GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

VOLUME 42 2014 NUMBER 3

ARTICLES

THE SENTENCING LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE

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The wound is the place where the Light enters you.
– Rumi

I. INTRODUCTION

150,000 human beings slaughtered; 200,000 women raped; thousands of limbs amputated; countless children forced to kill their own parents, forced into sexual slavery, and forced into the battlefields; and 2.6 million persons displaced.[1] These are just some of the gruesome realities of an unforgiving war that consumed Sierra Leone for more than ten years. There is another number of significance: Nine. That is the number of individuals held criminally responsible for these atrocities.[2]

After ten years and spending an estimated $250 million dollars,[3] the Special Court for Sierra Leone (SCSL) convicted and sentenced just nine men. With all trial and appeals at the SCSL now complete,[4] we are afforded an opportunity to evaluate its legacy. While commentators have reviewed the work of the SCSL from a variety of perspectives, the vantage point provided from an examination of its sentencing legacy has been largely ignored.[5] The

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[1] The war caused 12% of Sierra Leone's population to flee to neighboring countries and rendered homeless more than half of those that remained. *See* MARY KALDOR & JAMES VINCENT, UNITED NATIONS DEVELOPMENT PROGRAM, CASE STUDY: SIERRA LEONE (2006); *see also* TIM KELSALL, CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE 29 (2009) (discussing mutilations, decapitations, immolations, physical and sexual humiliation, sexual slavery and limb amputation); IAN SMILLIE ET AL., THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS & HUMAN SECURITY 9 (2000) (discussing the devastating nature of the conflict); Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L.J. 391, 394 (2001) (discussing a campaign of terror against civilians that included abducting children, forced prostitution, and the amputation of limbs); JOHN L. HIRSCH, SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY 14–15 (2001) (discussing the "relentless terror, loss of life, and indiscriminate amputations" that colored the conflict); Nsongurua J. Udombana, *Globalization of Justice and The Special Court for Sierra Leone's War Crimes*, 17 EMORY INT'L L. REV. 55, 71 (2003) (discussing the psychological effects that accompany the brutal nature of the conflict).

[2] Charles Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT'L L. 395 (2011) (arguing that "the limited number of persons" prosecuted is a "serious shortcoming" of the Special Court for Sierra Leone).

[3] Stuart Ford, *How Leadership in International Criminal Law is Shifting from the United States to Europe and Asia*, 55 ST. LOUIS U. L.J. 953, 975 (2011).

[4] THE SPECIAL COURT FOR SIERRA LEONE, ABOUT, http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx (last visited Apr. 15, 2014).

[5] While research and scholarship on ICL continues to proliferate, the law of punishment and sentencing in ICL still receives scant treatment in law review articles, books, and treatises. Even legacy projects specific to the SCSL largely ignore systematic and rigorous treatment of the SCSL's sentencing jurisprudence. When one considers that a perpetrator's punishment is

SCSL's legacy includes a rich and potent sentencing jurisprudence that can reshape and stabilize punishment and sentencing in international criminal law (ICL). This Article seeks to uncover these gems from the SCSL's sentencing jurisprudence. In doing so, it demonstrates the enduring relevance of this body of law to ICL generally and to the work of the International Criminal Court (ICC) in particular.[6]

This Article also makes additional contributions to the development of international criminal law. It provides a comprehensive critique of all sentencing judgments of the SCSL. In addition to synthesizing the sentencing jurisprudence, this Article also identifies the SCSL's key contributions to the substantive law of ICL, provides a normative assessment of the jurisprudence, and links judicial narratives to social narratives about war, atrocities, crimes, and accountability.

The choice to focus on the SCSL was encouraged by four milestones in ICL. First, the SCSL is the first United Nations sponsored international tribunal to indict, convict, and sentence a sitting Head of State for crimes against humanity and war crimes.[7] The indictment of Liberian President Charles Taylor, while he was a sitting Head of State for crimes committed as a Head of State, signals an inevitable eventual sunset on an international order founded on Westpahlia's contradictory and fallacious framework. Second, the SCSL has completed all trials and appeals proceedings in its four major cases. All defendants have been sentenced and all have exhausted their appeals.[8] Third, the completion of the work of the SCSL has spurred a proliferation of legacy scholarship examining many aspects of the court's work, but the court's sentencing jurisprudence remains largely under-examined.[9] Finally, the ICC's seminal sentencing judgment turns to the SCSL's sentencing jurisprudence, signaling the importance and

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integral to building a culture of accountability, the neglect of sentencing is surprising, although not without explanation. *See* Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 J. CRIM. L. & CRIMINOLOGY 857, 857–58 (2009).

[6] *See also* Vincent O. Nmehielle & Charles C. Jalloh, *The Legacy of the Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF. 107 (2006).

[7] Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgment (Spec. Ct. Sierra Leone, May 30, 2012) [hereinafter Taylor Sentencing Judgment].

[8] Press Release, Special Court for Sierra Leone, Oral Hearings Conclude in Taylor Appeal, Judges Will Now Retire to Deliberate and Consider Judgment (Jan. 23, 2013).

[9] *E.g.*, THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW (Charles C. Jalloh ed., 2013). *But see* Margaret M. deGuzman, *The Sentencing Legacy of the Special Court for Sierra Leone*, *in* THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY, *supra*, at 373–94.

continuing relevance of the body of law and international jurisprudence analyzed herein.

Part II offers a brief background to Sierra Leona's decade-long war. Part III provides a legal analysis of the four trials and their sentencing judgments. Part IV discusses the SCSL's sentencing legacy from multiple perspectives. First, it thematically systematizes the sentencing jurisprudence, drawing out key contributions of the SCSL to ICL sentencing law. This section also criticizes some shortcomings and missed opportunities regarding its rulings and sentencing practice.

Part V develops descriptive claims and normative assessments regarding the SCSL's sentencing legacy, including linking the sentencing discourse to broader social narratives about justice, culpability, the conflict, just war, and legitimacy. I argue that the judges at the SCSL have adopted a punitive model for international criminal justice and that this reorientation is a positive development. I also criticize the court's failure to develop a sentencing framework capable of implementing the punitive model. The Article concludes by introducing the reader to an original theory and preliminary consideration towards constructing a new framework for ICL sentencing and punishment. I argue that perpetrators who enable a situation or environment that encourages or sustains widespread criminality deserve greater punishment even if their mode of liability falls short of direct commission of the crimes. For the time being, I call this theory "enabler responsibility."[10]

II. BACKGROUND: PEACE AGREEMENTS AND BLANKET AMNESTIES FAIL TO STOP CONFLICT OR ATROCITIES

In Sierra Leone's 1996 democratic elections, Alhaji Ahmad Tejan Kabbah, an ethnic Mandingo, was elected President of Sierra Leone, becoming the country's first Muslim Head of State.[11] Although the people of Sierra Leone

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[10] It may also be understood as "enabler culpability" or "enabling atrocity." My current research focuses on further developing the contours of the "enabler responsibility" theory, which is the subject of a forthcoming article. This research project also re-conceptualize concepts at the heart of ICL, such as gravity, modes of liability, and the role of the accused. Thus, my theory pulls together these key sentencing factors to effectuate their harmonized consideration for the purpose of sentence allocations and just distribution of punishment among actors responsible for atrocity crimes. The theory explains variations in sentence allocations and integrates them with sentencing narratives and the goals of international prosecutions.

[11] Charles C. Jalloh, *The Contribution of the Special Court for Sierra Leone to the Development of International Law*, 15 AFR. J. INT'L & COMP. L. 165, 169 (2007); Lans Gberie, *Tejan Kabbah: This Is My Life*, NEWAFRICAN (Feb. 1, 2012), *available at* http://www.newafricanmagazine.com/index.php?option=com_k2&view=item&id=258:tejan-kabbah-this-is-my-life&Itemid=683; Prosecutor v. Sesay, Kallon, and Gbao, Case No. SCSL-04-15-T, Trial

hoped this would mark a turning point for a country devastated by war since 1991, tensions continued among armed groups, and their lust for power and wealth remained unabated.[12] Soon after the elections, conflict between the new government and armed leaders of the Revolutionary United Front (RUF) resumed. The RUF claimed that Kabbah's government was overrun with corruption, justifying an armed rebellion by the people.[13] The hostilities were intense, violent, and prolonged. Even if freeing Sierra Leoneans from corruption and misrule is accepted as the RUF's reasons for instigating armed conflict, they pursued this political goal with a brutal viciousness against civilians that belies their claim that they acted for the people.[14] The RUF's war against Sierra Leone's democratically elected government, and against past ruling regimes, was supported by Charles Taylor and his special armed forces, the National Patriotic Front of Liberia (NPFL), from neighboring Liberia.[15]

In December 1996, President Kabbah and RUF leader Foday Saybana Sankoh signed a peace agreement, the Abidjan Peace Accord, granting blanket amnesty to RUF fighters.[16] However, peace did not last long. Within months war consumed the country again. In March 1997, Sankoh was placed under house arrest in Nigeria for alleged weapons violations.[17] A few months later, a handful of opportunistic military officers in the Sierra Leone Army (SLA) overthrew President Kabbah and the newly elected government with a brutal military assault on Freetown in which Charles Taylor had "a heavy footprint" in planning, supporting, and overseeing.[18]

Chamber Sentencing Judgment (Spec. Ct. Sierra Leone Apr. 8, 2009) [hereinafter RUF Sentencing Judgment].

