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## Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes

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# LESSONS FROM THE SPECIAL COURT FOR SIERRA LEONE ON THE PROSECUTION OF GENDER-BASED CRIMES

VALERIE OOSTERVELD\*

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## I. INTRODUCTION

Gender-based crimes were rampant during the decade-long armed conflict in Sierra Leone. Crimes of sexual violence such as rape, sexual mutilation, and sexual slavery were committed.<sup>1</sup> There were also crimes targeted against individuals based on gender, including the forced recruitment of boys and men into fighting forces or diamond mining, and the forced marriage of girls and women to combatants.<sup>2</sup> The Special Court

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1. See HUMAN RIGHTS WATCH, "WE'LL KILL YOU IF YOU CRY": SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT 25-50 (2003), available at <http://www.hrw.org/sites/default/files/reports/sierleon0103.pdf> (reporting acts of sexual violence by all actors in the conflict, including rape, rape with objects such as weapons or burning wood, "virgination" of young girls, sexual mutilation, forced pregnancies, forced abortion, and sexual slavery); PHYSICIANS FOR HUMAN RIGHTS, WAR-RELATED SEXUAL VIOLENCE IN SIERRA LEONE: A POPULATION-BASED ASSESSMENT 2-4 (2000) (deducing from study data that approximately 50,000 to 64,000 internally displaced women in Sierra Leone may have been victims of sexual violence, including rape (89% of study participants), gang rape (33% of study participants), sexual slavery (15% of study participants), and several other crimes that occurred mostly between 1997 and 1999).

2. See HUMAN RIGHTS WATCH, *supra* note 1, at 42-43 (noting that rebel forces used abduction as a means of recruiting by forcibly conscripting boys and men in towns the rebel forces attacked, and that abducted women became sexual slaves and were forced to perform slave labor); SUSAN MCKAY & DYAN MAZURANA, WHERE ARE THE GIRLS? GIRLS IN FIGHTING FORCES IN NORTHERN UGANDA, SIERRA LEONE AND MOZAMBIQUE: THEIR LIVES DURING AND AFTER WAR 91-93 (2004) (observing that girls participated in fighting forces as cooks, porters, caretakers, laborers in diamond

for Sierra Leone was created in 2002 as a joint international-domestic effort to prosecute those bearing ~~social responsibility for~~ crimes against humanity and war crimes committed during the conflict.<sup>3</sup> Given the widespread nature of gender-based violations, it was likely that the Special Court's trials would explore the accountability of individuals for these crimes.<sup>4</sup> Thus, the Prosecutor of the Special Court made the prosecution of gender-based crimes a priority. As a result, ten out of the thirteen accused from the Sierra Leone conflict were charged with the crimes against humanity of rape and sexual slavery, and the war crime of outrages upon personal dignity.<sup>5</sup> Six of the accused were also charged with forced marriage under the heading of the crime against humanity of other

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mines, and as "wives" of combatants).

3. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 1, Jan. 16, 2002, 2178 U.N.T.S. 138, at 138.

4. However, it was not a foregone conclusion—other international criminal tribunals have had spotty records with respect to the prosecution of gender-based crimes, even when the conflicts under their mandate were rife with such crimes. *See, e.g.*, BINAIFER NOWROJEE, "YOUR JUSTICE IS TOO SLOW": WILL THE ICTR FAIL RWANDA'S RAPE VICTIMS? 6, 9 (criticizing the International Criminal Tribunal for Rwanda's (ICTR) sexual violence prosecution record, noting that because the Prosecutor's Office lacked a comprehensive strategy for prosecuting sexual crimes, no rape charges were brought in 90% of the cases, and 20% of the cases resulted in acquittals because the Prosecutor's Office failed to prove the case beyond a reasonable doubt).

5. The ten charged with these crimes included Charles Taylor, three Armed Forces Revolutionary Council (AFRC) accused, three Revolutionary United Front (RUF) accused, Sam Bockarie, Johnny Paul Koroma, and Foday Sankoh. The indictments against Bockarie and Sankoh were later withdrawn due to their deaths. *See* Prosecutor v. Bockarie, Case No. SCSL-03-04-I, Indictment, ¶¶ 33, 41-45 (Mar. 7, 2003) (charging Sam Bockarie with rape, sexual slavery and any other form of sexual violence, and outrages upon personal dignity) *withdrawn*, Case No. SCSL 03-04-I-022, Withdrawal of Indictment (Dec. 8, 2003) (withdrawing Bockarie's indictment due to his death). The original indictment noted that

the AFRC/RUF routinely captured and abducted members of the civilian population. Captured women and girls were raped; many of them were abducted and used as sex slaves and as forced labour. Some of these women and girls were held captive for years. Men and boys who were abducted were also used as forced labour [and held captive] . . . AFRC/RUF also physically mutilated men, women and children, including amputating their hands or feet and carving 'AFRC' and 'RUF' on their bodies.

*Id.* ¶ 33. *See* Prosecutor v. Koroma, Case No. SCSL-03-03-I, Indictment, ¶¶ 39-43 (Mar. 7, 2003) (charging Koroma with the same sexual violence crimes as charged against Bockarie); Prosecutor v. Sankoh, Case No. SCSL-03-02-I, Indictment, ¶¶ 42-46 (Mar. 7, 2003) (charging Sankoh with the same sexual violence crimes as charged against Bockarie); *see also* Prosecutor v. Taylor, Case No. SCSL-03-01-PT, Prosecution's Second Amended Indictment, Counts 4-6 and ¶¶ 14-17 (May 29, 2007) (detailing charges of rape, sexual slavery, and outrages upon personal dignity against Charles Taylor, including the rape of an unknown number of women and girls in Kono District, Kailahun District, and Freetown and the Western Area, as well as the abduction and forced sexual slavery of girls and women from these areas). The Prosecutor tried to amend the Civil Defence Forces (CDF) indictment to include similar charges, but was unsuccessful. *See* Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶ 6 (May 20, 2004) (describing the Prosecution's proposed amendment to the original indictment adding counts of rape, sexual slavery, other inhumane acts like forced marriages, and outrages upon personal dignity). The *Norman* decision is examined in more detail in Parts IV and V, *infra*.

inhumane acts.<sup>6</sup>

In 2007 and 2008, the Special Court issued its first two trial-level and first two appellate-level judgments in what are popularly known as the Armed Forces Revolutionary Council (AFRC) and Civil Defence Forces (CDF) cases.<sup>7</sup> A number of important lessons on the prosecution of gender-based violations can be drawn from these judgments and this Article explores each of the lessons in turn. The first lesson from the Special Court's judgments to date is that seemingly gender-neutral crimes may in fact contain gendered elements. Gendered crimes may be multilayered and complex, and may include both sexual and non-sexual aspects. This lesson emerges most noticeably from the AFRC trial and appeals judgments. In *Prosecutor v. Brima, Kamara & Kanu*, the Court explored the nature of the crime against humanity of forced marriage as an inhumane act.<sup>8</sup> A majority of the Trial Chamber equated forced marriage with sexual slavery, thereby categorizing forced marriage solely as a crime of sexual violence.<sup>9</sup> On appeal, the Appeals Chamber corrected this misperception, characterizing forced marriage as a crime distinct from sexual slavery because it is a "forced conjugal association with another person resulting in great suffering, or serious physical or mental injury."<sup>10</sup>

The second lesson relates to evidence. At the trial level in the CDF case, the Trial Chamber rejected the Prosecutor's initial request to amend the joint indictment to include certain gender-based crimes, and a subsequent request to consider evidence of gender-based acts as proof of either the crime against humanity of other inhumane acts or the war crime of cruel treatment.<sup>11</sup> The dissenting justice and the Appeals Chamber both raised important evidentiary issues to challenge the Trial Chamber's decisions,

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6. The AFRC accused and the three RUF accused were charged with forced marriage. See *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Corrected Amended Consolidated Indictment, ¶¶ 54-60 (Aug. 2, 2006) (charging the RUF members with rape, sexual slavery and any other form of sexual violence, and other inhumane acts, specifically forced marriages where the "wives" were forced to perform a number of conjugal duties under coercion by their "husbands"); *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶¶ 51-57 (Feb. 18, 2005) (charging the three members of the AFRC with rape, sexual slavery and any other form of sexual violence, and other inhumane acts, specifically forced marriages with members of the AFRC).

