tortora G, 'Management Committee for the Special Court for Sierra Leone' in Cesare P R Romano, Andre Nollkaemper and Jann K Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004)

O Ojielo, 'Beyond the TRC: Governance in Sierra Leone' in L Gberie (ed), *Rescuing a Fragile State* (Waterloo Wilfrid Laurier University Press, 2009)

Orentlicher D, 'The Future of Universal Jurisdiction in the New Architecture of Transitional Justice' (2003) in S Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes* (University of Pennsylvania Press, 2004)

Palmer N, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (OUP, 2015)

Rawls J, *A Theory of Justice* (Revised edn, OUP, 1999)

Rawls J, *The Law of Peoples with 'The Idea of Public Reason Revisited'* (Harvard University Press, 2001)

Roberson G, *Crimes Against Humanity: The Struggle for Global Justice* (3rd edn, Penguin Books, 2006)

Romano C P R, Nollkaemper Andre and Kleffner Jann K, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series) (OUP, 2004)

Robertson G, *Crimes Against Human Rights: The struggle for global justice* (3rd edn, Penguin Books, 2006)

Sheldon G, 'The Nuremburg Trial and Aggressive War' in Guenael Mettraux (ed), *Perspectives on the Nuremburg Trial* (OUP, 2008)

Sikkink K, *The Justice Cascade: Human Rights Prosecutions are changing the World Politics* (W W Norton and Company Ltd, 2011)

Smith A, 'The Expectations and Role of International and National Civil Society and the SCSL' in Charles Jalloh (eds), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (CUP, 2013)

Smith A, Sierra Leone: 'The Intersection of Law, Policy, and Practice' in Cesare P R Romano, Andre N and J K K, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004)

Solomon R C and Murphy M C (ed), *What is Justice? A Classic and Contemporary Readings* (2nd edn, OUP, 2000)

Schabas W A, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (CUP, 2006)

Schabas W A, 'The Internationalised Court and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone' in Cesare P R Romano, Andre Nollkaemper and Jann K Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (International Courts and Tribunals Series), (OUP, 2004)

Sadat L N, Scharf M P, and Bassiouni M C, *Theory and Practice of International Criminal Law: Essays in Honor of M Cherif Bassiouni* (Leiden, NLD: Martinus Nijhoff, 2008)

Shahabuddeen M, *International Criminal Justice at the Yugoslav Tribunal: A Judges Recollection* (OUP, 2012)

Shraga D, 'The Second Generation UN- Based Tribunals: A Diversity of Mixed Jurisdiction' in C P R Romano, A Nollkaemper and J K Kleffner, *Internationalized Criminal Courts* (OUP 2004)

Steiner H J, Steiner, Alston P and Goodman R, *International Human Rights in Content: Law Politics Morals* (3rd edn OUP, 2007)

Teale J, *The Atlantic Slave Trade 1770- 1807*, (Hodder Education, 2013)

Teitel R G, *Transitional Justice* (OUP, 2002)

Teitel R G, *Globalizing Transitional Justice: Essays for the New Millennium* (OUP, 2014)

Triffterer O (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, C H Beck Hart Nomos, 2008)

Tutu D, *No Future Without Forgiveness* (Rider, 2000)

Williams M, Nagy R, and Elster J, (ed), *Transitional Justice* (New York University Press (NYU Press, 2012)

Williams S, *Hybrid and Internationalised Criminal Tribunals: Selected jurisdictional Issues* (Hart, 2012)

JOURNAL ARTICLES

Adams J Q, 'Retributive Pre-Punishment' (2013) Volume 39 Social Theory and Practice 213

Adjovi R, 'The Special Court for Sierra Leone's Appeals Judgment in the AFRC case' (2008) Volume 3 Hague Justice Journal 25

Ainley K, Datzberger S, Freidman Rebekka and Mahoney Chris, 'Ten Years on: Transitional Justice in Post-Conflict Sierra Leone' (2013) The Justice and Security Research Programme 3

Aptel C, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' (2008) Volume 14 New England Journal of International and Comparative Law 169

Anan *et al* J (ed), 'The state of female youth in Northern Uganda' Findings from the Survey of War-Affected Youth (SWAY) Phase 11' (2008) UNICEF

<<https://tinyurl.com/y8sruxf7>>

Arsanjani M H, 'The Rome Statute of the International Criminal Court' (1999) Volume 93 American Journal of International Law 22

Armstead J H Jr, 'The International Criminal Court: History, Development and Status' (1998) Volume 38 Santa Clara Law Review 745

Austin K and Stewart N, 'Courting Justice in Rome' (1998) Volume 5 Human Rights Tribune 6

An-Na'im A A, 'Editorial Note: From the Neo-colonial 'Transitional' to Indigenous Formations of Justice' (2013) Volume 7 The International Journal of Transitional Justice 197

Barria L A and Roper S D, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) Volume 9 The International Journal of Human Rights 349

Barria L A and Roper S D, 'Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia' (2005) Human Rights Review 5

Barendrecht M (eds), 'Measuring Access to Justice in a Globalising World: The Hague Model of Access to Justice, Final Report- April 2010' (2010) The Hague Institute for the Internationalisation of Law 1

Bassiouni M C, 'Editorial' (2014) Volume 8 The International Journal of Transitional Justice 325