[12] Nsongurua J. Udombana, *Globalization of Justice and The Special Court for Sierra Leone's War Crimes*, 17 EMORY INT'L L. REV. 55, 71 (2003) (stating that the atrocities were occasioned by the desire to control the country's natural resources).

[13] *See* Babafemi Akinrinade, *International Humanitarian Law and the Conflict in Sierra Leone*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 391, 392 (2001); Jalloh, *supra* note 11, at 169; RUF Sentencing Judgment ¶ 146.

[14] *See, e.g.*, SMILLIE ET AL., *supra* note 1, at 8; Fritz & Smith, *supra* note 1, at 394.

[15] Jamie O'Connell, *Here Interest Meets Humanity: How to End the War and Support Reconstruction in Liberia, and the Case for Modest American Leadership*, 17 HARV. HUM. RTS. J. 207, 213 (2004); Fritz & Smith, *supra* note 1, at 394 (discussing how after the RUF entered Sierra Leone and controlled the Eastern region of the country, it implemented Charles Taylor's a campaign of terror by abducting children, forcing prostitution, and amputating limbs).

[16] Fritz & Smith, *supra* note 1, at 395.

[17] Prosecutor v. Sesay, Kallon and Gbao, Trial Chamber Judgment ¶ 19 (Spec. Ct. Sierra Leone Mar. 2, 2009) [hereinafter RUF Trial Judgment].

[18] Taylor Sentencing Judgment ¶¶ 76, 77, 98; *see also Sierra Leone: Getting Away With Murder, Mutilation, and Rape*, 11 HUMAN RTS. WATCH 3(A), at 12 (July 1999); James Rupert, *Diamond Hunters Fuel Africa's Brutal Wars*, WASH. POST FOREIGN SERV., Oct. 16, 1999; Ian Stewart, *President Opens Talks as City Burns*, TIMES DAILY, Jan. 8, 1999.

Establishing themselves as the Armed Forces Revolutionary Council (AFRC), they installed one of their own, Johnny Paul Koroma, as Sierra Leone's new President. Although the AFRC and RUF joined forces, their union was an uneasy one. Together they fought against the Civil Defense Force (CDF), a loosely organized fighting force loyal to President Kabbah and his ousted government.[19] The CDF was led by Samuel Hinga Norman, and its ranks were filled with Kamajor fighters, members of the Sierra Leone Mende ethnic group. With the support of a West African multilateral armed force, the Economic Community of West African States Monitoring Group, the CDF regained control of Freetown and reinstate President Kabbah. The retreating AFRC and RUF fighters pillaged villages, killed or imprisoned civilians, and otherwise terrorized the population.

After two more years of fighting, another peace agreement was signed and again Sankoh and his soldiers were granted full amnesty despite the horrible atrocities they committed against innocent men, women, and children.[20] The Lome Peace Agreement was signed in 1999 between President Kabbah and the RUF represented by Sankoh.[21] Despite Sankoh's claim that he waged war to fight against a corrupt Kabbah, Sankoh agreed to be his vice-president and stop the fighting.[22] Of course, getting official control over Sierra Leone's lucrative diamond fields probably eased his hardship of having to share power with someone he accused of being corrupt, revealing more about his motives for the waging war than his rhetoric. In less than a year, Sankoh had gone from death row to the country's vice-presidency.[23] The policy of "peace without accountability" again proved an utter failure when Kabbah, under pressure from the British and Americans, pardoned Sankoh's legal conviction for murder of ordinary Sierra Leoneans and welcomed him with a prominent position in government.[24] Deals with the devil cannot bring peace or justice.

Two peace agreements and two full amnesties failed to deliver lasting peace. More hostilities followed and so too did graver atrocities. Throughout the war, Charles Taylor, by then President of Liberia, provided

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[19] Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-T, Trial Judgment (Aug. 2, 2007) [hereinafter CDF Trial Judgment]; *see also* Lansana Gberie, *The Civil Defense Forces Trial: Limit to International Justice?*, *in* THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY, *supra* note 9, at 633–34.

[20] Tony Karon, *The Resistible Rise of Foday Sankoh*, TIME, May 12, 2000, *available at* http://www.time.com/time/arts/article/0,8599,45102,00.html.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Obituaries: Foday Sankoh*, TELEGRAPH, July 31, 2003, *available at* http://www.telegraph.co.uk/news/obituaries/1437579/Foday-Sankoh.html.

material support to RUF/AFRC armed groups, including supplying arms and military personnel.[25] Eventually, a UN peacekeeping mission was deployed to Sierra Leone (UNAMISL) and in 2002 the hostilities finally ceased.[26] In June 2000, President Kabbah wrote a letter to the United Nations Security Council requesting the establishment of a "special court for Sierra Leone" to prosecute RUF and AFRC leaders for atrocities that brutalized and terrorized the people of Sierra Leone for more than ten years.[27]

III. FROM AMNESTY TO ACCOUNTABILITY: A UNIQUE COURT IS BORN

After the failures of the "peace with amnesty" strategy, movement towards accountability and justice gained traction, perhaps encouraged by the international tribunal model in response to the atrocities in Rwanda and Yugoslavia. The adopted mechanism, however, departed from the model of the *ad hoc* tribunals, creating an innovative court.[28] The legal authority for the SCSL rests on a bilateral agreement between the United Nations and the government of Sierra Leone concluded in January 2002. The Preamble of the United Nations Security Council Resolution regarding the Court states: "a credible system of justice and accountability for very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace."[29] The Court has authority to prosecute crimes against humanity (CAH), war crimes (WC) and crimes found in the national laws of Sierra Leone.[30] However, the codified crimes are not accompanied by individualized penalty ranges or maximums, violating international standards for *nulla poena sine lege*.[31] The statute provides only a single scant article on penalties, no identifiable maximum terms, and does nothing more than rule out the death penalty.[32]

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[25] O'Connell, *supra* note 15, at 216–18.

[26] *Id.*

[27] President of the Republic of Sierra Leone, Letter dated Aug. 9, 2000, from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 10, 2000).

[28] *See* Jalloh, *supra* note 2, at 398–404 (discussing the creation of the court).

[29] *See* Taylor Sentencing Judgment ¶ 12 (citing U.N. Sec. Res. 1315 (2000),14 Aug. 2000, ¶ 7).

[30] Agreement Between the UN and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone, adopted August 14, 2000, arts. 2–5, *available at* http://www.rscsl.org/Documents/RSCSL%20Agreemtn%20and%20Statute.pdf [hereinafter SCSL Statute]. In practice, however, the Prosecutor never charged crimes under domestic law.

[31] *See* Dana, *supra* note 5, at 857 (advancing a theoretical and doctrinal framework for *nulla poena sine lege* under international law).

[32] For a discussion on the death penalty for atrocity crimes see, Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 AM. J. INT'L L. 747 (2005).

The SCSL tried nine individuals in four separate cases. Eight defendants were prosecuted in three separate trials grouped according to the armed groups they aligned with during the conflict: (1) RUF trial against defendants Issa Hassan Sesay, Morris Kallon and Augustine Gbao;[33] (2) the AFRC trial against defendants Alex Tamba Brima (a.k.a. Gullit), Santigie Borbor Kanu, and Brima Bazzy Kamara, all high-ranking officials;[34] and (3) CDF trial against defendants Moinina Fofana and Allieu Kondewa, both top leaders.[35] President Charles Taylor was tried separately.[36] Thus, there was one trial of government supporters (CDF) and three trials against opponents of the Sierra Leone government (Charles Taylor, RUF, and AFRC). In addition, a few other perpetrators were also indicted,[37] but they either died before their trial commenced[38] or before a judgment was pronounced.[39] The following sections provide a legal analysis of the trial and sentencing judgments for each group of defendants.

A. The Head of State Trial: Prosecutor v. Charles Taylor

1. The Crimes

In March 2003, the SCSL issued an arrest warrant for a sitting Head of State. Charles Taylor, President of Liberia, was summoned to answer an eighteen-count indictment charging him with crimes against humanity and

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[33] RUF Trial Judgment; Prosecutor v. Sesay, Kallon, Gbao, Case No. SCSL-04-15-A, Appeal Judgment (Oct. 26, 2009), *available at* http://www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/tabid/105/Default.aspx [hereinafter RUF Appeal Judgment].

[34] Prosecutor v. Brima, Kamara, Kanu, Case No. SCSL-04-16-T, Trial Judgment (June 20, 2007) [hereinafter AFRC Trial Judgment]; Prosecutor v. Brima, Kamara, Kanu, Case No. SCSL-04-16-T, Sentencing Judgment (July 19, 2007) [hereafter AFRC Sentencing Judgment]; Prosecutor v. Brima, Kamara, Kanu, Case No. SCSL-04-16-A, Appeal Judgment (Feb. 22, 2008), *available at* http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/tabid/106/Default.aspx [hereinafter AFRC Appeal Judgment].