7. *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A, Appeals Judgment (May 28, 2008); *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-A, Appeals Judgment (Feb. 22, 2008); *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-T, Trial Chamber Judgment (Aug. 2, 2007); *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-T, Judgment (June 20, 2007).

8. *Brima*, Case No. SCSL-04-16-T, Trial Chamber Judgment, ¶¶ 701-704.

9. See *id.* ¶ 704 (finding that the Prosecution failed to establish the elements of "forced marriage" as a crime independent of the crime of sexual slavery).

10. *Brima*, Case No. SCSL-04-16-A, Appeals Judgment, ¶ 195.

11. See *Norman*, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶¶ 82-87 (dismissing the motion to amend the Indictment as untimely, although noting that "[t]he Chamber is preeminently conscious of the importance that gender crimes occupy in international criminal justice given the very high casualty rates of females in sexual and other brutal gender-related abuses during internal and international conflicts").

noting that the circumstances surrounding the collection of evidence of gender-based violations may differ from the circumstances relating to other crimes, and that evidence of gender-based violations is not inherently more prejudicial than other kinds of evidence.<sup>12</sup>

The final lesson relates to how the Court's mandate to address gender-based crimes is connected with the rights of the accused. This lesson is most evident in the CDF case, in which a majority of the trial judges failed to bear in mind the Prosecutor and Court's obligations to consider gender-based crimes with the defendants' rights to be tried without undue delay and to have adequate time to prepare a case. On appeal, Justice Winter convincingly concluded in her dissent that the majority trial judges should have considered several other important factors: the scope and nature of the amendments, the consequences of admittance or denial of amendments on the trial proceedings, the fairness of the proceedings to both the defense and prosecution, whether denial of the amendments would impede the Special Court's fulfillment of its mandate, and whether victims would be provided with proper access to justice.<sup>13</sup> In other words, the majority trial judges should have balanced the rights of the accused with these other relevant matters.

It may seem that some of these lessons are obvious. For example, the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) have considered evidence of gender-based acts under the heading of crimes such as torture, inhumane acts and enslavement.<sup>14</sup> These tribunals have also recognized the difficulties of collecting evidence of gender-based violations.<sup>15</sup> Even though the ICTY and ICTR explored these issues prior to the Special Court's consideration in the AFRC and CDF cases, it is important to note that the Special Court has confirmed that these approaches are correct. The Special Court's reasoning creates internal precedent for the remaining Special Court cases and, more generally, strengthens accepted practice within international criminal law. The Special Court has also analyzed gender issues not yet examined by the

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12. See *Fofana*, Case No. SCSL-04-14-A, Appeal Judgment, sec. VII, ¶¶ 80-85 (Winter, J., partially dissenting opinion) (finding that the trial court erred by dismissing the prosecution's motion to amend the indictment because it is extremely difficult to obtain evidence of gender-based sexual crimes and that allowing the prosecution to temporally and geographically expand their investigation would not have compromised the defendants' rights).

13. See *id.* ¶¶ 82-86 (finding error with the Trial Chamber's reluctance to admit evidence of sexual violence because the allegations were not specifically pleaded in the Indictment, noting that the accused had sufficient notice that evidence of gender-based sexually violent crimes such that it could be admitted under counts 3 and 4 of the Indictment, and that the Prosecution's Pre-Trial Brief clearly noted evidence of rape and sexual slavery).

14. See *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 745 (Feb. 22, 2001); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 267 (Dec. 10, 1998); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 697 (Sept. 2, 1998).

15. E.g., *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 417, 455 (discussing the effect of sexual violence trauma on memory).

ICTY or ICTR.<sup>16</sup> The Special Court's judgments to date demonstrate that there is more work to do within international criminal law on the analysis of gender-based violations, even though there has been much progress in this field over the last fifteen years.

## II. THE AFRC AND CDF ACCUSED

The conflict in Sierra Leone is widely recognized to have begun in March 1991 with an attack in the Kailahun District by the rebel Revolutionary United Front (RUF) forces led by a former soldier of the Sierra Leone Army, Foday Sankoh.<sup>17</sup> RUF forces controlled large parts of Sierra Leone, especially in the northern regions, by 1995.<sup>18</sup> This success prompted the emergence of local militias, primarily consisting of traditional hunters, who fought on behalf of the government and became known as the Civil Defence Forces (CDF).<sup>19</sup> The CDF collaborated with the fighting forces of the Economic Community of West African States Monitoring Group, or ECOMOG.<sup>20</sup> Ahmad Tejan Kabbah, leader of the Sierra Leone People's Party, won the March 1996 Sierra Leone presidential elections.<sup>21</sup> In May 1997, junior members of the Sierra Leone Army seized power from the Kabbah government because they believed the government favored the CDF over the Army.<sup>22</sup> They formed a new government called the Armed Forces Revolutionary Council (AFRC), headed by Johnny Paul Koroma<sup>23</sup> who invited the RUF to join the AFRC.<sup>24</sup> The AFRC and RUF fought together to gain control over parts of Sierra Leone controlled by the CDF as well as to control diamond mining.<sup>25</sup> Over time, however, relations between the AFRC and RUF deteriorated and the Kabbah government was

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16. For example, the Special Court has studied forced marriage and concluded that it is different from sexual slavery. *See, e.g., Brima*, Case No. SCSL-04-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶¶ 8, 10, 52 (May 6, 2004). In *Brima*, the Prosecution requested to amend the Indictment with specific references to forced marriage. It submitted to the court an "Investigator's Statement" that explained "that the crimes of sexual violence are not simply sexual slavery but are most appropriately characterized as 'forced marriages.' [The Investigator] state[d] that new investigations have 'clarified' the nature of the relationships." *Id.* Ultimately, the court allowed the additional count of forced marriage, viewing it as a "kindred offense" and concluded that the defense was already on notice. *Id.*

17. *See Brima*, Case No. SCSL-2004-16-A, Appeals Judgment, ¶ 4.

18. *See id.* (describing how RUF consolidated its territorial control to seize nationwide power).

19. *See id.*

20. *See Fofana*, Case No. SCSL-04-14-A, Judgment, ¶¶ 8-9.

21. *See Brima*, Case No. SCSL-2004-16-A, Appeals Judgment, ¶ 5 (discussing how government support for the CDF spurred a failed *coup d'état* by Johnny Paul Koroma, who was imprisoned following the attempt).

22. *See Brima*, Case No. SCSL-04-16-T, Judgment, ¶ 164.

23. *See Brima*, Case No. SCSL-2004-16-A, Appeals Judgment, ¶ 7 (finding that this coup placed Koroma in power after freeing him from prison and suspending Sierra Leone's constitution).

24. *See id.*

25. *See Brima*, Case No. SCSL-04-16-T, Judgment, ¶¶ 166-172.

reinstated in March 1998.<sup>26</sup> The period that followed, including the AFRC's invasion of Freetown in September 1997, was marked by widespread and brutal atrocities.<sup>27</sup> The AFRC eventually divided into two groups in April 1999: the first group included the "West Side Boys," who attacked the civilian population in the Port Loko District; and the second group included supporters of an RUF faction. In July 1999, Kabbah's government signed the Lomé Peace Accord with the RUF, but hostilities did not officially end until January 2002.<sup>28</sup>

Indictments against AFRC leaders Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu were approved on March 7, May 28, and September 16, 2003 respectively.<sup>29</sup> The indictments were later consolidated and amended.<sup>30</sup> The amended consolidated indictment charged Brima, Kamara, and Kanu with seven counts of crimes against humanity, including rape, sexual slavery, and forced marriage (as a separate inhumane act); six counts of violations of article 3 common to the Geneva Conventions; and one count of a serious violation of international humanitarian law, namely the conscription, enlistment, or use of child soldiers.<sup>31</sup> Brima was arrested on March 10, Kamara on May 29, and Kanu on September 17, 2003.<sup>32</sup> Their joint trial began on March 7, 2005 and concluded on December 8, 2006.<sup>33</sup> The trial judgment was issued on June 20, 2007,<sup>34</sup> and was followed by an appeals judgment on February 22, 2008.<sup>35</sup> Details relating to gender issues raised in these judgments are examined in Section III of this Article.