Bassiouni M C, 'International Recognition of Victims' Rights' (2006) Volume 6 Human Rights Law Review 203

Bassiouni M C, 'Crimes and the Criminal Process' (1997)12 Arab Law Quarterly 269

Beever A, 'Corrective Justice and Personal Responsibility in Tort Law' (2008) Volume 28 Oxford Journal Legal of Legal Studies 475

Bélair K, 'Unearthing the Customary Law Foundations of "Forced Marriages" During Sierra Leone's Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women's Rights in Post- Conflict Sierra Leone' (2006) Volume 15 Columbia Journal of Gender and Law 551

Bigi G, 'The Decision of the Special Court for Sierra Leone to Conduct the Charles Taylor Trial in The Hague' (2007) Volume 6 The Law and Practice of International Courts and Tribunals 303

Bosire L K and Lynch G, 'Kenya's Search for Truth and Justice: The Role of Civil Society' (2014) Volume 8 The International Journal of Transitional Justice 256

Bosire L K, 'Overpromised, under delivered: transitional justice in Sub-Saharan Africa' (2006) International Centre for Transitional Justice 1

Burgis-Michelle B, 'Defining Justice during Transition? International and Domestic Contestations over the Special Tribunal for Lebanon' (2013) Volume 7 The International Journal of Transitional Justice 497

Bueno I and Diaz R A, 'Which Approach to Justice in Colombia under the Era of the ICC' (2013) Volume 13 International Criminal Law Review 211

Byron C, Turns D, Warbrick C and McGoldrick D (ed), 'The preparatory Commission for the International Criminal Court' (2001) Volume 50 The International and Comparative Law Quarterly 420

Clark J N, 'Reconciliation via Truth? A Study of South Africa's TRC' (2012) Volume 11 Journal of Human Rights 189

Clark J N, 'The State Court of Bosnia and Herzegovina: a path to reconciliation?' (2010) Volume 13 Contemporary Justice Review 371

Clarke K M, 'The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord' (2011) Volume 18 Indiana Journal of Global Legal Studies 7

Cassese A, 'On the Current Trend towards Criminal Prosecutions and Punishment of Breaches of International Criminal law' (1998) Volume 9 European Journal of International Law 2

Cassese A, 'Report on the Special Court for Sierra Leone' (2006) Independent Expert 1

Cheryl L, 'Denial, Silence and the Politics of the Past: Unpicking the Opposition to Truth Recovery in Northern Ireland' (2013) Volume 7 the International Journal of Transitional Justice 157

Cheng C, 'Charles Taylor trial highlights ICC concerns' (27 April 2012) Opinion Al Jazeera English <<https://tinyurl.com/yb8xay2r>>

Cohen D, 'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia: 'Lessons Learned' and Prospects for the Future' (2007) Volume 43 Stanford Journal of International Law 137

Cohn I, 'The Protection of Children and the Quest for Truth and Justice in Sierra Leone' (2001) Volume 55 Journal of International Affairs 1

Costi A, 'Hybrid Tribunals as a viable Transitional Justice Mechanism to combat impunity in Post-Conflict Situation' (2006) Volume 22 New Zealand Universities Law Review 213

Crocker D A, 'Punishment, reconciliation and democratic deliberation' (2002) Buffalo Criminal Law Review 509

Ciorciari J D and Heindel A, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal' (2013) Michigan Journal of International Law 1

Cruvellie T, 'From the Taylor Trial to a Lasting Legacy: Putting the Special Court

Model to the Test' (2009) International Centre for Transitional Justice and Sierra Leone Court Monitoring Programme 1

Daid C M, 'SCSL 11-Million dollar funding deficit' (2010) International Criminal Law Bureau

Datzberger S, 'Lumpen Youth, Civil War, and Conflict Resolution Civil Society in Sierra Leone Before and During the War' (2012) Volume 1 The Journal of Sierra Leone Studies 1

Dieckmann J and Kerll C, 'UN Ad Hoc Tribunals Under Time Pressure- Completion Strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defence' (2008) Volume 8 International Criminal Law Review 87

Dickinson L A, 'The Relationship Between Hybrid Courts and the International Courts: The Case of Kosovo' (2003) Volume 37 New England Law Review 1059

Donner A M, 'Enhancing the Legitimacy and Accountability of the Prosecutorial Discretion at the International Criminal Court' (2003) Volume 97 The American Journal of International Law 769

Donlon F, 'The Transition of Responsibilities from the Special Court to the Residual Special Court for Sierra Leone: Challenges and Lessons Learned for Other International Tribunals' (2013) Volume 11 Journal of International Criminal Justice 1

Dougherty B K, 'Right-sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone' (2004) Volume 80 International Affairs 311

Dupuy K and Binningsbø H M, 'Power-sharing Agreements, Negotiations and Peace Processes' (2008) Centre for the Study of Civil War, Oslo 1

Emory International Law Review, 'Ensuring the effective prosecution of sexually violent crimes in the Bosnian war crimes chamber: Applying lessons from the ICTY' (2013) Volume 27 Emory International Law Review 565

Erik W J and Mitri Y, 'The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country' (2008) Volume 7 The Law and Practice of International Courts and Tribunals 87