[35] CDF Trial Judgment; Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-T, Sentencing Judgment (Oct. 9, 2007) [hereinafter CDF Sentencing Judgment]; Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-A, Appeal Judgment (May 28, 2008), *available at* http://www.sc-sl.org/CASES/ProsecutorsvsFofanaandKanuAFRCCase/tabid/106/Default.aspx [hereinafter CDF Appeal Judgment].

[36] Taylor Sentencing Judgment.

[37] Prosecutor v. Bockarie, Case No. SCSL-03-04-I-003, Decision Approving the Indictment (Mar. 7, 2003); *see also* Prosecutor v. Sankoh, Case No. SCSL-03-02-I-001, Decision Approving the Indictment (Mar. 7, 2003).

[38] Prosecutor v. Bockarie, Case No. SCSL-03-04-PT, Withdrawal of Indictment (Dec. 8, 2003).

[39] Prosecutor v. Sankoh, Case No. SCSL-03-02-PT-054, Withdrawal of Indictment (Dec. 8, 2008).

war crimes.[40] But it would be some time before Taylor would appear before the Court. After stepping down from the presidency, Taylor went into exile in Nigeria. Although the Nigerian government initially resisted surrendering Taylor to the SCSL, it eventually relented to international pressure, including requests for his arrest and surrender by Liberia's newly elected President Ellen Johnson Sirleaf.[41] In June 2006, Taylor's trial was transferred from Freetown to The Hague for security concerns. On April 26, 2012, Taylor was found guilty of planning and aiding and abetting "some of the most heinous and brutal crimes recorded in human history."[42] Specifically, Taylor was convicted of acts of terrorism, murder, rape, sexual slavery, cruel treatment, recruitment of child soldiers, enslavement and pillage.[43] At the time of his sentencing, Charles Taylor was sixty-four years old.[44]

Article 6(1) states: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute shall be individually responsible for the crime."[45] Articles 2 to 4 consist of crimes against humanity, violations of Additional Protocol II and Article 3 Common to the Geneva Conventions, and other breaches of international humanitarian law. Pursuant to Article 6.1 of the Statute, the Trial Chamber convicted Charles Taylor for planning and aiding and abetting in crimes against humanity and war crimes in Freetown, Kono, and Makeni between December 1998 and February 1999.[46] However, the Trial Chamber made no findings and provided no reasons for its planning conviction in relation to Counts 1–8 and 11 for crimes committed in the Kono District.[47] Consequently, the Appeals Chamber reversed the planning convictions in those counts for crimes committed in the Kono District.[48]

The Trial Chamber found that Taylor aided and abetted the RUF and AFRC's operational strategy to commit atrocity crimes against the civilian population of Sierra Leone.[49] Crucial to Taylor's conviction was the Trial

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[40] Taylor Sentencing Judgment ¶ 82.
[41] *Id.*
[42] *Id.* ¶ 70.
[43] *Id.*
[44] *Id.* ¶ 82.
[45] SCSL Statute, art. 6(1).
[46] *Id.* ¶ 1.
[47] Taylor Appeal Judgment ¶¶ 571–574.
[48] *Id.*
[49] Taylor Trial Judgment ¶ 6905 (These crimes included murders, rapes, sexual slavery, looting, abductions, forced labour, conscription of child soldiers, amputations and other forms of physical violence and acts of terror); Taylor Appeal Judgment ¶ 253.

Chamber's finding that his actions were "critical in enabling" the RUF's and AFRC's crimes and that Taylor "supported, sustained, and enhanced" their criminality.[50] His conviction also rested on his practical and moral support to the AFRC and the RUF in the commission of crimes.[51] Practical assistance included supplying perpetrators with arms and ammunition as well as providing military personnel.[52] Through ongoing consultation and guidance, he provided encouragement and moral support to the RUF and AFRC fighters.[53] The judges also found Taylor guilty of planning the commission of crimes in the attacks on Kono and Makeni, and in the invasion of and retreat from Freetown between December 1998 and February 1999.[54] The findings of fact showed that Taylor not only planned the attacks, but also closely followed their implementation via daily communications with rebel groups.[55]

2. The Punishment

According to the Trial Chamber, sentencing for international crimes must serve the primary objectives of retribution and deterrence.[56] Retribution is defined as "duly expressing the outrage of the international community at these crimes."[57] Moreover, punishment by international tribunals should "make plain the condemnation of the international community of the behavior in question" and express its intolerance toward such serious violations of international humanitarian and human rights law.[58] As for deterrence, the judges considered both general and specific deterrence as relevant to determining an appropriate sentence. However, the Taylor Trial Chamber rejected rehabilitation as a factor in ICL sentencing allocations, a view not shared by all SCSL judges.[59] Despite identifying retribution and deterrence as the "primary objectives" of ICL

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[50] Taylor Trial Judgment ¶¶ 6914, 6924, 6936–6937, 6944, 6946, 6959; Taylor Appeal Judgment ¶ 254.

[51] Taylor Sentencing Judgment ¶ 76.

[52] *Id.*

[53] *Id.*

[54] *Id.* ¶ 77.

[55] *Id.*

[56] *Id.* ¶ 13.

[57] *Id.*

[58] *Id.* ¶ 14.

[59] *Id.* ¶ 79 (holding that retribution and deterrence are the primary functions of ICL sentencing and rejecting rehabilitation as a sentencing factor). *Cf.* CDF Sentencing Judgment ¶ 26 (treating rehabilitation as a "primary" consideration in sentencing along with retribution and deterrence); AFRC Sentencing Judgment ¶¶ 13–14 (also regarding rehabilitation as a primary goal of ICL sentencing along with retribution and deterrence).

sentencing, the Taylor Trial Chamber implicitly called into question their primacy by adding that

> the main purpose of a sentence is to influence the legal awareness of the accused, the surviving victims, and their relatives and the general public in order to reassure them that legal system is implemented and enforced. Sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody.[60]

The judges identified four imperative considerations, grounded in the SCSL's constitutive legal texts, that were relevant to determining a fair sentence for Charles Taylor: (1) gravity of the offense; (2) individual circumstances of the accused; (3) applicable aggravating and mitigating factors; and (4) where appropriate, the sentencing principles found in the practice of the International Criminal Tribunal for Rwanda (ICTR) and Sierra Leone.[61] This is consistent with the general sentencing jurisprudence of the SCSL, although in practice judges often collapsed together the second and third categories (individual circumstances of the accused and applicable aggravating and mitigating factors).[62] As explained below, this merger is a missed opportunity to develop a sentencing framework tailored to ICL.

Regarding the first consideration, the judges begin with the standard affirmation that "gravity of the offense is the primary consideration in imposing a sentence and is the litmus test" for ICL sentences.[63] Moving beyond declaratory expressions, the Trial Chamber conceptualized "gravity" as a measure of two rudiments: the *inherent* gravity of the crime and the criminal conduct of the perpetrator.[64] "Inherent" suggests an abstract assessment of the elements of the crime; however, what follows is not an "inherent" evaluation but a factual one. The judges' failure to have their analysis follow their avowed standards weakens the normative value of their sentencing judgment and increases the likelihood of error and double counting.

After carefully laying out this reasonable analytical framework (above) for determining gravity, the judges appear to depart from it. Regarding the

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[60] Taylor Sentencing Judgment ¶ 16 (citing Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgment ¶ 139 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003)).

[61] *Id.* ¶ 18.

[62] *Id.* ¶ 22 ("The Trial Chamber notes that 'individual circumstances of the convicted person' can be either mitigating or aggravating.").

[63] *Id.* ¶ 19.

[64] *Id.*

first measure of gravity, the Trial Chamber explained that in determining the gravity of Taylor's offense it specifically considered seven "gravity" factors: (1) the "scale" of the offenses committed; (2) their "brutality"; (3) the temporal scope of the crime; (4) the "role of the Accused" in their commission; (5) the "number of victims"; (6) the "degree of suffering" or impact of the crime on the immediate victim; (7) the crime's "effect on relatives" of the victim; and (8) the "vulnerability" of victims.[65] While these factors are relevant to sentence allocations, the judges are not actually examining the *inherent* gravity of the offense per their own conceptualization, but considering gravity-in-fact.[66] This is often why they have trouble distinguishing gravity factors from aggravating factors.