Three individuals within the CDF were indicted by the Prosecutor of the Special Court: Sam Hinga Norman was the CDF's "National Coordinator,"

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26. See *Brima*, Case No. SCSL-2004-16-A, Appeals Judgment, ¶ 10.

27. See *Brima*, Case No. SCSL-04-16-T, Judgment, ¶¶ 173-207 (claiming that attacks on Freetown continued after the AFRC signed the Conakry Accord in October 1997).

28. See *Brima*, Case No. SCSL-2004-16-A, Appeals Judgment, ¶ 12.

29. Prosecutor v. Brima, Case No. SCSL-2003-06-I, Indictment (Mar. 7, 2003); Prosecutor v. Brima, SCSL-2003-06-I, Decision Approving the Indictment and Order for Non-Disclosure (Mar. 7, 2003); Prosecutor v. Kamara, Case No. SCSL-2003-10-I, Indictment (May 28, 2003); Prosecutor v. Kamara, SCSL-2003-10-I, Decision Approving the Indictment, the Warrant of Arrest, and Order for Non-Disclosure (May 28, 2003); Prosecutor v. Kanu, Case No. SCSL-2003-13-I, Indictment (Sept. 15, 2003); Prosecutor v. Kanu, Case No. SCSL-2003-13-I, Decision Approving the Indictment, the Warrant of Arrest and Order for Transfer and Detention, and Order for Non-Public Disclosure (Sept. 16, 2003). An indictment was also issued for Johnny Paul Koroma, Prosecutor v. Koroma, Case No. SCSL-2003-03-I, Indictment (Mar. 7, 2003). However, Koroma is presumed dead. See, e.g., *War Crime Court Probes Death Reports*, BBC NEWS, June 16, 2003, <http://news.bbc.co.uk/2/hi/africa/2992462.stm> (last visited May 21, 2009).

30. *Brima*, Case No. SCSL-2004-16 PT, Further Amended Consolidated Indictment.

31. See *id.* ¶¶ 41-79.

32. See *Brima*, Case No. SCSL-04-16-T, Judgment, at Annex A: Procedural History, ¶¶ 1-3.

33. See *id.* ¶¶ 58, 62.

34. *Brima*, Case No. SCSL-04-16-T, Judgment.

35. *Brima*, Case No. SCSL-2004-16-A, Appeals Judgment.

Moinina Fofana was the “Director of War,” and Allieu Kondewa was the “High Priest.”<sup>36</sup> The original indictment against Norman was approved on March 7 and indictments against Fofana and Kondewa were approved on June 24, 2003.<sup>37</sup> The three indictments were later consolidated into a single indictment on February 5, 2004.<sup>38</sup> Norman, Kondewa, and Fofana were charged with two counts of crimes against humanity, five counts of violations of article 3 common to the Geneva Conventions and of Additional Protocol II, and one count of a serious violation of international humanitarian law.<sup>39</sup> Norman was arrested on March 10 and Kondewa and Fofana were arrested on May 29, 2003.<sup>40</sup> Their joint trial commenced on June 3, 2004 and was completed on November 29, 2006. Norman died in February 2007, prior to the release of the trial judgment,<sup>41</sup> and proceedings against him were thereafter terminated.<sup>42</sup> The trial judgment against Kondewa and Fofana was issued on August 2, 2007<sup>43</sup> and the appeals judgment on May 28, 2008.<sup>44</sup> The gender-related aspects of these judgments are discussed below in Parts IV and V.

### III. LESSON ONE: GENDERED CRIMES MAY BE COMPLEX AND SEEMINGLY GENDER-NEUTRAL CRIMES MAY CONTAIN GENDERED ELEMENTS

In the AFRC case, all three accused were charged with the crimes against humanity of rape, sexual slavery, and any other form of sexual violence, and forced marriage under the category of “other inhumane acts” as well as the war crime of outrages upon personal dignity.<sup>45</sup> Forced marriage refers to the practice during the Sierra Leonean conflict of assigning abducted girls and women to combatants as “wives.” These

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36. See *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-T, Judgment, ¶ 1.

37. *Prosecutor v. Fofana*, Case No. SCSL-03-11-I, Indictment (June 24, 2003); *Prosecutor v. Kondewa*, Case No. SCSL-03-12-I, Indictment, (June 24, 2003); *Prosecutor v. Norman*, Case No. SCSL-03-08-I, Indictment (Mar. 7, 2003).

38. *Prosecutor v. Norman, Fofana & Kondewa*, Case No. SCSL-03-14-I, Indictment (Feb. 5, 2004)

39. See *Norman*, Case No. SCSL-03-14-I, Indictment, ¶¶ 1-8 (Feb. 5, 2004).

40. See *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, ¶ 1 (Oct. 9, 2007) (noting that the accused persons were arrested for allegedly committing crimes against humanity and other serious offenses as defined by the Special Court for Sierra Leone); see also Press Release, David M. Crane, Prosecutor, Special Court for Sierra Leone (Mar. 10, 2003), available at <http://www.specialcourt.org/documents/WhatHappening/PressReleaseOTP.html> (announcing the arrest of Norman for war crimes, crimes against humanity, and violations of international humanitarian law).

41. See *Fofana*, Case No. SCSL-04-14-T, Judgment ¶ 4 (stating that Norman died in the hospital after completion of the trial).

42. See *id.* ¶ 5 (noting that the judgment in relation to the two remaining defendants was based on the evidence of record submitted by all original parties).

43. *Fofana*, Case No. SCSL-04-14-T, Judgment (Aug. 2, 2007).

44. *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A, Appeals Judgment, (May 28, 2008).

45. See *Brima*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶¶ 51-57 (discussing the widespread sexual violence committed against civilian women and girls, including rapes involving multiple rapists and abductions of groups of civilian women for the purpose of sexual slavery).



“wives” were often raped by their “husbands” and were sometimes forced to bear and rear resulting children. “Wives” were also usually forced to undertake domestic labor such as cleaning, cooking, and laundry.<sup>46</sup> They were also expected to protect the property of their “husband” and to move his possessions as needed.<sup>47</sup> As a result of the violence they suffered, some of these “wives” contracted sexually transmitted diseases or HIV.<sup>48</sup> Thus, forced marriage is a type of gender-based crime with sexual and numerous non-sexual aspects.

However, it was not understood in this way by a majority of the Trial Chamber in the AFRC case. The majority held that “the Prosecution evidence in the present case does not point to even one instance of a woman or girl having had a bogus marriage forced upon her in circumstances which did not amount to sexual slavery.”<sup>49</sup> According to the majority, one must subtract the sexual aspects of the forced marriage evidence (as these go to proof of sexual slavery) and the remaining non-sexual aspects (presumably the forced domestic labor, physical abuse, and forced child-bearing and child-rearing) do not reach the gravity required for “other inhumane acts.”<sup>50</sup> Thus, the majority found that the evidence of forced marriage was subsumed by the crime against humanity of sexual slavery, and dismissed the forced marriage charges as redundant.<sup>51</sup> The majority also dismissed the sexual slavery charges for duplicity, as the original charge was for “sexual slavery and any other form of sexual violence.”<sup>52</sup> The majority then considered the evidence of sexual slavery under the war crimes charge of outrages upon personal dignity.

The majority of the Trial Chamber viewed forced marriage as a sexual crime. By focusing entirely on the sexual aspects of forced marriage, the majority focused too much on the sexual aspects of the crime and focused too little on the harm caused by the non-sexual aspects. As a result, it did

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46. See *Brima*, Case No. SCSL-04-16-T, Judgment, ¶10 (June 20, 2007) (Sebutinde, J., concurring) (noting that stereotyped perceptions of women are exacerbated during wartime and put women at greater risk for abduction and violence).

47. *Id.* ¶14; see also *id.* ¶31 (Doherty, J., dissenting) (stating that “bush wives” were also expected to gratify the sexual wishes of their husbands without question).

48. See *id.* ¶30 (Doherty, J., dissenting) (noting also that miscarriages were very common among “bush wives,” and medical attention was often limited or unavailable for such women).

49. *Id.* ¶710 (majority opinion) (noting that not one of the victims of sexual slavery had given evidence that their rebel captor’s declaration of marriage had caused any particular physical or mental trauma).