Evenson E M, 'Truth and Justice in Sierra Leone: Coordination between commission and Court' (2004) Volume 104 Columbia Law Review 730

Facts on 'Hissène Habré' (January 2018) Trial International

<<https://trialinternational.org/latest-post/hissene-habre/>>

Falk R, 'Opening the other eye: Charles Taylor and selective accountability' (1 May 2012) Opinion Al Jazeera English <<https://tinyurl.com/y7kc4rba>>

Fletcher L, Harvey M W, Jamie R, 'Context, Timing and Dynamics of Transitional Justice: A Historical Perspectives' (2009) Volume 31 Human right Quarterly 163

Ford S, 'The ICC and the Security Council: How much support is there for ending Impunity' (2016) Volume 26 Indianan International and Comparative Law Review 31

Frisso G M, 'The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims' (2011) Goettingen Journal of International Law 3

Frulli M, 'The Special Court for Sierra Leone: Some Preliminary Comments' (2000) Volume 11 European Journal of International Law 857

Gardner J, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2010) University of Oxford Legal Research Paper Series 1

Gong-Gershowitz J, 'Forced Marriage: A New" Crime Against Humanity?' (2009) Volume 8 North western Journal of International Human Rights 53

Goy Barbara, 'Individual Criminal Responsibility before the International Criminal Court A Comparison with the *Ad Hoc* Tribunals' (2012) Volume 12 International Criminal Law Review 1

Glatte S, 'Judging the (East) German Past A Critical Review of Transitional Justice in Post-Communist Germany' (2011) Oxford Transitional Justice Research Working Paper Series 1

Gold A S, 'Theory of Regressive Justice' (2014) Volume 64 University of Toronto Law Journal 159

Goswami N, 'The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era' by Christian Henderson, Strategic Analysis (2011) Volume 35 Journal of Conflict Security Law 35

Goodfellow N A, 'The Miscategorization of 'Forced Marriage' as a Crime against Humanity by the Special Court for Sierra Leone' (2001) Volume 11 International Criminal Law Review 831

Grodsky B K G, 'Transitional Justice: Power, Symbols and Political Science' (2013) Volume 7 The International Journal of Transitional Justice 186

Goy B, 'Individual Criminal Responsibility before the International Criminal Court A Comparison with the *Ad Hoc* Tribunals' (2012) Volume 12 International Criminal Law Review 1

Hand C A, Hanks Judith and House Toni, 'Restorative justice: the indigenous justice system' (2012) 15 Contemporary Justice Review 449

Hardtke K A, 'The actions of one, the responsibility of a Nation: Charles Taylor's Conviction by the Special Court for Sierra Leone and its impact on State Responsibility claims against Liberia' (2014) Volume 31 Wisconsin International Law Journal 910

Higonnet E R, 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform' (2006) Volume 23 Arizona Journal of International and Comparative Law 347

Hobbs H, 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy' (2016) Volume 16 Chicago Journal of International Law 484

Hodgkinson S L, 'Are AD Hoc Tribunals an effective tool for Prosecuting International Terrorism cases?' (2010) Volume 24 Emory International Law Review 515

Howarth K, 'The Special Court for Sierra Leone - Fair Trials and Justice for the Accused and Victims' (2008) 8 International Criminal Law Review 399

Hola B, Smeulers A, and Bijleveld C, 'Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice' (2000) Volume 22 Leiden Journal of International 79

Horowitz S, 'How can International Criminal Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone' (2013) Volume 46 Israel Law Review 339

Howarth K, 'The Special Court for Sierra Leone - Fair Trials and Justice for the Accused and Victims' (2008) 8 International Criminal Law Review 399

Humphrey M, 'The Special Tribunal for Lebanon: Emergency Law and Justice' (2011) Volume 4 Arab Studies Quarterly 1

Holocaust Encyclopaedia: 'International Military Tribunal at Nuremberg' (1945)

Human Rights Watch, 'Shocking War Crimes in Sierra Leone: New Testimonies on Mutilation, Rape of Civilians' (June 1999) <<https://tinyurl.com/y87s4eew>>

Human Rights Watch, 'Bringing Justice: the Special Court for Sierra Leone, Accomplishment, Shortcomings, and Needed Support' (September 2004) <<https://tinyurl.com/y79cw7mz>>

Human Rights Watch, 'Nigeria: Detain Taylor Immediately Liberia's Ex-Leader Must Be Found and Sent to Trial' (2006) <<https://tinyurl.com/ycze6y9v>>

Human Rights Watch, 'Trying Charles Taylor in The Hague: Making Justice Accessible to Those Most Affected' (16 June 2006)

<<http://www.refworld.org/docid/44c7607b4.html>>

Human Rights Watch, 'Charles Taylor: Hague Trial Must Be Accessible to West Africans' (June 2006) <<https://tinyurl.com/y9ukbvt9>>

Human Rights Watch, 'Senegal/Chad: Court Upholds Habré Conviction' (April 2017) <<https://tinyurl.com/ycmgjko2>>

Human Rights Watch, '“We’ll Kill You If you Cry”: Sexual Violence in the Sierra Leone Conflict' (2003) Volume 15 Human Rights Watch 1, <<https://tinyurl.com/ycvtngkg>>