As applied to Taylor's conduct, the Trial Chamber primarily considered the tremendous suffering caused by the commission of the crimes and the physical and psychological impact on the victims.[67] The court recalled the horrifying testimony of a mother who was forced to carry a bag containing the heads of her children and a child who was ordered to amputate the hands of others and then punished for refusing to rape a woman.[68] The Trial Chamber viewed such irreparable injuries as consequences of crimes that Taylor had a hand in either planning or aiding and abetting.[69] The temporal scope of Taylor's criminal conduct heightened the gravity of his crimes. Taylor was responsible for perpetrating atrocity crimes against innocent civilians and populations for over a five year period, not merely the eighteen month period between 1998–1999 during which the bulk of the crimes occurred.[70] Moreover, like all SCSL judgments and ICL sentencing jurisprudence in general, the Taylor Trial Chamber considers the role of the accused in the crime within the balance of weighing the gravity of the offense, specifically, as it appears here as part of assessing the "inherent gravity of the offense." Although a relevant sentencing factor, it appears misplaced for the purpose of assessing "inherent" gravity.

Regarding the second measure of gravity—the criminal conduct of the accused—the Trial Chamber examined the "mode of liability" supporting the accused's conviction and "the nature and degree of his participation" in the offenses.[71] Thus, properly understood, this is something different from the

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[65] *Id.* ¶ 20.
[66] *Id.* ¶ 21.
[67] *Id.* ¶ 71.
[68] *Id.* ¶ 72.
[69] *Id.* ¶ 71.
[70] *Id.* ¶ 78.
[71] *Id.* ¶ 21.

"role of the Accused" identified above as a gravity factor, although there could be potential overlap depending on the interpretation. Taylor was convicted under two distinct modes of liability: (1) planning, and (2) aiding and abetting. The trial court accepted the argument that "aiding and abetting *as a mode of liability* generally warrants a lesser sentence than that to be imposed for more direct forms of participation."[72] Some SCSL judges even considered this to be a well-established principle in ICL sentencing, although there is some doubt about its status as a general principle and its actual scope.[73] However, the Taylor Trial Chamber further declared that it would also consider "the unique circumstances of this case"[74] when determining Taylor's punishment, indicating perhaps its intention to offset this principle with another principle: those who plan crimes are deserving of greater punishment. As discussed below, however, the sentencing judgment would have benefitted from explaining this point more clearly. In particular, the Trial Chamber's findings that Taylor "enabled" the RUF crimes would justify a high sentence even if his mode of liability is largely viewed as aiding and abetting.[75]

Regarding aggravating circumstances, the Taylor Trial Chamber stated that where a factor has already been taken into consideration in assessing the gravity of the offence, "it cannot be considered additionally as an aggravating factor and *vice versa*."[76] Likewise, if a factor is an element of the underlying crime, it cannot be used as an aggravating factor.[77] The ICC followed these same principles in its first sentencing judgment.[78] The Trial Chamber increased Taylor's punishment based on several aggravating circumstances: his leadership role; his special status as Head of State; his

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[72] *Id.* (emphasis added). This ruling was found to be an error on appeal. Taylor Appeal Judgment ¶ 651.

[73] Prosecutor v. Krstic, Case No. IT-99-36-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007).

[74] Taylor Sentencing Judgment ¶ 21.

[75] *See, e.g.*, Taylor Trial Judgment ¶¶ 5834–5835, 5842, 6913–6915 (finding that "Taylor's acts and conduct had a substantial effect on the commission of the crimes because they: (i) enabled the RUF/AFRC's Operational Strategy; (ii) supported, sustained and enhanced the RUF/AFRC's capacity to implement its Operational Strategy."). My "enabler responsibility" theory, the focus my forthcoming article, provides a stronger, more transparent, and more predictable justification for punishment than a broad appeal to "unique circumstances." *See* Shahram Dana, *Enabler Responsibility: A Theory for Punishing Atrocity Crimes* (forthcoming) (on file with author).

[76] Taylor Sentencing Judgment ¶ 28.

[77] *Id.*

[78] Prosecutor v. Lubanga, ICC-01/04-01/06, T.Ch. I, Decision on Sentence pursuant to April 76 of the Statute, ¶ 15 (July 10, 2012), http://www.icc-cpi-int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/court%20records/chambers/trial%20chamber%20i/Pages/2842.aspx [hereinafter Lubanga Sentencing Judgment].

betrayal of trust; the extraterritorial reach of his crimes; and his exploitation of war for personal financial gain.[79]

The judges also held that the extraterritorial nature of Taylor's criminality aggravated his punishment, a novel and controversial development in ICL.[80] In the words of the Trial Chamber, "[w]hile Mr. Taylor never set foot in Sierra Leone, his heavy footprint is there . . . ."[81] They reasoned that acts of intervention by a Head of State in support of armed rebels in another State by way of financial assistance, training, supply of weapons, and logistic support constitutes a clear violation of the customary law of non-intervention.[82] When a Head of State's criminal conduct extends into neighboring countries, the extraterritorial reach of his criminality is an aggravating factor.[83] As a sitting Head of State, Taylor "enabled" atrocity crimes in another country using the power of state institutions and military resources under his control as President of Liberia and Commander in Chief of its Armed Forces.[84]

Taylor's punishment was also aggravated because he sought and did in fact gain financially from his crimes. The judges found that he benefitted by receiving diamonds in exchange for arms and ammunition used by rebels to "target civilians in a campaign of widespread terror and destruction."[85] Crimes such as terrorizing civilians, amputations, rape and murder were critical to maintaining control over the diamond fields.[86] Taylor deliberately participated in the commission of these crimes.[87] Finally, the Trial Chamber also appears to treat attacks on traditional places of sanctuary, such as churches, mosques, schools and hospitals, as an aggravating factor.[88]

The Trial Chamber also opined that ICL sentencing law holds that mitigating circumstances need only be proven by a preponderance of the evidence.[89] Unlike aggravating factors, such circumstances need not to be related to the offense.[90] The Defense argued for mitigation of Taylor's

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[79] Taylor Sentencing Judgment ¶¶ 95–103.
[80] *Id.* ¶ 27.
[81] *Id.* ¶ 98.
[82] *Id.* ¶ 27.
[83] *Id.*
[84] *Id.* ¶ 97.
[85] *Id.* ¶ 99.
[86] *Id.* ¶ 75.
[87] *Id.* ¶ 76.
[88] *Id.* ¶ 26.
[89] *Id.* ¶ 34 (listing mitigating circumstances).
[90] *Id.* ¶ 31.

sentencing based on his remorse and individual circumstances, such as his age, health and family circumstances.[91] Although international judges at the ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY) sometimes accepted age, health, and family circumstances as mitigating factors, the Taylor Trial Chamber rejected the notion that such personalized factors should mitigate the punishment of a Head of State who was responsible for crimes against humanity and war crimes.[92] In doing so, it also took the position that rehabilitation is not a factor that should influence the sentence of a high level perpetrator.[93] Thus the judges appear to adopt a punitive model for sentencing. They implicitly accepted that remorse may constitute a mitigation factor,[94] Taylor showed no remorse and the judges declined to apply this mitigating factor to reduce his sentence.[95] Thus, the sixty-four year-old Charles Taylor was sentenced to fifty years imprisonment.[96]

Appealing the sentencing, Taylor argued that the Trial Chamber should have treated serving a sentence abroad as a mitigating factor.[97] Taylor also argued that the Trial Chamber should not have considered the extraterritoriality of his criminality and his breach of trust as aggravating factors.[98] He also claimed that the Trial Chamber erred in referring to Sierra Leonean law which makes no distinction between principal and accessory liability for sentencing purposes[99] and by double-counting his position as Head of State as an aggravating factor.[100] Significantly, relying on the Trial Chamber's ruling that aiding and abetting liability generally warrants a lesser sentence than other forms of criminal participation, Taylor argued that his sentence should be lower than the direct perpetrators he aided, such as RUF leader Issa Hassan Sesay, who was sentenced to fifty-two years.

On appeal, the SCSL confirmed Taylor's fifty year sentence.[101] It held that "the Trial Chamber erred in law by holding that aiding and abetting liability generally warrants a lesser sentence than other forms of criminal participation."[102] Focusing on the "totality principle," the SCSL rejected an

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[91] *Id.* ¶ 79.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* ¶ 91.
[96] *Id.* at 40.
[97] Taylor Appeal Judgment ¶ 647 n.1903.
[98] *Id.*
[99] *Id.* ¶ 668.
[100] *Id.*
[101] *Id.* at 305.
[102] *Id.* ¶ 670.

abstract hierarchy among forms of criminal participation for the purposes of sentencing.[103] The judges further opined that such a hierarchy was unsupported by customary international law.[104] While recognizing that minor participation in a crime could justify a lesser penalty, a categorical approach to modes of liability was rejected in favor of considering the "totality" of the perpetrator's conduct and criminality.[105] The Appeals Chamber confirmed the Trial Chambers' remaining rulings on aggravating and mitigating factors.[106]

TABLE 1: CHARGES, CONVICTION, AND APPEAL SUMMARY FOR CHARLES TAYLOR

CRIMINAL CHARGES IN CHARLES TAYLOR TRIAL	TAYLOR TC SENTENCE	TAYLOR AC SENTENCE
COUNT 1: Acts of Terrorism as War Crimes	50 years (Global sentence only. Individual sentences for each conviction not rendered.)	50 year sentence affirmed
COUNT 2: Murder as CAH		
COUNT 3: Violence to life, health and physical or mental well-being of persons, in particular murder as WC		
COUNT 4: Rape as CAH		
COUNT 5: Sexual slavery / sexual violence as CAH		
COUNT 6: Outrages upon personal dignity as WC		
COUNT 7: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment as WC		
COUNT 8: Other inhumane acts as CAH		
COUNT 9: Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities as serious violation of international humanitarian law		
COUNT 10: Enslavement as CAH		
COUNT 11: Pillage as WC		