50. See *id.* ¶¶697, 703-704, 710 (arguing that such “inhumane acts” must include conduct that is not subsumed by other crimes in the Statute).

51. See *Brima*, Case No. SCSL-04-16-T, Judgment, ¶¶711, 714 (Sebutinde, J., concurring) (maintaining that the use of the term “wife” by rebel forces was used to show ownership over the victims rather than to establish a marital relationship with the victims).

52. See *id.* ¶¶93-95 (Doherty, J., dissenting) (arguing that the proper remedy was not to strike out the entire charge, but to sever “any other form of sexual violence” from that charge); see also *Brima*, Case No. SCSL-2004-16-A, Appeals Judgment, ¶¶99-110 (noting that the Appeals Chamber ruled that the sexual slavery charges should not have been dismissed).

not take into account the ongoing harm caused by the social stigma of having been a “wife.”<sup>53</sup> In dissent, Justice Doherty disagreed with the majority’s approach. She outlined a collection of harms that may be suffered by those who were forcibly married: abduction, repeated rape and ongoing sexual violence, resulting pregnancies, physical abuse, miscarriages, death threats, being forced to live with and be loyal to an individual the victim fears or despises, forced relocation with the “husband” as the troops moved, mental trauma, lasting stigma associated with being labeled a “wife,” and rejection by society, all of which may be compounded by the youth of the victim.<sup>54</sup> Unlike the majority however, she did not focus on the sexual aspects of forced marriage. Instead, she argued that the “crucial element of ‘forced marriage’ is the imposition, by threat or physical force arising from the perpetrator’s words or other conduct, of a forced conjugal association by the perpetrator over the victim.”<sup>55</sup> She noted, however, that abduction, rape, and other acts may help to prove the lack of consent of the victim.<sup>56</sup> She also pointed out that this definition of forced marriage meets the requirement of causing serious harm to the mental or physical health of the victim and therefore qualifies as an inhumane act as a crime against humanity.<sup>57</sup>

The Appeals Chamber took a view similar to that of Justice Doherty. It chided the Trial Chamber majority for characterizing forced marriage as a sexual crime: “no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery.”<sup>58</sup> They involve different elements of crime, and “unlike sexual slavery, forced marriage implies a relationship of exclusivity between the ‘husband’ and ‘wife,’ which could lead to disciplinary consequences for breach of this

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53. See *Brima*, Case No. SCSL-04-16-T, Judgment, ¶ 16 (Sebutinde, J., concurring). Justice Sebutinde demonstrated a somewhat more nuanced view than that expressed in the majority judgment, noting that “wives” were “forced to render gender-specific forms of labour (conjugal duties) including cooking, cleaning, washing clothes or carrying loads for [the husband], for no genuine reward.” *Id.* She seemed to argue that these acts are proof of the element of sexual slavery requiring the exercise of powers attaching to the right of ownership, while the rape fulfilled another element, that of requiring the perpetrator to cause the victim to engage in sexual acts. *Id.* This is a narrow approach to forced marriage that views the gender-specific labor as a mode of proof of the sexual crimes and not as separate proof of harm.

54. See *id.* ¶¶ 37-50 (Doherty, J., dissenting) (detailing testimony from a variety of witnesses who had suffered abduction and forced marriage in Sierra Leone). Testimonies included accounts of sexual slavery, forced domestic labor (such as laundering, cooking, etc.), forced marriage, rape, and the status difference between “wives” of commanders and other abducted women. *Id.*

55. See *id.* ¶ 53 (noting that such imposition of a forced conjugal relationship can result from the perpetrator’s words or conduct).

56. See *id.* ¶¶ 52, 70 (reiterating that the crime of “forced marriage” is “concerned primarily with the mental and moral suffering of the victim.”).

57. See *id.* ¶ 57 (asserting that the evidence presented met the legal threshold to constitute a “crime against humanity”).

58. See *Brima*, Case No. SCSL-2004-16-A, Appeals Judgment, ¶ 195 (arguing that there are a number of distinguishing factors between forced marriage and sexual slavery, despite the fact that these categories share a common aspect of non-consensual sex).

exclusive arrangement.”<sup>59</sup> The Appeals Chamber defined the crime in a slightly more expansive manner than Justice Doherty as a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.<sup>60</sup>

This comparison of the reasoning of the Trial and Appeals Chambers’ rulings leads to the conclusion that judges (and prosecutors, defense lawyers and, in the International Criminal Court, victims’ counsel) must not jump to the conclusion that gender-based crimes are to be equated with the narrower category of crimes of sexual violence. Gender-based crimes include crimes such as rape and sexual slavery, but the classification is much wider. Forced marriage is one example of a gender-based crime that may have sexual aspects (for example, repeated rape), but also may have many non-sexual aspects (for example, forced child-bearing and child-rearing, cooking and laundering).<sup>61</sup> In other words, gender must be understood in all of its complexity.<sup>62</sup> The understanding of gender must not be collapsed into that of sex.<sup>63</sup>

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59. See *id.* ¶ 195 (asserting that such distinctions imply that forced marriage is not a predominantly sexual crime in nature).

60. *Id.* ¶ 196 (noting that the Court’s definition refers explicitly to the concept of forced marriage within the specific context of the conflict in Sierra Leone).

61. See *id.* ¶ 52 (Doherty, J., dissenting) (emphasizing that “forced marriage” does not require proof of physical violence).

62. Gender has been defined by the United Nations Office of the Special Advisor on Gender Issues as

the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.

Office of The Special Advisor on Gender Issues and Advancement of Women, Dep’t of Economic and Soc. Affairs, Concepts and Definitions, <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> (last visited May 21, 2009). See Valerie Oosterveld, *The Special Court for Sierra Leone, Child Soldiers and Forced Marriage: Providing Clarity or Confusion?*, 45 CAN. Y.B. INT’L L. 131-72 (2009) [hereinafter Oosterveld, *Child Soldiers and Forced Marriage*]; Valerie Oosterveld, *The Special Court for Sierra Leone’s Consideration of Gender-Based Violence: Contributing to Transitional Justice?*, 10 HUM. RTS. REV. 73-98 (2009) [hereinafter Oosterveld, *Consideration of Gender-Based Violence*].

63. See Karen Engle, *Feminism and its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT’L L. 778, 815 (2005) (examining how the Office of the Prosecutor and the International Criminal Tribunal for the Former Yugoslavia emphasized ethnicity over gender as the motivating force behind the sexual violence, thereby placing men and women within the same standard, and raising the possibility that a gender-neutral approach could shift the focus from violence and “gender oppression” to sex); Katherine M. Franke, *Gendered Subjects of Transitional*

This author hopes that the International Criminal Court (ICC) will heed this lesson, as a comprehensive understanding of gender will assist prosecutors to better explain the harms suffered by certain victims, and this, in turn, will help judges to understand these harms in a wider context. Forced marriage of the kind discussed in the AFRC case has taken place in the conflict in northern Uganda by the Lord's Resistance Army.<sup>64</sup> The ICC's Prosecutor has also referred to forced marriage in the conflict in the Democratic Republic of the Congo.<sup>65</sup> However, in this case the Prosecutor has chosen to charge only the sexual slavery aspect of forced marriage and not the other aspects.<sup>66</sup> In the confirmation of charges hearing, he successfully used evidence of forced marriage to prove that there is sufficient evidence to establish substantial grounds to believe that civilian women were subjected to the crime against humanity of sexual slavery.<sup>67</sup> The Pre-Trial Chamber seemed to adopt an approach similar to that of Justice Sebutinde in the AFRC case, using evidence of non-sexual acts such as abduction, imprisonment and forced cooking as proof of the exercise of powers attaching to the right of ownership.<sup>68</sup> Perhaps in future

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*Justice*, 15 COLUM. J. GENDER & L. 813, 822-23 (2006).

The reduction of gender to the sexual and the ignorance of how men can suffer gendered violence is, to be most generous, a form of overcompensation for the years of ignoring women's place in humanitarian law . . . . [T]o see the 'gender issue' surface only in the case of sexual violence is to elide the gendered dimensions of war, violence, and the investment in killing over caring.