Iverson J, 'Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics' (2013) Volume 7 the International Journal of Transitional Justice 413

Jalloh C C, 'Special Court for Sierra Leone: Achieving Justice?' (2011) Volume 32 Michigan Journal of International Law 395

Jalloh C C, 'The Trial of President Charles Taylor' (2014) Research Paper No. 14-28 Legal Studies Research Paper Series 1

Jalloh C C, 'Prosecuting those bearing greatest responsibility': The lessons of the Special Court for Sierra Leone' (2017) Volume 96 Marquette Law Review 863

James-Allen P, Weah A and Goodfriend L (ed), 'Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia' (2010) International Center for Transitional Justice 3

Jasini R and Phan V, 'Victim participation at the Extraordinary Chambers in the Courts of Cambodia: are retributive and restorative principles enhancing the prospect for justice?' (2011) Volume 24 Cambridge Review of International Affairs 379

Jappah J V and Smith D T, 'Transitional Justice: Prioritizing Truth Commissions or International Tribunals to Ensure Healing and Reconciliation' (2013) Volume 5 Journal of International and Global Studies 1

Jejan-Cole A, 'The Special Court for Sierra Leone: Conceptual Concerns and Alternatives' (2001) African Human Rights Law Journal 107

Johnson L, 'UN-Based International Criminal Tribunal' (2008) Volume 36 Journal of International Law and Policy 275

Jorgensen N H B, 'Child Soldiers and the Parameters of International Criminal Law' (2012) *Chinese Journal of International Law* 657

Johnson I, 'Treaty Interpretation: The Authority of Interpretive Communities' (1990-1991) *Volume 12 Michigan Journal of International Law* 371

Kamara J F, 'Preserving the Legacy of the Special Court for Sierra Leone: Challenges and Lessons Learned in Prosecuting Grave Crimes in Sierra Leone' (2009) *Volume 22 Leiden Journal of International Law* 761

Karnavas M G, 'The ICTY Legacy: A Defence Counsel's Perspective' (2001) *Volume 3 Goettingen Journal of International Law* 1053

Kaufman Z D, 'Transitional Justice for Tojos's Japan: The United States Role in the establishment of the International Military Tribunal for the Far East and other Transitional Justice Mechanisms for Japan after World War 11' (2013) *Volume 27 The Emory International Law Review* 755

Kelso C, 'The Coalition to Stop the Use of Child Soldiers' (November 2002) *Child Soldier 139 Report 1* <<https://tinyurl.com/y83c4khj>>

Kerr R and Lincoln J, 'The Special Court for Sierra Leone Outreach, Legacy and Impact, Final Report' (2008) *War Crimes Research Group Department of War Studies 1*

Kendall S and Nouwen S M H, 'Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda' (April 2016) *Volume 110 The American Journal of International Law* 212

Khan T and Wormington J, 'Mobile Courts in the DRC: Lessons from Development for International Criminal Justice' (2014) *Oxford Transitional Justice Research Working Paper Series 1*

Ku J and J Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Law' (2006) *Volume 84 Washington University Law Review* 777

Lomé Peace Accord, UN Peacemaker' <<https://tinyurl.com/yao9l9gz>>

Lafont C, 'Procedural justice? Implications of the Rawls-Habermas debate for discourse ethics' (2003) *Volume 29 Philosophy and Social Criticism* 163

Lincoln J, 'The Special Court for Sierra Leone: Outreach, Legacy and Impact' (2008) *United States Institute of Peace Programme on the Rule of Law in African Countries Emerging from Violent Conflict* <<https://tinyurl.com/ydadz3a>>

Laxminarayan M, 'Procedural Justice and Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type' (2012) Volume 25 Social Just Research 390

Linton S, 'Putting Cambodia's Extraordinary Chambers into Context' (2007) Volume 11 Singapore Year Book of International Law 195

Linton S, 'New approaches to international justice in Cambodia and East' (2002) Volume 84 RICR Mars 93

Lecture McDougal M S and Johnson Larry D, 'UN- Based International Criminal Tribunals: How they Mix and Match' (2008) Volume 36 Denven Journal of International Law and Policy 275

Ljubojevic A, 'What's the Story? Transitional Justice and the Creation of Historical Narratives in Croatia and Serbia' (2012) Volume 49 Politicka misao 50

Mahoney M K, 'Procedural justice and the judge-probationer relationship in a cooccurring disorders court' (2014) International Journal of Law and Psychiatry 260

Matiangai S, 'Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth and Reconciliation Commission for Liberia' (2009) Volume 21 Florida Journal of International Law 210

Marshall T F, 'The evolution of restorative justice in Britain' (1996) Volume 4 European Journal of Criminal Policy and Research 21

Meisenberg S, 'The Final Judgement in the trial of Charles Taylor' (2013) Journal of International Criminal Justice

McGregor L, 'Transitional Justice and the Prevention of Torture' (2013) Volume 7 the International Journal of Transitional Justice 29

MacKenzie M and Sesay M, 'No Amnesty from/for the International: The Production and Promotion of TRCs as an International Norm in Sierra Leone' (2012) Volume 13 International Studies Perspectives 146

McAuliffe P, 'UN Peace-Building, Transitional Justice and the Rule of Law in East Timor: The limits of institutional response to political questions' (2011) Netherlands International Law Review 103