[103] *Id.* ¶¶ 661–671.
[104] *Id.* ¶ 668.
[105] *Id.*
[106] *Id.*

B. The RUF Trial: Prosecutor v. Sesay, Kallon & Gbao

1. The Crimes

The defendants Issa Hassan Sesay, Morris Kallon and Augustine Gbao were members of the Revolutionary United Front (RUF).[107] The RUF formed in the late 1980s with the goal of overthrowing what it considered to be a corrupt government in Sierra Leone.[108] The RUF joined forces with Liberian fighters from the National Patriotic Front of Liberia led by Charles Taylor.[109] Sesay was a senior officer and top commander in the RUF, junta, and AFRC/RUF forces.[110] From early 2000 until about August 2000, Sesay was a Battle Field Commander of the RUF and reported only to the leaders of the RUF and AFRC, Foday Saybana Sankoh and Johnny Paul Koroma, respectively.[111] During Sankoh's imprisonment from May 2000 until July 2003, Sesay directed all RUF activities in Sierra Leone.[112] Kallon was also a senior officer and commander in the RUF, Junta and AFRC/RUF armed forces.[113] Kallon was second in command only to Sesay.[114] In early 2000 he became the Battle Group Commander in the RUF and reported only to Sesay, Sankoh and Koroma.[115] In 2001, he became the Battle Field Commander.[116] Gbao was a senior officer and commander in the RUF, subordinate only to the RUF Battle Group and Battle Field Commanders, and Koroma.[117]

The Indictment alleged that all three accused acted in concert with Charles Taylor[118] and carried out a campaign to terrorize the civilian population and anyone who supported the elected government of President Kabbah or failed to sufficiently support the AFRC and RUF.[119]

The RUF defendants were charged with war crimes consisting of acts of terrorism; collective punishment; violence to life, health, and physical or

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[107] RUF Trial Judgment ¶ 4.
[108] *Id.* ¶ 9.
[109] *Id.* ¶ 10.
[110] Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL – 2004-15-PT, Corrected Amended Consolidated Indictment ¶ 20 (Aug. 2, 2006).
[111] *Id.* ¶ 22.
[112] *Id.* ¶ 23.
[113] *Id.* ¶ 24.
[114] *Id.* ¶ 25.
[115] *Id.* ¶ 27.
[116] *Id.* ¶ 28.
[117] *Id.* ¶ 33.
[118] *Id.* ¶ 35.
[119] *Id.* ¶ 44.

mental well-being, including murder and mutilations; outrages upon personal dignity; abductions and hostage taking; conscription or enlisting of children under the age of fifteen, pillaging; and attacks against personnel involved in humanitarian assistance or peacekeeping mission.[120] They were also charged with crimes against humanity for widespread murders, extermination, rape, sexual slavery and other forms of sexual violence, and other inhumane acts.[121]

Sesay and Kallon were found guilty of all counts, except count 16 (murder as a crime against humanity) and count 18 (abductions and hostage taking).[122] Their crimes included murder (as a war crime) and sexual violence against women and girls, and forced "marriages" as well as widespread and extremely brutal physical and mental violence against civilians, including mutilations and cutting off limbs, the use of child soldiers, abductions, forced labor, looting and burning homes.[123] Gbao was found guilty of the same crimes, except for conscription and enlistment of children in armed conflict.[124]

2. The Punishment

The RUF Trial Chamber held that "it is settled law that the goals and objectives" of international sentencing for atrocity crimes "derive essentially from the doctrines underlying penal sanctions in the domestic or national law setting."[125] Thus, it considered the penology underlying national criminal justice for ordinary crimes as the appropriate source from which to construct a philosophical framework for international sentencing for atrocity crimes.[126] This may explain its practice of imposing more severe sentences than other tribunals. The Trial Chamber identified retribution and deterrence (both general and specific) as the primary justifications for punishment.[127] The RUF judges acknowledge that other objectives, such as prevention, rehabilitation, and stigmatization, are found in ICL sentencing jurisprudence but stops short of adopting them as

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[120] *Id.* ¶ 22.
[121] *Id.* ¶¶ 54–60.
[122] RUF Trial Judgment ¶¶ 677–684.
[123] *Id.*
[124] *Id.* ¶¶ 684–687. Specifically, Gbao was convicted of all counts in TABLE 2, except for counts 12, 16, 17, and 18. *See infra* TABLE 2, at page 639.
[125] RUF Sentencing Judgment ¶ 12.
[126] *Id.*
[127] *Id.* ¶ 13.

relevant consideration for sentencing allocations.[128] For example, the judges associate rehabilitation with individual restoration and hold that this "is more relevant in the context of domestic criminality than international criminality."[129] Significantly, the judges also excluded reconciliation as a sentencing factor.

The RUF Trial Chamber identified the same four constitutive considerations for determining an appropriate sentence as the Taylor Trial Chamber: gravity of the offense, individual circumstances of the accused, aggravating and mitigating factors, and if appropriate the general sentencing practices of the ICTR and the national courts of Sierra Leone.[130] No accused, however, was charged with offenses under Sierra Leonean law, so the Chamber never considered local law.[131] The Trial Chamber further observed that an individual convicted of more crimes should receive a higher sentence and that the sentence should be individualized and proportionate.[132] The Trial Chamber pronounced specific sentences for each crime before imposing a cumulative sentence,[133] a welcomed improvement on the practice of the ad hoc tribunals, which merely provided an unspecific "global" sentence in contravention of the Rules of Procedure and Evidence (RPE).[134]

The Trial Chamber held that "gravity of the offense" is the "litmus test for the appropriate sentence."[135] In terms of methodology, the judges treated the "form and degree of the participation" in the crime as part of the gravity assessment.[136] The Trial Chamber conceptualized "gravity of the offense" in terms of seven assessment points: (1) the "scale" of the offenses committed; (2) their "brutality"; (3) the "role of the Accused" in their commission; (4) the "number of victims"; (5) the "degree of suffering" or impact of the crime on the immediate victim; (6) the crime's "effect on relatives" of the victim; and (7) the "vulnerability" of victims.[137] More specifically, "the role of the Accused" is determined by the mode of liability that he was convicted of and

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[128] *Id.* ¶ 14.
[129] *Id.* ¶ 16.
[130] Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL – 2004-15-PT, Corrected Amended Consolidated Indictment (Aug. 2, 2006).
[131] *Id.* ¶ 32.
[132] *Id.* ¶ 18.
[133] *Id.*
[134] Dana, *supra* note 5, at 917–19.
[135] RUF Sentencing Judgment ¶ 19.
[136] *Id.*
[137] *Id.*

the nature and degree of his participation in the commission of the offence.[138] Regarding the latter, the Trial Chamber held "aiding and abetting as a mode of liability generally warrants a lesser sentence than that imposed for a more direct form of participation."[139] However, in the last judgment it rendered, the SCSL disavowed this ruling as a general principle of ICL.[140]

The "effect" of the crime on relatives of the victim includes serious mental and emotional suffering resulting from being forced to haplessly watch the murder of their family members, systematic rampage of their villages, indiscriminate sexual assaults and sexual slavery.[141] All of these crimes were carried out for the purpose of terrorizing the population.[142] The victims, especially those of sexual crimes and sexual slavery, were young women and girls—an especially vulnerable group of individuals that is suffering the aftereffects of the crimes to this day.[143] Similarly, victims of physical abuse, such as beatings, amputations, physical mutilations (hot irons were used to inscribe "RUF" into victims' bodies), were subject to collective punishment and terrorizing and the aftereffects of these crimes left victims permanently disfigured, unconscious or dead.[144] Moreover, a large number of victims were enslaved and abducted and children under fifteen years of age were used as soldiers.[145] Children—an especially vulnerable victim population—were arbitrarily abducted, subject to harsh training and made to commit various brutal crimes as soldiers.[146] If an accused was convicted of participating in a joint criminal enterprise (JCE), the Trial Chamber considered the level of his contribution to the JCE.[147]

The court found that Sesay was in a leadership position and was in a superior-subordinate relationship with the perpetrators that attacked UNAMSIL personnel.[148] It concluded that Sesay was not directly responsible for the attacks on UNAMSIL, did not order such attacks, and was not involved in a joint criminal enterprise to commit these crimes.[149]

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[138] *Id.* ¶ 20.
[139] *Id.*
[140] *See generally* Taylor Appeal Judgment. *See also supra* Part III.*A* (discussing the prosecution of Charles Taylor).
[141] RUF Sentencing Judgment ¶ 132.
[142] *Id.* ¶ 210.
[143] *Id.* ¶ 132.
[144] *Id.* ¶ 155.
[145] *Id.* ¶ 180.
[146] *Id.* ¶ 183.
[147] *Id.* ¶ 23.
[148] *Id.* ¶ 63.
[149] *Id.* ¶ 57.