*Id.*

64. See MCKAY & MAZURANA, *supra* note 2, at 73 (presenting data that shows that girls' functions within the LRA were more complex than the original reports focusing on forced marriage and sexual slavery stated, and emphasizing that "72 percent reported receiving weapons and military training"); see also Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, Counts 5 & 13 (Sept. 27, 2005) (noting that the International Criminal Court has issued warrants of arrest including reference to sexual slavery for Joseph Kony as the leader of the Lord's Resistance Army); ABDUCTED AND ABUSED: RENEWED CONFLICT IN NORTHERN UGANDA, 15 HUM. RTS. WATCH 12(A), July 2003, at 28-31 (describing forced marriage to LRA combatants resulting in rape, unwanted pregnancies, forced childbearing and childrearing, transmission of sexually transmitted diseases and HIV, and difficulties adjusting to post-LRA life).

65. See Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-01/04-01/07, Prosecution's Submission of Public Version of Document Containing the Charges, ¶ 89 (Apr. 24, 2008) (maintaining that women who were captured and spared because they hid their ethnicity, were raped, forcibly taken to military camps and given as "wives" to their captors).

66. *Id.* at Count 7.

67. See Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 353-354 (Sept. 30, 2008) (examining the evidence presented by civilian women from Bogoro who were captured, raped and bore children by their captors).

68. See U.N. PREPARATORY COMM'N FOR THE INT'L CRIM. CT., REPORT OF THE PREPARATORY COMM'N FOR THE INT'L CRIM. CT., PART II: FINALIZED DRAFT TEXT OF THE ELEMENTS OF CRIMES, U.N. Doc. PCNICC/2000/1/Add.2, at 13 (Nov. 2, 2000). The ICC's Elements of Crime delineates the following elements for the crime of sexual slavery:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar

cases the Prosecutor could instead charge all of the acts relating to forced marriage, and not only the sexual slavery. *Journal of Gender, Social Policy & the Law* 17(2) 118-122. harm.<sup>69</sup>

The next part of the first lesson relates to the fact that seemingly gender-neutral crimes may include gendered elements. A majority of the ARFC Trial Chamber and a majority of the CDF Trial Chamber both mistakenly concluded that acts of sexual violence should only be used to prove the crimes against humanity of “rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence” under article 2(g) of the Special Court’s Statute.<sup>70</sup> As mentioned earlier, in the AFRC case the Prosecutor argued that forced marriage could be considered under the crime against humanity of “other inhumane acts,” but the Trial Chamber majority disagreed.<sup>71</sup> The Appeals Chamber corrected this misapprehension, noting that the ICTY and ICTR have recognized a wide range of sexual and other gender-based acts as inhumane acts, and that there is no reason why the listing of sexual violence crimes in article 2(g) should foreclose the possibility of charging as inhumane acts crimes which may have a sexual or gender component.<sup>72</sup>

A similar conclusion emerged in the CDF appeals judgment. During the CDF trial, the Prosecutor brought a motion to determine admissibility of acts of sexual violence<sup>73</sup> as evidence of the crime against humanity of other

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deprivation of liberty.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

*Id.*

69. This could be done through the charge of inhumane acts as a crime against humanity, as was done in the Special Court, or by coupling charges of the crimes against humanity of enslavement and sexual slavery. Another option, where warranted, is to charge forced marriage as the crime against humanity of gender-based persecution.

70. Statute of the Special Court for Sierra Leone art. 2(g), Jan. 16, 2002, 2178 U.N.T.S. 145.

71. *See Brima*, Case No. SCSL-04-16-T, Judgment, ¶¶ 703-707, 710 (arguing for a restrictive interpretation that the residual nature of “other inhumane acts” indicates that evidence of a sexual nature could only be considered under the sexual slavery charge, and that remaining evidence of forced marriage was not of sufficient gravity to qualify as an “inhumane act”).

72. *See Brima*, Case No. SCSL-04-16-A, Appeals Judgment, ¶¶ 184-186 (asserting that the Trial Chamber erred in finding that Article 2(i) of the Statute excludes sexual crimes and indicating that the statute must be interpreted expansively to prevent the “imagination of future torturers” from getting around the crimes encompassed by the statute).

73. In pleadings and decisions, the Special Court’s Prosecutor and the trial judges tended to use the word “sexual” as if it is synonymous with “gender,” even where the word “gender” was more appropriate. This Article uses the term “gender” where appropriate, except when quoting judicial decisions that use the term “sexual” even though the term “gender” should have been used. *See Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A, Appeals Judgment, n.1294 (May 28, 2008) (Winter, J., dissenting). Justice Winter noted that the prosecution used the term “sexual

inhumane acts (Count 3 of the Indictment) and the war crime of cruel treatment (Count 4).<sup>74</sup> A majority of the Trial Chamber ruled that evidence of sexual violence was not admissible under either count.<sup>75</sup> While the Trial and, therefore, Appeal Chambers' consideration of this issue focused in large part on whether the Prosecutor could bring such evidence when it was not indicated in the Indictment, the Appeals Chamber, citing ICTY and ICTR jurisprudence, did note that sexual violence can indeed constitute an inhumane act as alleged in Count 3 and cruel treatment as alleged in Count 4.<sup>76</sup> The lesson emerging from both cases, therefore, is that acts of gender-based violence can serve as evidence of crimes against humanity *other than* rape, sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence, including seemingly gender-neutral crimes.

#### IV. LESSON TWO: CONSIDERATION OF EVIDENCE MUST BE GENDER-SENSITIVE

The second lesson learned from the Special Court's judgments to date is that consideration of evidence must be gender-sensitive. This lesson was most apparent in the CDF judgments, unfortunately because of the failure of a majority of the Trial Chamber to undertake gender-sensitive consideration of the evidence. The first example explored under this lesson stems from Justice Itoe's classification of evidence of gender-based crimes as prejudicial, and the second relates to the dismissal by the majority of the Prosecutor's request to consider circumstances surrounding the collection of such evidence in the CDF case.

The Prosecutor wished to introduce evidence of gender-based violence at trial in order to prove elements of the crime against humanity of inhumane acts and the war crime of cruel treatment. Despite the existence of ICTY and ICTR case law in support of this argument, a majority of the Trial Chamber denied this request, with Justice Itoe stating that "gender evidence" amounts to "prejudicial evidence" because it is "of a nature [as] to cast a dark cloud of doubt on the image of innocence that the Accused

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violence" in its Ground of Appeal, even though it was referring to forced marriage. Thus, she stated, "[i]n view of this consideration, the term sexual violence will be referred to as 'gender-based violence.'" *Id.*

74. See *Prosecutor v. Norman, Fofana & Kondewa*, Case No. SCSL-04-14-T, Decision on Urgent Prosecution Motion Filed 15 February 2005 for a Ruling on the Admissibility of Evidence, ¶¶ 1-3 (May 23, 2005).

75. See *id.* (denying the Prosecution's motion to delimit the adduction of particular relevant and admissible evidence); *Prosecutor v. Norman, Fofana & Kondewa*, Case No. SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, ¶ 19 (May 24, 2005) (holding that allowing the admission of the evidence in question would prove unfair to the defendants and derogate their due process rights).

76. See *Fofana*, Case No. SCSL-04-14-A, Appeals Judgment, ¶ 441-442 (opining that the failure of Counts 3 and 4 to explicitly list the sexual acts that might amount to "other inhumane acts" or "cruel treatment" does not mean that sexual violent acts could not act as proof "other inhumane acts" or "cruel treatment"; the absence of an explicit list was simply a defect of the indictment).

enjoys under the law until the contrary is proved.”<sup>77</sup> He also argued that  
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has the potential of staining the mind of the Judge with an impression that adversely affects his clean conscience towards all parties, and particularly, the party who is the victim of that evidence [i.e. the accused] which is tendered, to the extent that it leaves in the mind of the Judge, an indelible scar of bias which could make him ill disposed to the cause of the victim of said evidence [the accused] as a result of which injustice could be occasioned to the party who after all, may be innocent or have a just cause, and who, but for the admission of that contested evidence, should ordinarily have had the benefit of the judicial balance tilting in his favour.<sup>78</sup>

Justice Itoe concluded that the admission of evidence of sexual violence is “unfairly compromising of the interests and status of innocence of the good standing of the victim of such evidence [i.e. the accused].”<sup>79</sup> In other words, Justice Itoe implies that evidence of gender-based crimes is more likely to impugn the reputation of the defendants than other kinds of evidence, and that this perceived harm to the accused should guide the justices. Justice Boutet, in dissent, convincingly replied that “[e]vidence of acts of sexual violence are no different than evidence of any other act of violence for the purposes of constituting offences within Counts 3 and 4 of the Indictment and are not inherently prejudicial or inadmissible character evidence by virtue of their nature or characterization as ‘sexual.’”<sup>80</sup>

On appeal, Fofana used Justice Itoe’s statements to argue against the Prosecutor’s position.<sup>81</sup> In response, the Appeals Chamber followed the same line of argument as Justice Boutet and correctly held that “the right to a fair trial enshrined in Article 17 of the Statute cannot be violated by the introduction of evidence relevant to any allegation in the trial proceedings, regardless of the nature or severity of the evidence.”<sup>82</sup> The Appeals

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77. See *Prosecutor v. Norman, Fofana & Kondewa*, Case No. SCSL-04-14-PT, Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, ¶ 78 (May 24, 2005) (voicing the fear that evidence of gender-based crimes threatens the presumption of the defendants’ innocence).