McGoldrick D and Williams S, 'The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future' (2010) Volume 59 International and Comparative Law Quarterly 803

Meisenberg S M, 'Legality of amnesties in international humanitarian law- The Lome Amnesty Decision of the Special Court for Sierra Leone' (2004) Volume 86 International Review of the Red cross 847

Mehigan J, 'Book Reviews': in Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected jurisdictional Issues* (Hart, 2012) Australian International Law Journal 283

Meernik J, 'Sentencing and Decision Making at the International Criminal Tribunals' (2011) Volume 92 Social Science Quarterly 588

Milla G, Disaggregating hybridity: Why hybrid institutions do not produce predictable experiences of peace (2014) Volume 51 Journal of Peace Research 501

Milanovic M, 'SCSL Appeals Chamber Affirms Charles Taylor's Conviction' (2013) Blog of the European Journal of International Law
<<https://tinyurl.com/ybdy7dgm>>

Moseley AI, 'Just War Theory' the Internet Encyclopaedia of Philosophy- IEP A Peer-Review Academic Resource

Mutyaba R, 'An Analysis of the Cooperation Regime of the International Criminal Court and its Effectiveness in the Court's Objective in Securing Suspects in its Ongoing Investigations and Prosecutions' (2012) Volume 12 International Criminal Law Review 937

Nagy R, 'Transitional Justice as Global Project: critical reflections' (2008) Volume 29 Third World Quarterly 275

Nagy R, 'Transitional Justice as Global Project: critical reflections' (2008) Volume 29 Third World Quarterly 275

Nesbitt M, 'Lessons from the Sam Hinga Norman Decision of the Special Court for Sierra Leone: How trials and truth commissions can co-exist' (2007) Volume 08 German Law Journal 977

Nelson De R, 'With Liberty and Some Justice for a Few: Thinking Theologically about Criminal Justice' (2013) Volume 52 Dialog: A Journal of Theology 93

No Peace Without Justice, 'Making Justice Work: Assessing the impact and legacy of the Special Court for Sierra Leone in Sierra Leone and Liberia' (September 2012) International criminal justice <<http://www.npwj.org/node/5599>>

Nguyen F, 'Untangling Sex, Marriage, and Other Criminalities in Forced Marriage' (2014) Volume 6 Gottingen Journal of International Law 13

O'Brien M, 'Don't kill them, let's choose them as wives: the development of the crimes of forced marriage, sexual slavery and enforced prostitution in international criminal law' (2015) *The International Journal of Human Rights* 1

Olsthoorn J, 'Hobbes's Account of Distributive Justice as Equity' (2013) *British Journal for the History of Philosophy* 13

Oosterveld V, 'The Special Court for Sierra Leone's Consideration of Gender-based Violence: Contributing to Transitional Justice?' (2009) *Volume 10 Human Rights Review* 73

Oosterveld V, 'Atrocity Crimes Litigation Year-In-Review (2010): A Gender Perspective' (2011) *Volume 9 Journal of International Human Rights* 326

Oosterveld V, 'Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-based Crimes' (2009) *Volume 17 American University Journal of Gender, Social Policy and Law* 407

Oosterveld V, 'Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties' (2011) *Volume 2 International Humanitarian Legal Studies* 127

Oosterveld V, 'Transition to The Special Court for Sierra Leone: Residual Special Court Sierra Leone' (2011) *IntlawsGrrrls* <<https://tinyurl.com/yazmrznt>>

O'Mahony D, 'Criminal Justice Reform in a Transitional Context: Restorative Youth Conferencing in Northern Ireland' (2012) *Volume 12 International Criminal Law Review* 549

Park A S J, 'Community-based restorative transitional justice in Sierra Leone' (2010) *Volume 13 Contemporary Justice Review* 95

Phoebe K, 'The Power to Prosecute: The Special Court for Sierra Leone from a Defence Perspective' (2006) *6 International Criminal Law Review* 387

Payam A, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) *Volume 95 American Journal of International Law* 7

Payam A, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (1996) *Volume 90 American Journal of International Law* 501

Payam A, 'Justice in The Hague, Peace in the Former Yugoslavia?: A Commentary on the United Nations War Crimes Tribunal' (1998) *Volume 20 Human Rights Quarterly* 737

Pérez-León-Acevedo J P, 'The conviction of Hissène Habré by the Extraordinary African Chambers in the Senegalese Courts: Bringing justice in cases of serious human rights violations in Africa' (June 2016) Africa Law Advancing the role and rule of law in Africa <<https://tinyurl.com/ycejmav7>>

Perriello T and Wierda M, 'The Special Court for Sierra Leone Under Scrutiny' (2006) The International Centre for Transitional Justice 1

Phoebe K, 'The Power to Prosecute: The Special Court for Sierra Leone from a Defence Perspective' (2006) 6 International Criminal Law Review 387

Prooijen J-William van, Coffeng J and Vermeer M (eds), 'Power and retributive justice: How trait information influences the fairness of punishment among power holders' (2014) Volume 50 Journal of Experimental Social Psychology 190

Prooijen Jan-Willem van and Coffeng J (eds), 'What is Fair Punishment for Alex or Ahmed? Perspective Taking Increases Racial Bias in Retributive Justice Judgments' (2013) Volume 26 Social Justice Research 383