Sesay's liability for the attacks against UNAMSIL peacekeepers was by omission only.[150] He failed to prevent or punish subordinates for their attacks on the UNAMSIL.[151] Nevertheless, the Trial Chamber concluded that the gravity of Sesay's crimes was "exceptionally high."[152]

By contrast, Kallon was found to have directly participated in the crimes.[153] He abducted children for solider training and helped maintain a brutal system of forced recruitment of child soldiers.[154] He ordered attacks on UN peacekeepers.[155] Furthermore, Kallon was found to have substantially contributed to the JCE as a senior military leader.[156] The Chamber found that Kallon was high-ranking and had the ability to control the subordinate commanders but failed to prevent or punish the crimes carried out by these individuals.[157] The Trial Chamber found that the gravity of Kallon's criminal conduct reached the highest levels with respect to the use of child soldiers and attacks on UNAMSIL peacekeepers.[158] Gbao was found to have helped establish and manage a system of civilian enslavement, but not found to have direct control over fighters.[159] Although Gbao's crimes were serious, the Chamber found that his participation in the JCE was more limited than that of Sesay and Kallon.[160]

The Trial Chamber relied on the ICTY's sentencing jurisprudence to identify possible aggravating factors.[161] These included the leadership role of the accused, motives, premeditation, enthusiastic participation in the crime, the temporal scope of the accused's criminality, attacks on traditional places of sanctuary such as churches, schools and hospitals, sadism and desire for revenge, abuse of trust or official capacity, and total disregard for sanctity of human dignity and life.[162] Although some of the accused exhibited bad behavior during trial, the court did not treat such behavior as an aggravating factor.

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[150] *Id.* ¶ 61.
[151] *Id.* ¶ 58.
[152] *Id.* ¶ 116.
[153] *Id.* ¶ 47.
[154] *Id.* ¶ 236.
[155] *Id.*
[156] *Id.* ¶ 240.
[157] *Id.* ¶ 218.
[158] *Id.* ¶ 41.
[159] *Id.* ¶ 268.
[160] *Id.* ¶ 271.
[161] *Id.* ¶ 25.
[162] *Id.*

According to the Trial Chamber, the only mitigating circumstance that it is required to take into account pursuant to the statute and RPE is the accused's substantial cooperation with the Prosecutor.[163] Penalty mitigation based on all other possible sentence-reducing factors are at the court's discretion, including expression of remorse, lack of education or training, no prior convictions, personal and family circumstances, promotion of peace and reconciliation after the conflict, good behavior in detention and assistance to detainees or victims.[164]

Although Sesay was himself forcibly recruited into the RUF at the age of nineteen, perhaps even younger, the Trial Chamber declined to treat this circumstance as a mitigating factor because he could have "chosen another path."[165] Moreover, the fact that he had no prior convictions was given little weight in mitigation.[166] Sesay's statement of remorse was found not to be sincere, but his empathy for the victims was given limited mitigation.[167] Likewise, the Trial Chamber found that Kallon was forcibly recruited into the RUF and had no prior criminal convictions.[168] But like Sesay, these factors would not find favor with the judges at the SCSL for the purpose of reducing Kallon's sentence. The occasional assistance Kallon provided to some civilians was not consistent enough to deserve penalty reduction. For the Trial Chamber, it merely showed that the accused had the power to influence the RUF away from mass crimes but failed to do so.[169] The Chamber did consider Kallon's statement of remorse mitigating because he genuinely and sincerely acknowledged his role in the crimes and recognized the pain suffered by the victims.[170] The Chamber also rejected Kallon's claim that he was acting under duress in carrying out superior orders given to him by the RUF leadership.[171] Gbao was not found to have expressed remorse for his crimes, but he was sixty years old at the time of trial and thus the Trial Chamber mitigated his sentencing on the account of old age.[172] The Trial Chamber issued individual penalties for each crime that the accused was convicted of before issuing a

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[163] *Id.* ¶ 29.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.* ¶ 85.
[168] *Id.*
[169] *Id.* ¶ 252.
[170] *Id.*
[171] *Id.* ¶ 84.
[172] *Id.* ¶ 277.

cumulative sentence. The sentences, all to run concurrently, for each count are listed in TABLE 2.[173]

The most severe sentences that Sesay received was for the war crimes of terrorism; mutilation; deliberate attacks on peacekeepers; conscripting and enlisting child soldiers; and enslavement as a crimes against humanity.[174] Each of these crimes was punished by a sentence of fifty years or more. These sentences were to run concurrently and Sesay received a total sentence of fifty-two years of imprisonment.[175] The severest individual prison sentences that Kallon received were forty and thirty-nine years for deliberate attacks on peacekeeper and terrorism as a war crime, respectively. Gbao's punishment for the same two crimes was substantially less. He received a prison sentence of twenty-five years for each crime (deliberate attacks on peacekeeper and terrorism as a war crime) to run concurrently.[176] Thus, when we compare the prison sentence of twenty-five years for a low level foot soldier with the fifty-two years imposed on a high level commander, we observe a 100% increase in penalty. Even comparing a high-ranking perpetrator (Kallon) with the highest-ranking figure (Sesay) in custody within the same organization, there is still a significant 25%–33% increase in prison time.

The Appeals Chamber upheld all convictions for Sesay and Kallon but unanimously overturned Gbao's conviction on count 2 (collective punishment) and found that he was not responsible for one of two attacks against UN peacekeepers in count 15. Nevertheless, this reduction in the scope of Gbao's criminal responsibility did not reduce his punishment overall, although sentences for relevant individual counts were revised.[177]

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[173] *Id.* at 93; *see infra* TABLE 2, at p. 639.
[174] RUF Sentencing Judgment ¶¶ 3, 6, 9.
[175] *Id.* § IV.
[176] *Id.*
[177] RUF Appeal Judgment.

TABLE 2: CHARGES, CONVICTIONS, AND APPEAL SUMMARY OF RUF DEFENDANTS

CRIMINAL CHARGES IN RUF TRIAL	SESAY TC	SESAY AC UPHELD?	KALLON TC	KALLON AC UPHELD?	GBAO TC	GBAO AC UPHELD?
COUNT 1: Acts of Terrorism as War Crimes (WC)	52 years	Y	39 years	Y	25 years	Y
COUNT 2: Collective Punishments as WC	45 years	Y	35 years	Y	20 years	N
COUNT 3: Extermination as Crime against humanity (CAH)	33 years	Y	28 years	Y	15 years	Y
COUNT 4: Murder as CAH	40 years	Y	35 years	Y	15 years	Y
COUNT 5: Murder as WC	40 years	Y	35 years	Y	15 years	Y
COUNT 6: Rape as CAH	45 years	Y	35 years	Y	15 years	Y
COUNT 7: Sexual slavery / sexual violence as CAH	45 years	Y	30 years	Y	15 years	Y
COUNT 8: Other inhumane acts as CAH	40 years	Y	30 years	Y	10 years	Y
COUNT 9: Outrages upon personal dignity as WC	35 years	Y	28 years	Y	10 years	Y
COUNT 10: Mutilation as WC	50 years	Y	35 years	Y	20 years	Y
COUNT 11: Other inhumane acts as CAH	40 years	Y	30 years	Y	11 years	Y
COUNT 12: Conscription or enlisting children under the age of 15 as WC	50 years	Y	35 years	Y	NG	NG
COUNT 13: Enslavement as CAH	50 years	Y	35 years	Y	25 years	Y
COUNT 14: Pillage as a WC	20 years	Y	15 years	Y	6 years	Y
COUNT 15: Attacking peacekeepers as a WC	51 years	Y	40 years	Y	25 years	Y
COUNT 16: Murder as CAH	NG	NG	NG	NG	NG	NG
COUNT 17: Murder as WC	45 years	Y	35 years	Y	NG	NG
COUNT 18: Abductions/Hostage Taking as WC	NG	NG	NG	NG	NG	NG

C. The AFRC Trial: Prosecutor v. Brima, Kamara & Kanu

1. The Crimes

The AFRC fighting faction largely consisted of soldiers from the Sierra Leone Army (SLA).[178] Alex Tamba Brima (aka Gullit) and Brima Bazzy Kamara were SLA Staff Sergeants. Santigie Borbor Kanu (aka Five-Five) was a SLA Sergeant.[179] Brima was a senior member of the AFRC and helped stage the coup that ousted the government of President Kabbah. He was in direct command of the AFRC forces, which at times included RUF fighters, in the Kono District during the conflict. Kamara also participated in the coup and was a member of a combined AFRC/RUF junta governing body.[180] Kanu was also a senior member of the AFRC, the junta and AFRC/RUF forces. He was also involved in the coup and was a member of the AFRC Supreme Council. All three accused were commanders during the relevant period of conflict and they acted in concert with Charles Taylor to carry out the crimes.[181] The three AFRC defendants and the three RUF defendants shared a common plan to take control of Sierra Leone, especially the diamond mining areas.[182] The three AFRC fighters were charged with eleven counts of atrocities crimes as listed in TABLE 3 below.[183]

The Trial Chamber acquitted Brima and Kamara of count 11 (other inhumane acts as CAH) and refused to consider JCE as a mode of criminal responsibility because it found it to be defectively pleaded. The court also dismissed count 7 (sexual slavery and other forms of sexual violence as CAH) and count 8 (other inhumane acts as CAH) as duplicative pleadings of other charges. Regarding the charges in counts 7, 8 and 9, Prosecution argued that forced marriages fell under count 8 as other inhumane acts and were distinct from sexual acts.[184] The Trial Chamber rejected this argument and found that the evidence did not establish a non-sexual crime of "forced marriage"

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[178] Prosecutor v. Brima, Kamara and Kanu, Further Amended Consolidated Indictment ¶ 12 (Feb. 15, 2005), SCSL-04-16-PT, *available at* http://www.rscsl.org/Documents/Decision/AFRC/141/SCSL-04-16-PT-141.pdf.