78. See *id.* ¶ 64 (discussing the definition of prejudicial evidence, and focusing on the risk of prejudicing the judge toward the defendants).

79. See *id.* ¶ 65 (distinguishing prejudicial evidence from incriminating evidence by considering the probative value versus the potential for prejudice).

80. *Prosecutor v. Norman, Fofana & Kondewa*, Case No. SCSL-04-14-PT, Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, ¶¶ 26-33, 36 (May 24, 2005) (disagreeing with the majority’s refusal to grant the Prosecution’s request to amend the Indictment). Justice Boutet cited several documents to support his argument that the stigmatizing nature of gender-based crimes makes it particularly difficult to obtain the requisite evidence needed to sustain a conviction. Boutet argued that the Prosecutor did not have enough evidence at the time of the original Indictment to charge the accused with gender-based crimes. *Id.*

81. See *Fofana*, Case No. SCSL-04-14-A, Appeals Judgment, ¶ 446 n.864 (noting that Fofana relied on Justice Itoe’s denial of the Prosecution’s request to amend the Indictment since the evidence would be too prejudicial).

82. See *id.* (concluding that the relevance of the evidence outweighed the potential

Chamber, therefore, clearly indicated that evidence of gender-based violence is not inherently more prejudicial than other kinds of evidence. This is an important, and rather basic, lesson that should be applied by all international and domestic tribunals prosecuting international crimes.

Linked to this observation is the fact that the collection of evidence of gender-based violence may be conducted under different circumstances than the collection of other kinds of evidence, and that this difference should be taken into account when relevant. In February 2004, prior to the start of trial, the Prosecutor sought leave to amend the CDF indictment to include four new charges: rape as a crime against humanity, sexual slavery and any other form of sexual violence as crimes against humanity, other inhumane acts (forced marriage) as a crime against humanity, and outrages upon personal dignity as a war crime.<sup>83</sup> On May 20, 2004, a majority of the Trial Chamber denied the request on the basis that granting the amendment would prejudice the rights of the accused, violate their right to be tried without undue delay, and constitute an abuse of process.<sup>84</sup> The majority rejected the Prosecutor's argument that he could not have requested an amendment earlier because he did not have solid evidence of gender-based violence earlier. The majority held that the Prosecutor was aware of indications of gender-based crimes in June 2003 and that it was therefore not timely to wait until February 2004 to submit the amendment request.<sup>85</sup> The majority judges characterized the amendment motion as a prosecutorial request for an exception to the general rules on timeliness for "gender offences and offenders."<sup>86</sup>

In dissent, Justice Boutet properly pointed out that the Prosecutor can only bring a charge forward when the evidence meets the test of "reasonable certainty of conviction," which was only the case as of late November 2003, when the Prosecutor was assured of the full cooperation of witnesses willing to testify to gender-based violations.<sup>87</sup> The Prosecutor

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for prejudice, and that the defendants received sufficient notice as to the evidence introduced).

83. See *Prosecutor v. Norman, Fofana & Kondewa*, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶ 6 (May 20, 2004) (noting that on February 9, 2004, the Prosecution requested leave to add four new counts to the Indictment that directly address gender-based crimes).

84. See *Norman*, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶ 86 (denying the Prosecution's motion to amend the indictment, stating that to allow such an amendment would unduly prejudice the defendants' rights to a fair and expeditious trial, and fearing that such a result would work to bring the administration of justice into disrepute).

85. See *id.* ¶¶ 44, 55 (discussing the timing of the Prosecution's decision to file a motion to amend the indictment and concluding that some of the evidence relied upon in the motion had long been in the Prosecution's possession).

86. See *id.* ¶¶ 83-84 (observing that the rules governing gender offenses are no different from those of other offenses and that to sustain the motion would create an unwanted exception in the rules governing gender offenses).

87. See *Prosecutor v. Norman, Fofana & Kondewa*, Case No. SCSL-04-14-PT, Boutet Dissent, ¶¶ 24, 35 (maintaining that the Prosecutor must have sufficient, credible evidence before bringing charges, and that the prosecution filed its motion to amend the indictment without undue delay following the discovery of sufficient, credible evidence of gender-based violations).



should not be expected to request amendments before ensuring that the evidence is reliable. *Reliability: Referring to Social Pressure and Gender Justice* Boutet pointed out that it may take longer to secure evidence of gender-based crimes (especially crimes of sexual violence) than other crimes.<sup>88</sup> Gender-based crimes, including rape, may have created psychological damage and the survivors often live in fear of being ostracized and isolated, or being the subject of reprisals.<sup>89</sup> In Sierra Leone, myths about raped adolescent girls and women—that these girls and women may become barren, sexually obsessed, and unable to remain faithful to their husbands—may create barriers to evidence collection.<sup>90</sup> On appeal, Justice Winter helpfully reiterated these factors.<sup>91</sup> Thus, the test for timeliness in bringing additional charges must take into account general and country-specific circumstances related to gender-based violence.

The specific circumstances of evidence collection in any given case of gender-based violence must also be taken into account. In the CDF case, the Prosecutor had an additional hurdle to overcome: the CDF were viewed by many as heroes, creating an additional level of reluctance in and risk to potential witnesses.<sup>92</sup> Therefore, it took more time to identify and ensure protection for victims willing to testify. The Prosecutor pointed out that “[i]n some circumstances, it was the existence of the Indictment and subsequent incarceration of the Accused that created the conditions for these potential witnesses to come forward and to give evidence whereas before they were unwilling to do so.”<sup>93</sup> While the majority of the Trial Chamber ignored this reality, it is an important factor that should have been weighed when evaluating the timeliness of the Prosecutor’s request for amendment.

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88. See *id.* ¶¶ 26-33 (discussing the variety of social pressures and potential for stigma that often lead to the reluctance of victims of sexual violence to come forward or testify).

89. See *id.* (highlighting the far-reaching consequences of systematic sexual violence on a victim beyond the actual perpetrated act and noting the damage done not only to the individual victim, but also the fear engendered in the community as a whole).

90. See *id.* ¶ 30 (pointing out that many societies tend to blame victims of sexual violence, thereby reinforcing victims’ feelings of shame, guilt, loneliness, and depression).

91. See *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A, Appeals Judgment, ¶ 79 (May 28, 2008) (Winters, J., partially dissenting) (reiterating the inadequacy of evidence simply indicating gender-based crimes and the importance of the Prosecution waiting to file a motion to amend until they have sufficient material facts to sustain a *prima facie* case).

92. See *Prosecutor v. Norman, Fofana & Kondewa*, Case No. SCSL-04-14-T, Majority Decision on the Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution’s Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, ¶ 8 (Aug. 2, 2004) (discussing the Prosecution’s arguments against the contention made by the court that the need for the amendment was based on a lack of due diligence on the part of the Prosecution).

93. See *Fofana*, Case No. SCSL-04-14-A, Appeals Judgment (Partially Dissenting Opinion of Honourable Justice Renate Winters), ¶ 79 (noting the difficulty of getting victims of gender-based offences to come forward and accepting the Prosecution’s explanation as to why the motion to amend the indictment did not come sooner).