Reisman T, 'Charles Taylor found guilty' (2012) International Justice Monitor <<https://tinyurl.com/yanklga7>>

Reydams L, 'The ICTR Ten Years on: Back to the Nuremberg Paradigm?' (2005) Volume 3 Journal of International Criminal Justice 977

Rodman K A, 'Justice is Interventionist: The Political Sources of the Judicial Reach of the Special Court for Sierra Leone' (2013) Volume 73 International Criminal Law Review 63

Roberts A, 'Implementation of the Laws of War in the Late-20th Century Conflict Part 11' (1998) 29 Security Dialogue 137

Roberts A, 'Implementation of the Laws of War in Late-Twentieth-Century Conflicts' (1996) International Law Studies 359

Roach K, 'Changing Punishment at the turn of the Century: Restorative justice on the rise' (2000) Canadian Journal of Criminology 249

Rothhe D L and Mullins C W, 'Beyond the Juristic Orientation of International The Relevance of Criminological Insight to International Criminal Justice: Criminal Law and its Control A Commentary' (2010) Volume 10 International Criminal Law Review 97

Ryan A, 'Special Panels for Serious Crimes of Timor-Leste: Lesson for the Region' (2007) Asia Advocacy Officer for Progression (formerly the Catholic Institute for International relations 95

Schabas W A, 'The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone' (2003) Volume 25 Human Rights Quarterly 1035

Schabas W A, 'Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) Volume 15 TRC and Special Court for Sierra Leone Criminal Law Forum 3

Schabas W A, 'Amnesty, the Sierra Leone Truth and Reconciliation and Commission and the Special Court for Sierra Leone' (2004) Volume 11 University of California, Davis 145

Schimmel N, 'The Moral Case for Restorative Justice as a Corollary of the Responsibility to Protect: A Rwandan Case Study of the Insufficiency of Impact of Retributive Justice on the Rights and Well-Being of Genocide Survivors' (2012) Volume 11 Journal of Human Rights 161

Schocken C, 'The Special Court for Sierra Leone: Overview and Recommendations' (2002) Volume 20 Berkeley Journal of International Law 436

Sellers V P, 'Wartime Female Slavery: Enslavement?' (2011) Volume 44 Cornell International Law Journal 115

Seth R M Lazar, 'Corrective Justice and the Possibility of Rectification' (2008) Volume 11 Ethic Theory Moral Practice 355

Shinoda H, 'Peace- Building by the Rule of Law: An examination Intervention in the Form of International Tribunals' (2002) Volume 17 International Tribunal Journal of Peace and Studies 41

Silva D S, 'Powers and Faden's Concept of Self-Determination and What It Means to 'Achieve' Well-Being in Their Theory of Social Justice' (2013) Volume 6 Public Health Ethics 35

Shany Y, 'How can International Criminal Courts have a Greater Impact on National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation' (2013) Volume 46 Israel Law Review 431

Silva D S, 'Powers and Faden's Concept of Self-Determination and What It Means to 'Achieve' Well-Being in Their Theory of Social Justice' (2013) Volume 6 Public Health Ethics 35

Sirleaf M, 'Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth and Reconciliation Commission for Liberia' (2009) Volume 21 Florida Journal of International Law 210

Sesay M G and Suma M, 'Transitional Justice and DDR: The Case of Sierra Leone' (2009) Research Unit International Center for Transitional Justice 1

Smith S E, 'International Criminal Law' (2009) Volume 12 Otago International Criminal Law Review 211

Smith A A and Meli S, 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) the Special Court for Sierra Leone and No Peace Without Justice 1

Special Court for Sierra Leone: 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) Special Court for Sierra Leone and No Peace Without Justice 1

Stafford N K, 'A Model War Crimes Court: Sierra Leone' (2003) Volume 10 ILSA Journal of International and Comparative Law 117

Staggs M, 'Second Interim Report on the Special Court for Sierra Leone: "Bringing Justice and ensuring lasting Peace": Some reflections on the Trial Phase at the Special Court for Sierra Leone' (2006) U C Berkeley War Crimes Studies Centre 1

Stephen C, 'The Taylor Trial: A Model for International Justice' (August 2010) Global Policy Forum <<https://tinyurl.com/yd7fxeh9>>

Sriram C L, 'Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone' (2006) Volume 29 Fordham International Law Journal 472

Stromseth J E, 'The international Criminal Court and Justice on the Ground' (2009) Arizona State Law Journal 427

Sweeney J A, 'Restorative Justice and Transitional Justice at the ECHR' (2012) Volume 12 International Criminal Law Review 313

The making of Human Rights Reality Watch, 'Hissene Habre trial at the Extraordinary African Chambers in the courts of Senegal' (November 2014) African Legal Aid <<https://tinyurl.com/ybuj88pe>>

The Special Court for Sierra Leone: Residual Special Court for Sierra Leone <<http://rscsl.org/>>

The Special Court for Sierra Leone: Promises and Pitfalls of a 'New Model' (4 August 2003) International Crisis Group <<https://tinyurl.com/ya9y8qdg>>

The Special Court for Sierra Leone: 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) Special Court for Sierra Leone and No Peace Without Justice 1