[179] *Id.*

[180] AFRC Trial Judgment ¶ 70B.

[181] *Id.*

[182] *Id.* ¶ 60.

[183] Prosecutor v. Brima, Kamara and Kanu, Further Amended Consolidated Indictment ¶ 12 (Feb. 15, 2005), SCSL-04-16-PT, *available at* http://www.rscsl.org/Documents/Decision/AFRC/141/SCSL-04-16-PT-141.pdf; *see infra* TABLE 3, at p. 644.

[184] AFRC Trial Judgment ¶ 701.

independent of sexual slavery under article 2(g) of the Statute.[185] It concluded that the crime of sexual slavery subsumes the crime of "forced marriage" in count 9, and dismissed counts 7 and 8. The Appeals Chamber overruled, finding that a forced marriage is not necessarily a sexual crime because "sex is not the only incident of the forced relationship." "A forced marriage involves a perpetrator compelling a person by force or threat of force, through words or conduct of the perpetrator or those associated with him into a forced conjugal association" and results "in great suffering or physical or mental injury" to the victim.[186] Although the Appeals Chamber found error with the Trial Chamber's ruling on this issue, it declined to enter additional convictions for forced marriage. Furthermore, the Appeals Chamber found that the JCE count was not defectively pleaded.[187] Despite reversing the Trial Chambers rulings, which dismissed counts 7 and 8 and the JCE mode of liability, the Appeals Chamber affirmed the sentences of all three AFRC defendants.[188]

2. The Punishment

Brima and Kanu were sentenced to fifty years imprisonment and Kamara received forty-five years.[189] Unlike the judges in the RUF case, the AFRC Trial Chamber failed to provide a penalty for each crime the accused was convicted of before imposing a cumulative sentence.[190] The judges here only offered a "global" sentence for multiple convictions.[191] The AFRC Trial Chamber held that retribution, deterrence and rehabilitation are the main goals of sentencing for atrocity crimes and thus all three are determinative of proper sentencing allocations.[192] The judges considered the standard sentencing factors such as the gravity of the offense, and any aggravating and mitigating circumstances. They also dismissed the relevance of Sierra Leonean sentencing practices on the grounds that the accused were not charged with crimes under Sierra Leonean law.[193] The Trial Chamber emphasized that the three accused were convicted of "some of the most heinous, brutal and atrocious crimes ever recorded in human history."[194]

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[185] *Id.* ¶ 704.
[186] AFRC Appeal Judgment ¶ 195.
[187] *Id.* ¶ 66.
[188] *Id.* ¶ 67.
[189] AFRC Sentencing Judgment ¶ 26.
[190] *Id.*
[191] *Id.* ¶ 30.
[192] *Id.* ¶ 14.
[193] *Id.* ¶ 32.
[194] *Id.* ¶ 34.

With respect to Brima, the Trial Chamber found that he committed atrocity crimes against "very large numbers of unarmed civilians and had a catastrophic" impact on the victims and their families.[195] Pursuant to Article 6(1),[196] Brima was directly criminally responsible for exterminations, murders, mutilations (amputations of various limbs), and terrorizing the civilian population. He personally planned and ordered the crimes of collective punishment, recruitment and use of child soldiers, sexual enslavement, looting, murders and enslavement of civilians.[197] Brima was also found liable under Article 6(3), an indirect form of criminal responsibility by omission, for crimes committed by his subordinates in various districts. He was a primary perpetrator of various murders of civilians, which the judges treated as indicative of the particular gravity of his offenses.[198] The Trial Chamber found that no personal circumstances justified mitigation in Brima's case. The Chamber found that he was a professional soldier with a duty to protect civilians but failed to do so.[199] In fact, Brima carried out attacks himself, which according to the Trial Chamber aggravated his punishment.[200] Moreover, the Chamber found that Brima's position as the overall commander of the troops was an aggravating factor.[201] Other aggravating factors included Brima's tactics of extreme coercion, his zealous participation in some of the crimes, and the prolonged period of time during which enslavement and attacks on places of worship were carried out.[202] The Trial Chamber did not find Brima's statement of remorse to be genuine and did not take this factor into consideration as mitigating.[203]

With respect to Kamara, the Trial Chamber found him responsible under Article 6(1) for ordering five murders of civilians, planning abduction of children for use as child soldiers, planning crimes of sexual slavery and enslavement against civilians, aiding and abetting murder and extermination of civilians, and mutilations of persons.[204] He was also found liable under Article 6(3) for crimes committed by subordinates in various districts.[205] Similar to Brima, Kamara's crimes were extremely brutal because they

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[195] *Id.* ¶ 40.
[196] SCSL Statute, art. 6(1) states: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime."
[197] AFRC Sentencing Judgment ¶ 34.
[198] *Id.* ¶ 40.
[199] *Id.* ¶ 53.
[200] *Id.*
[201] *Id.* ¶ 55.
[202] *Id.*
[203] *Id.* ¶ 67.
[204] *Id.* ¶ 70.
[205] *Id.* ¶ 71.

targeted a very large number of unarmed civilians and impacted the victims' lives in "catastrophic and irreversible" way.[206] The Trial Chamber found that nothing in Kamara's personal circumstances warranted mitigation of his punishment.[207] Kamara was a professional soldier and instead of protecting civilians he attacked them and gave orders to the soldiers under his authority to attack them.[208] The judges held that a professional soldier and ranking officer ordering attacks on civilians for whom he has a duty to protect is a particularly aggravating factor.[209] Other aggravating factors in Kamara's case included vulnerability of victims, the heinous nature of the crimes, and the fact that he was a senior government and military official with a duty to prevent or punish crimes.[210] The court emphasized that the way the crimes were committed—locking civilians in their homes and setting them on fire until everyone inside burned alive—was especially cruel and constituted an aggravating factor.[211] According to the judges, it also showed that Kamara was a direct and active participant in the crimes he ordered.[212] Kamara's position of authority was also considered an aggravating factor.[213] The Chamber found no mitigating circumstances in his case.[214]

With respect to Kanu, the Trial Chamber found him responsible under both Article 6(1) for direct participation in the crimes and Article 6(3) as a commander that failed to prevent or punish the crimes of subordinates under his control.[215] The court held that Kanu was directly responsible pursuant to Article 6(1) for: (a) planning abduction of children for use as child soldiers; (b) committing sexual slavery and enslavement of civilians; (c) ordering murders and mutilations; (d) personally mutilating civilians and looting civilian property; (e) instigating other murders; and (f) aiding and abetting murder and extermination of civilians.[216] Kanu was found liable under Article 6(3) for failing to prevent or punish the crimes of his subordinates in various districts.[217] The judges rejected his claim that the bulk of the crimes were committed by the RUF, who were not under his control.[218]

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[206] *Id.* ¶ 72.
[207] *Id.* ¶ 78.
[208] *Id.* ¶ 73.
[209] *Id.* ¶ 82.
[210] *Id.*
[211] *Id.*
[212] *Id.* ¶ 83.
[213] *Id.* ¶ 82.
[214] *Id.* ¶ 80.
[215] *Id.* ¶¶ 92–93.
[216] *Id.* ¶ 100.
[217] *Id.* ¶ 95.
[218] *Id.* ¶ 98.