In sum, the second lesson is that a gender-sensitive trial requires gender-sensitive consideration of evidence. This did not happen in the CDF trial for a number of reasons: the majority judges improperly prospectively denied the introduction of evidence of gender-based crimes; one of the majority judges improperly viewed such evidence as inherently prejudicial; and the majority judges improperly excluded from their evaluation of timeliness consideration of the circumstances surrounding the collection of evidence of gender-based crimes.<sup>94</sup> These mistakes should not be repeated at the Special Court or any other international criminal tribunal.

#### V. LESSON THREE: JUDICIAL BALANCING IS NECESSARY TO ENSURE GENDER-SENSITIVE PROSECUTIONS

The Special Court's CDF case serves to illustrate the third lesson that it is relevant for judges to consider gender-related issues as part of a rights balancing exercise. This lesson stems from a series of motions decisions that had a profoundly negative impact on the outcome of the CDF trial judgment. As mentioned earlier, on February 9, 2004, the Prosecutor sought leave to amend the CDF indictment to include charges relating to the crimes against humanity of rape, sexual slavery, and forced marriage (as an inhumane act), and the war crime of outrages upon personal dignity.<sup>95</sup> This request was made prior to the assignment of the trial date. Similar requests to add these crimes to the AFRC and RUF indictments had been approved.<sup>96</sup> On May 20, 2004, just prior to the beginning of the trial,<sup>97</sup> a majority of the Trial Chamber rejected this request in a poorly written and confusing decision.<sup>98</sup> The majority held that the Prosecutor brought the request after undue delay and that granting the request might require an unreasonable delay in the trial in order to allow the accused to prepare defenses to the new charges.<sup>99</sup> In determining what constitutes an

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94. See *supra* notes 81-84 and accompanying text.

95. *Norman*, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶ 6.

96. See *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶¶ 25-28 (May 6, 2004) (finding that in the overall interest of justice, indictments may be amended, the crucial consideration being timing on the part of the prosecution); see also *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶ 57 (May 6, 2004) (citing precedent from other International Criminal Tribunals, the court held that where the Prosecution seeks to add only one count that expands on the existing indictment, the amendment does not unfairly prejudice the rights of the defendants).

97. See *Norman*, Case No. SCSL-04-14-PT, Boutet Dissent, ¶ 6 (establishing the starting date of the CDF trial as June 3, 2004).

98. See *Norman*, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶¶ 42, 48-86 (arguing that the Prosecution waited too long to amend the indictment, and that the delay was undue).

99. See *id.* ¶¶ 43, 49, 55, 63 (criticizing the prosecution for what the court felt amounted to a prosecutorial strategy relying on delay); *Norman*, Case No. SCSL-04-14-PT, Boutet Dissent, ¶¶ 6, 37-48. In his dissent, Justice Boutet pointed out that the case was being heard one month on and one month off, therefore no delay would occur as the defense may be able to conduct any additional investigations during the months off. He also pointed out that the Prosecutor only had "indications" of gender-based

undue or unreasonable delay, the majority judges put much emphasis on 424 Special Court's time frame. *Gender Resistance Policy & the Law* created 7:2 much shorter time frame" for determinations of delay than might be the case in other courts.<sup>100</sup> Thus, for the majority judges, "extreme expeditiousness" was the "watchword" of the trial (though the judges did not comment on their own three and a half month delay in deciding the motion) and the judges' "permanent preoccupation" when determining the interests of justice.<sup>101</sup> The majority entirely discounted the Prosecutor's explanations as to why the motion was brought in February 2004, as well as the Prosecutor's argument that he has a specific duty to prosecute gender-related crimes.<sup>102</sup> Indeed, the majority seemed to imply that giving any weight to these arguments would create an unwarranted exception.

[T]he rules relating to the detection and prosecution of [gender-based] offences are the same as those governing the other war crimes and international humanitarian offences, and must not constitute or give rise to any exceptions to the general rules that relate to the respect and protection of the interests of the Parties . . . and the overall interests of justice.<sup>103</sup>

Justice Boutet wrote a strong dissent to the majority decision.<sup>104</sup> In examining the nature of the offences, Justice Boutet correctly balanced the rights of the accused with the duty of the Prosecutor not to bring charges before he has evidence strong enough for a reasonable certainty of conviction.

The Prosecutor unsuccessfully sought leave to appeal from the Trial Chamber, despite arguing that the decision rendered him unable to establish a complete and accurate historical record of the crimes committed during the armed conflict in Sierra Leone, failed to acknowledge the right of the victims to have crimes committed against them characterized as gender-based crimes, and permitted impunity for these crimes.<sup>105</sup> The end result

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crimes, as opposed to solid evidence, as of June 2003. *Id.*

100. See *Norman*, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend Indictment, ¶ 53 (highlighting the differences between an international tribunal and a municipal judiciary, noting both the limited duration of the tribunal, and the importance of the perception of its credibility).

101. See *id.* ¶¶ 53, 61 (discussing the judges' desire to honor the mandate establishing their court, the decision contends that only by expediting the trial will justice be properly administered within judicial traditions and norms).

102. See *id.* ¶ 58 (arguing that the Prosecution's attempt to amend the indictment violates the defendants' right to be fairly and properly informed of the charges they face, and faulting the diligence of the Prosecution for not including the gender offences in the initial indictment).

103. See *id.* ¶ 83 (echoing the decision's main point that the nature of the gender offences alone should not dictate whether the court sustains the motion to amend).

104. See *supra* Section IV for analysis of Justice Boutet's understanding that the collection of evidence of gender-based crimes may be more difficult than the collection of evidence of other crimes, and that this fact is relevant to considering timeliness.

105. See *Norman*, Case No. SCSL-04-14-T, Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal, ¶¶ 4, 6 (arguing that without allowing the additional charges, many of the crimes committed during the armed conflict in Sierra Leone will go unpunished); *Norman*, Case No. SCSL-04-14-T, Boutet Dissent, ¶ 27 (maintaining that the prosecution not only can, but further has a duty to,

was that no gender-based charges were considered by the CDF Trial Chamber and the trial judgment is consequently silent on these types of crimes.

Following the issuance of the trial judgment, the Prosecutor asked the Appeals Chamber to consider whether the Trial Chamber's denial of his request to amend the indictment represented an error in law, in fact or in procedure.<sup>106</sup> As a pragmatic remedy, he requested that, if an error was found, the Appeals Chamber simply reverse the legal reasoning employed by the Trial Chamber and issue a declaration to this effect.<sup>107</sup> The usual remedy would be a retrial, but a retrial is impractical as the Special Court is slated to close in mid 2010.<sup>108</sup> The Appeals Chamber declined to consider the appeal, stating that to do so would only be an "academic exercise" given the remedy requested and the fact that the request does not relate to actual verdicts in the trial judgment.<sup>109</sup>

In contrast, Justice Winter, in a convincing and well-argued dissent, considered the Prosecutor's appeal. She found that the Trial Chamber majority's reasoning "contained both errors of law invalidating the decision and errors of fact which have occasioned a miscarriage of justice."<sup>110</sup> Winter took the reasoning begun by Justice Boutet further. She held that the Trial Chamber did not correctly balance the rights of the accused to be tried without undue delay and to have adequate time to prepare a defense with several factors: the scope and nature of the amendments;<sup>111</sup> the consequences of admittance—and denial—of amendments on the trial proceedings;<sup>112</sup> whether the amendments will help to ensure "that the real issues in the case will be determined"; the difference between the duty of the Prosecutor to prove guilt beyond a reasonable doubt and the defense's burden to show that proof beyond a reasonable doubt was not shown; and

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bring newly found charges); *Prosecutor v. Norman, Fofana & Kondewa*, Case No. SCSL-04-14-T, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, ¶ 44 (Jan. 17, 2005) (holding that the Prosecution's attempt to appeal directly to the Appeals Chamber was not properly brought as the Appeals Chamber did not have jurisdiction to hear such an appeal).

106. *Fofana*, Case No. SCSL-04-14-A, Appeals Judgment, ¶ 410.

107. *Id.*

108. *Id.* ¶ 425; *Fofana*, Case No. SCSL-04-14-A, Appeals Judgment, ¶ 68 (Winter, J., partially dissenting).