The 'Sierra Leone Legal Information Institute (Sierra LII)' (2018) Sierra Leone <<https://tinyurl.com/ya2c92f9>>

Torricelli V, 'The Contribution African States Can Make to the ICC Review' (2010) Oxford Transitional Justice Research Working Paper Series 1

Tolbert D, 'Exploring the Legacy of the Special Court for Sierra Leone (2013) International Criminal Transitional Justice <<https://tinyurl.com/y7otwqbq>>

Tolbert D, 'ICTJ: SCSL Holds Valuable Lessons for International Justice' (Feb 2013) <<https://tinyurl.com/ybhajmv5>>

Tom P and Marieke W, 'The Special Court for Sierra Leone Under Scrutiny' (2006) The International Centre for Transitional Justice 1

Trust Africa, 'Hissène Habré Trial before the Extraordinary African Chambers: December Hearings' (February 2016) International Justice Monitor <<https://tinyurl.com/ya2yk6by>>

The Trial of former Liberian president Charles Taylor resumes at the Special Court for Sierra Leone in The Hague' (2010) The Hague Justice Portal <<https://tinyurl.com/y78rw99f>>

'The Trial of former Liberian president Charles Taylor resumes at the Special Court for Sierra Leone in The Hague' (2010) The Hague Justice Portal <<https://tinyurl.com/y78rw99f>>

UNDP, 'The "Legacy" the Special Court for Sierra Leone' (2003) International Centre for Transitional Justice 1 <<https://tinyurl.com/ya5ak8as>>

Vickers L, 'Religious Freedom: Expressing Religion, Attire, and Public Spaces' in David Giller and Florence Z Mao (ed), (2013-2014) Volume XX11 Journal of Law and Policy 483

Wharton S, 'The Evolution of International Criminal Law: Prosecuting 'New' Crimes before the Special Court for Sierra Leone' (2011) Volume 11 International Criminal Law Review 217

Wetze J Erik and Mitri Yvonne, 'The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country' (2008) Volume 7 The Law and Practice of International Courts and Tribunals 81

Wierda M, 'The Special Court for Sierra Leone Under Scrutiny' (2006) The International Centre for Transitional Justice 1

Wierda M, Hayner P and van Zyl P(ed), 'Exploring the Relationship between the Special Court for Sierra Leone and Truth and Reconciliation Commission of Sierra Leone' (2002) The International Center for Transitional Justice 1<<https://tinyurl.com/ycjb5zjn>>

‘Western Theories of Justice’ in the Internet Encyclopaedia of Philosophy- IEP A Per Review Academic Resource

Zacklin R, ‘The Failings of Ad Hoc Imitational Tribunals’ (2004) Volume 2 Journal of International Criminal Justice 541

REPORTS

Audio Visual Library of International Law on Statute for the Special Court for Sierra Leone Freetown, 16 January 2002 <<http://rscsl.org/CMS.html>>

Eleventh and Final Annual Report of the President of the Special Court for Sierra Leone (December 2003) <<https://tinyurl.com/y8a6x4wn>>

JSMP Report on ‘Digest of the Jurisprudence of the Special Panels for Serious Crimes’ (Dili, Timor Leste, April 2007) <<https://tinyurl.com/yc9mromv>>

Justice in motion: The Trial Phase of the Special Court for Sierra Leone <<https://tinyurl.com/y7vz6euy>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: ‘Special Court Prosecutor Says He Will Not Prosecute Children’ (Freetown, 2 November 2002) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: ‘Statement by David M Crane’ (10 March 2003) <<https://tinyurl.com/y9ppezxo>>

Prosecutor: ‘No one is above the law.’ (Freetown, 16 March 2003) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: ‘The Prosecutor Launches “Accountability Now Club” at Fourah Bay College’ (Freetown, 1 July 2004) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: ‘The Prosecutor Launches “Accountability Now Club” at Fourah Bay College’ (Freetown, 1 July 2004) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor, ‘The Opening Statement of D M Crane’ (Freetown 3 June 2004) <<https://tinyurl.com/y9ppezxo>>

Press Release Residual Special Court for Sierra Leone Public Information: ‘Binta Mansaray Appointed RSCSL Registrar’ (30 September 2014) Residual Special Court for Sierra Leone Statute Article 15 of (2010) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: ‘Urgent Statement by the Prosecutor of the Special Court, Desmond de Silva, QC, on his

request to Nigeria to execute a warrant of arrest on former President of Liberia Charles Taylor' (Freetown, 26 March 2006) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor 'Chief Prosecutor Announces the Arrival of Charles Taylor at the Special Court' (Freetown, (Freetown, 29 March 2006) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor Chief Prosecutor Welcomes the Successful Initial Appearance of Charles Taylor in Freetown, Sierra Leone (Freetown, 3 April 2006) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor, 'The Prosecutor's Meeting with Civil Society of Sierra Leone' (Freetown, 31 March 2006) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: 'Special Court Prosecutor to Step Down' (Freetown, 28 April 2006) <<https://tinyurl.com/y9ppezxo>>