109. *See Fofana*, Case No. SCSL-04-14-A, Appeals Judgment, ¶ 427; *id.* ¶ 73 (Winter, J., partially dissenting) (noting that consideration of this ground of appeal is far from an academic exercise, considering that "refusing to address the merits of the Prosecution's Ground of Appeal at the final stage permanently denies the Prosecution the opportunity to have the merits of its contentions adjudicated on appeal, which . . . denies it the right to a fair trial").

110. *Fofana*, Case No. SCSL-04-14-A, Appeals Judgment, ¶ 65 (Winter, J., partially dissenting).

111. *See id.* ¶ 79 (Winter, J., partially dissenting) (including taking into account that "victims of gender-based violence generally express greater reluctance to report and testify on those events than victims of other crimes").

112. *See Fofana*, Case No. SCSL-04-14-A, Appeals Judgment, ¶ 427 (considering only the consequences of admittance of the amendments, and not the impact of denial).

the fairness of the proceedings to both the defense and prosecution (which 426 acts on behalf of the entire society and the community, including the interest of the victims of the offence charged”).<sup>113</sup> In Winter’s view, another crucial factor to consider is whether denial of the amendments would impede the Special Court’s fulfillment of its mandate, which includes the prosecution of gender-based crimes and providing victims with proper access to justice.<sup>114</sup> She found that the decision of the Trial Chamber majority to deny the amendments did deny the ability of the Special Court to fulfill its mandate, which includes the prosecution of gender-based violence, and prevented—likely forever due to the impact of amnesty in the Lomé Peace Accord—victims of gender-based violence from seeing their case adjudicated before the Special Court.<sup>115</sup>

Michelle Staggs Kelsall and Shanee Stepakoff have examined this last point in detail. They studied the impact on the Prosecutor’s proposed victim-witnesses of the denial of the indictment amendment, and the subsequent, equally concerning refusal to allow the Prosecutor to use evidence of gender-based violence to prove other charges.<sup>116</sup> They argue that the Trial Chamber majority should not only have considered the legal impact of the denial on the victims, as Justice Winter has advocated, but also the personal impact.<sup>117</sup> The victims, who all had agreed to testify to various forms of gender-based violence before the Special Court, were silenced by the denial of the indictment amendment, which has led to lasting negative psychological effects.<sup>118</sup> They conclude that the Trial Chamber “seemingly needed to balance the harm done to the victim-witness in being precluded from giving evidence against the harm done to the accused in having the evidence heard.”<sup>119</sup>

The third lesson learned from the Special Court for Sierra Leone’s trial and appellate judgments to date is found in the CDF dissents: judicial balancing is key to gender-sensitive justice. Justice Boutet indicated that evidence of gender-based crimes may need to be considered in light of the difficulty of collecting such evidence. Justice Winter outlined how the

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113. See *Fofana*, Case No. SCSL-04-14-A, Appeals Judgment, ¶¶ 82-85 (Winter, J., partially dissenting); *id.* ¶¶ 79-80, 84 (pointing out several factual errors made by the Trial Chamber majority, as well as that their estimate of a two year delay was purely speculative); *id.* ¶ 85 (contending that the Trial Chamber majority should have considered “the impact on and significance of prosecuting the material facts alleged in the amended indictment” because “the denial of the amendments precluded that any of the gender-based violence allegedly committed against women and girls by the Kamajors/CDF during the armed conflict could be prosecuted”).

114. *Id.* ¶¶ 85-86.

115. *Id.* ¶ 86.

116. Michelle Staggs Kelsall & Shanee Stepakoff, “When We Wanted to Talk About Rape”: *Silencing Sexual Violence at the Special Court for Sierra Leone*, 1 INT’L J. TRANSNAT’L JUST. 355, 355 (2007). See also Oosterveld, *Consideration of Gender-Based Violence*, *supra* note 62; Oosterveld, *Child Soldiers and Forced Marriage*, *supra* note 62.

117. Kelsall & Stepakoff, *supra* note 116, at 357, 373.

118. *Id.* at 373.

119. *Id.* at 366.

rights of the accused needed to be balanced with, among other factors, consideration of the nature of collecting gender-based evidence, the impact of denial of the amendments to victims' access to justice, resulting impunity for gender-based crimes, and the Special Court's overall mandate to prosecute gender-based crimes. These factors are not only important for the CDF's specific indictment amendment decision, but for any occasion on which gender-based crimes are considered within international criminal justice proceedings.

## VI. CONCLUSION

This Article has outlined three lessons that can be drawn from the AFRC and CDF cases, and their trial and appeals judgments, at the Special Court for Sierra Leone. Part of the first lesson is that gendered crimes may be multilayered and complex. An excellent example of such a crime is forced marriage. In the AFRC trial judgment, a majority of the judges held that forced marriage is subsumed by the crime of sexual slavery, but the Appeals Chamber subsequently concluded that this is an overly simplistic, and incorrect, understanding of the crime.<sup>120</sup> According to the Appeals Chamber, forced marriage should be defined not by the sexual and non-sexual acts that are indicators of the crime, but as forced conjugal association resulting in severe suffering, or physical, mental, or psychological injury to the victim.<sup>121</sup> Another interlinked notion (and the final part of the first lesson) is that seemingly gender-neutral crimes, such as the war crime of cruel treatment or the crime against humanity of other inhumane acts may contain gendered elements. The Appeals Chamber has commented, in both the AFRC and CDF appeals judgments, that acts of gender-based violence can be used to prove such crimes.<sup>122</sup>

The second lesson to be gleaned from the Special Court's judgments is related to evidence. In the CDF case, a majority of the Trial Chamber failed to consider the difficulties often associated with collecting evidence of gender-based violence, and the specific difficulties in this respect related to ongoing strong support of the CDF.<sup>123</sup> One of the majority judges even implied that that evidence of gender-based violations is inherently more prejudicial than other kinds of evidence.<sup>124</sup> As a result, the majority rejected the Prosecutor's request, first, to amend the joint indictment to include certain gender-based crimes and, second, to consider evidence of gender-based acts as proof of other crimes.<sup>125</sup> The result was the exclusion of consideration of gender-based crimes in the CDF trial judgment and,

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120. *Fofana*, Case No. SCSL-04-14-A, Appeals Judgment, ¶ 195.

121. *Id.* ¶ 196.

122. *Id.* ¶¶ 184-186.

123. *Norman*, Case No. SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, ¶ 65 (Itoe, J., concurring).

124. *Id.* ¶ 4.

125. *Id.* ¶¶ 19-20.

consequently, silence within the Special Court's record of CDF crimes.<sup>126</sup> These mistakes by the Trial Chamber majority should never be repeated within the Special Court or any other institution tasked with implementing international criminal law.

The final lesson also stems from the CDF case and relates to how the Court's mandate to address gender-based crimes is connected with the rights of the accused. In the CDF case, when making the decisions to deny the Prosecutor's requests to amend the indictment to add gender-based crimes and to consider acts of gender-based violence as proof of other crimes, the majority of the Trial Chamber failed to consider, alongside the defendants' rights, the Prosecutor and Court's obligations with respect to gender-based crimes. They should have examined, *inter alia*, whether denial of the amendments would impede the Special Court's fulfillment of its mandate and whether victims would be denied proper access to justice.

These three lessons, which in some respects are particular to the Special Court's AFRC and CDF cases, are in other respects also relevant to the Charles Taylor and RUF cases currently before the Special Court, and to the future work of the International Criminal Court.<sup>127</sup> All international or internationalized tribunals should ensure that gender-based crimes are understood not only as crimes of rape, but also as crimes targeted at individuals because of socially-constructed understandings of their sex. Furthermore, those working within tribunals should understand that acts of gender-based violence can be used to prove a variety of crimes and should not only be confined to proving sexual crimes. Evidence of gender-based crimes should be dealt with sensitively, with an understanding of any difficulties related to evidence collection, and without assumptions that it may be more prejudicial to the case of an accused than other evidence. Finally, in weighing the rights of the accused, judges must also ask if there are other relevant factors that should be considered, such as the access of victims to justice or the overall mandate of the tribunal.

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126. *Fofana*, Case No. SCSL-04-14-A, Appeals Judgment, ¶ 446.

127. See generally *Prosecutor v. Taylor*, Case No. SCSL-03-01-I-75, Amended Indictment (Mar. 17, 2006) (charging Taylor with the crimes against humanity of rape and sexual slavery and the war crime of outrages upon personal dignity).