Press Release Special Court for Sierra Leone Office of the Prosecutor: 'Prosecutor Welcomes Start Date in Taylor Trial, Promises Access for Sierra Leoneans' (Freetown, 29 January 2007) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: 'Prosecutor Expresses Regret at the Death of Sam Hinga Norman' (Freetown, 22 February 2007) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor (Freetown, 7 May 2007) Trial of Charles Taylor Set for June 4 Opening <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: 'Special Court Prosecutor to Co-Host Film Screening at the UN to Promote Awareness on Child Soldiers' (Freetown, 19 July 2007) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: 'Prosecutor Welcomes Sentences in AFRC Case' (Freetown, 10 July 2008) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: 'Joseph F Kamara Appointed Deputy Prosecutor of Special Court' (Freetown, 6 August 2008) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: 'Special Court Office of the United Nations High Commissioner for Human Rights- 'Rule-of-Law

Tools for Post-Conflicts States Maximizing the legacy of the hybrid court United Nations (New York and Geneva, 2008) <<https://tinyurl.com/y9ppezxo>>

The Sierra Leone Court Monitoring Programme (SLCM) Press Release, Freetown, Sierra Leone (29 January 2009)

Press Release, Prosecutor Hails RUF Convictions' (Freetown, 25 February 2009) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: Special Court Prosecutors Train Northern Police Prosecutors <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: 'Deputy Prosecutor Completes Successful European Mission' (Freetown, June 2009) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor (28 September 2010) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: 'Prosecutor Welcomes Convictions in RUF Appeals Judgement' (Freetown, 14 and 15 May 2011) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor: 'Sixth Colloquium of International Prosecutors' (Freetown, 14 and 15 May 2011) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor (Freetown, 14 May 2012) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court for Sierra Leone Office of the Prosecutor (The Hague, 26 April 2012) <<https://tinyurl.com/y9ppezxo>>

Press Release, Special Court Begins "Holding Town Hall" meetings' (Freetown, 27 September 2002) <<https://tinyurl.com/y9ppezxo>>

Press Release: Ongwen trial opens at International Criminal Court (6 December 2016) <<https://tinyurl.com/yb94l24w>>

Press Release Special Court for Sierra Leone Office of the Prosecutor: 'Welcomes Discussions to Facilitate the Transfer of Charles Taylor to the Special Court' (20 May 2013) <<https://tinyurl.com/y9ppezxo>>

Medicine San Frontiers, 'Ebola: 'The hardest job of all'' (October 2014) <<https://tinyurl.com/y83hdd2r>>

'Report of the Sierra Leone Truth and Reconciliation Commission' (2004) Volume 3A Sierra Leone Web 1

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) <<https://tinyurl.com/y9spbs68>>

Security Council Press Release SC/6910: 'Council asks Secretary-General, Sierra Leone to negotiate agreement for creation of independence Special Court (14 August 2000) <<https://tinyurl.com/y8pmbs7e>>

Sierra Leone Web, 'Truth and Reconciliation Commission Report' (1996 -2017) the Sierra Leone Web <<https://tinyurl.com/y4lzbtrt>>

Special Court for Sierra Leone: Residual Special Court for Sierra Leone: Charles Taylor's timeline of trial events: Prosecutor v Charles Taylor <<http://www.rscsl.org/Taylor.html>>

Special Court for Sierra Leone: 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) Special Court for Sierra Leone and No Peace Without Justice 1 Special Court for Sierra Leone: Residual Special Court for Sierra Leone <<http://rscsl.org/>>

Special Court for Sierra Leone: Residual Special Court for Sierra Leone <<http://rscsl.org/>>

Special Court for Sierra Leone: Residual Special Court for Sierra Leone <<https://tinyurl.com/y9kuuasc>>

Special Court for Sierra Leone: 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) Special Court for Sierra Leone and No Peace Without Justice 1 Special Court for Sierra Leone: 'Impact and Legacy Survey for the Special Court for Sierra Leone' (2012) Special Court for Sierra Leone and No Peace Without Justice 1, Second Annual Report of the President of the Special Court for Sierra Leone, for the Period I January 2004- 17 January 2005 < <https://tinyurl.com/yc64xow>>

Third Annual Report of the President of the Special Court for Sierra Leone, for the Period (January 2005 to January 2006)

The Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (25 May 1999 to 7 July 1999) <<https://tinyurl.com/y8tjos34>>

United Nations, Department of Peacekeeping Operations. 2000. 'The Report of the Panel on United Nations Peace Operations,' (21 August 2000) <<https://tinyurl.com/yc2oglpf>>

NEWSPAPER ARTICLES

BBC, 'Ebola Virus: New case emerges in Sierra Leone' BBC News (London, 15 January 2016) <<https://tinyurl.com/ybw8fkaj>>

Bronner M, 'Former Chad leader Hissene Habre charged with crimes against humanity' the Guardian (London, Wednesday 3 July 2015) <<https://tinyurl.com/y8guxhcx>>

J Leigh, 'Charles Taylor should be tried in Sierra Leone' Cocorioko' The Voice of the People Online Newspaper (12 September 2018) <<https://tinyurl.com/y7w7f7at>>

Maclean R, 'Chad's Hissène Habré found guilty of crimes against humanity' the Guardian (London, May 2016) <<https://tinyurl.com/howl3v3>>

The Guardian, 'Sierra Leone mudslide: president calls for urgent help as search continues' the Guardian (London, 16 Wednesday 2017) <<https://tinyurl.com/y75f5lus>>