Similar to Kamara and Brima, the court rejected arguments for mitigation based on Kanu's personal circumstances.[219] The judges did find, however, that Kanu's leadership position, third in command of the armed forces, was an aggravating factor.[220] Moreover, Kanu's demonstration of amputations and orders to commit killings were aggravating factors.[221] There was also no evidence that Kanu was acting under duress in carrying out the crimes.[222] Kanu's statement to the Chamber expressed no remorse and was thus not taken into consideration as a mitigating circumstance.[223]

TABLE 3: CHARGES, CONVICTIONS, AND APPEAL SUMMARY OF AFRC DEFENDANTS

CRIMINAL CHARGES IN ARFC TRIAL	BRIMA TC	BRIMA AC UPHELD?	KAMARA TC	KAMARA AC UPHELD?	KANU TC	KANU AC UPHELD?	
COUNT 1: Acts of Terrorism as War Crimes (WC)	50 years (pursuant to a global sentence for all convictions)	Y	45 years (pursuant to a global sentence for all convictions)	Y		50 years in total	Y
COUNT 2: Collective Punishments as WC		Y		Y			RV
COUNT 3: Extermination as CAH		Y		Y			Y
COUNT 4: Murder as CAH		Y		Y			Y
COUNT 5: Violence to life, particularly murder as WC		Y		Y			Y
COUNT 6: Rape as CAH		Y		Y			Y
COUNT 7: Sexual slavery / sexual violence as CAH	Dismissed (DM)	Reversed (RV)	DM	RV		DM	RV
COUNT 8: Other inhumane acts as CAH	DM	RV	DM	RV		DM	RV
COUNT 9: Outrages upon personal dignity as WC, specifically rape, forced prostitution, and indecent assault	part of 50 years	Y	part of 45 years	Y		part of 50 years	Y
COUNT 10: Violence to life as WC		Y		Y			Y
COUNT 11: Other inhumane acts as CAH	NG	NG	NG	NG			Y

[219] *Id.* ¶ 105.
[220] *Id.* ¶ 106.
[221] *Id.*
[222] *Id.* ¶ 113.
[223] *Id.* ¶ 139.

D. The CDF Trial: Prosecutor v. Fofana & Kondewa

1. The Crimes

The Civil Defence Forces (CDF) fought against the RUF and the AFRC during the conflict in Sierra Leone.[224] The CDF was under the leadership of the Samuel Hinga Norman, who was considered as the group's "National Coordinator" and was a popular war hero to many Sierra Leoneans.[225] The defendants in the CDF trial were Norman and two other top CDF leaders: Moinina Fofana and Allieu Kondewa.[226] The CDF defendants contended throughout the trial that they were simply attempting to restore democracy and power to the democratically elected President Kabbah, whose government was overthrown by the AFRC in 1997.[227] They were charged with murder as both crimes against humanity and war crimes; inhumane acts as a crime against humanity; and six counts of war crimes, including violence to life, health and physical or mental well-being of persons (in particular cruel treatment), pillaging, acts of terrorism, collective punishments, and enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.[228]

The trial proceedings against Samuel Hinga Norman were terminated when he died after the trial was completed but before a judgment was pronounced.[229] The Trial Chamber acquitted Fofana of all crimes against humanity and found him guilty of war crimes only.[230] In particular, he was convicted of murder, cruel treatment, pillage, and collective punishment.[231] The Trial Chamber articulated sentences for each conviction (all to run concurrently) before entering a cumulative sentence. Fofana was sentenced to 6 years for murder, 6 years for inhumane acts, 3 years for pillage, and 4 years for collective punishment.[232] Kondewa was convicted of murder (for which he received a prison sentence of eight years), cruel treatment (eight years), pillage (five years), acts of terrorism (six years), and enlisting and/or using children in

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[224] CDF Trial Judgment ¶ 2.
[225] *Id.* ¶ 1.
[226] *Id.*
[227] *Id.* ¶ 11.
[228] *Id.* ¶ 3.
[229] *Id.* ¶ 4.
[230] *Id.* ¶ 45.
[231] *Id.* ¶ 975.
[232] CDF Sentencing Judgment p. 33.

hostilities (seven years).[233] Kondewa was likewise acquitted of all crimes against humanity as well as acts of terrorism as a war crime.[234]

The not guilty verdicts for crimes against humanity in counts one and three indicates that the judges concluded that Fofana and Kondewa lacked awareness of the contextual or jurisdictional elements necessary for a conviction for this category of crimes. It does not mean that they did not commit the constitutive elements of the underlying crimes of murder and inhumane acts. Their convictions for both murder and cruel treatment as war crimes under counts two and four respectively establish that Fofana and Kewdona did indeed perpetrate the underlying crimes according to the Trial Chamber. In fact, as discussed below, the Appeals Chamber reversed the trial judges on this point and found both defendants criminally responsible for crimes against humanity for murder and inhumane treatment.[235]

Regarding the war crimes of pillage, the Trial Chamber convicted Kondewa pursuant to a theory of superior responsibility under Article 6(3) for separate incidents of pillage in Moyamba District and again in the Bonthe District.[236] The Appeals Chamber, however, reversed Kondewa's conviction for superior responsibility regarding pillage committed in Moyamba on the grounds that it was not established beyond a reasonable doubt that Kondewa exercised control over the perpetrators.[237] The Appeals Chamber also set aside some of Kondewa's convictions for lack of evidence.[238] Specifically, the Appeals Chamber reversed the Trial Chamber's guilty verdicts against Kondewa pursuant to Article 6(1) for murder committed in Talia and Base Zero and for enlisting children under the age of fifteen years into armed forces or groups and using them to participate actively in hostilities.[239] Thus, at the conclusion of his appeal, Allieu Kondewa was acquitted on counts 6, 7 and 8, and was found guilty on counts 1, 2, 3, 4 and 5 (in part) pursuant to the following modes of liability[240]:

- Count 1 for murder[241] as a crime against humanity[242] pursuant to Article 6(1) for aiding and abetting the murders committed

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233 *Id.* at 34.
234 *Id.* ¶ 52.
235 *Id.*
236 CDF Sentencing Judgment p. 33.
237 CDF Appeal Judgment ¶ 580B.
238 *Id.* ¶ 560.
239 *Id.* at 187.
240 *Id.*
241 By majority with at least one judge dissenting.
242 SCSL Statute, art. 2.a.

in Tongo Fields and pursuant to Article 6(3) for superior responsibility for the murders committed in Bonthe District. For these murders, Kondewa was sentenced to twenty years of imprisonment.[243]

- Count 2 for murder[244] as a war crime[245] pursuant to Article 6(1) for aiding and abetting the murders committed in Tongo Fields and pursuant to Article 6(3) for superior responsibility for the murders committed in Bonthe District. For these murders, Kondewa was sentenced to twenty years of imprisonment.[246]
- Count 3 for other inhumane acts, as a crime against humanity[247] pursuant to Article 6(1) for aiding and abetting the murders committed in Tongo Fields and pursuant to Article 6(3) for superior responsibility for the other inhumane acts committed in Bonthe District. For these inhumane acts, Kondewa was sentenced to twenty years of imprisonment.[248]
- Count 4 for cruel treatment as a war crime[249] pursuant to Article 6(1) for aiding and abetting the murders committed in Tongo Fields and pursuant to Article 6(3) for superior responsibility for cruel treatment committed in Bonthe District. For the war crime of cruel treatment, Kondewa was sentenced to twenty years of imprisonment.[250]
- Count 5 for pillage as a war crime in violation of common Article 3 of the Geneva Conventions and Additional Protocol II[251] pursuant to Article 6(3) for superior responsibility for pillage war crimes committed in Bonthe District. For the war crime of pillage, Kondewa was sentenced to seven years of imprisonment.[252]

Regarding Fofana, the Appeals Chamber reversed his conviction on count 7 for the war crime of collective punishment, but also reversed the Trial Chamber's acquittal on counts 1 and 3 for murder and inhumane acts as a

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[243] CDF Sentencing Judgment p. 33.
[244] By majority with at least one judge dissenting.
[245] SCSL Statute, art. 3.a.
[246] CDF Sentencing Judgment p. 33.
[247] SCSL Statute, art. 2.i.
[248] CDF Sentencing Judgment p. 33.
[249] SCSL Statute, art. 3.a.
[250] CDF Sentencing Judgment p. 33.
[251] SCSL Statute, art. 3.f.
[252] CDF Sentencing Judgment p. 33.

crime against humanity.[253] It also unanimously held that Fofana was not guilty of acts of terrorism and, by majority, not guilty of war crimes for collective punishment and enlisting child soldiers.[254] Thus, Fofana was found guilty on counts 1, 2, 3, 4, and 5 and not guilty on counts 6, 7 and 8. The final disposition of the charges against Moinina Fofana are as follows, including the applicable mode of liability:

- Count 1 for murder as a crime against humanity[255] pursuant to Article 6(1) for aiding and abetting the murders committed in Tongo Fields and pursuant to Article 6(3) for superior responsibility for the murders committed in Koribondo and Bo District. For these murders, Fofana was sentenced to fifteen years of imprisonment.[256]
- Count 2 for murder as a war crime[257] pursuant to Article 6(1) for aiding and abetting the murders committed in Tongo Fields and pursuant to Article 6(3) for superior responsibility for the murders committed in Koribondo and Bo District. For these murders, Fofana was sentenced to fifteen years of imprisonment.[258]
- Count 3 for other inhumane acts, as a crime against humanity[259] pursuant to Article 6(1) for aiding and abetting the murders committed in Tongo Fields and pursuant to Article 6(3) for superior responsibility for the other inhumane acts committed in Koribondo and Bo District. For these inhumane acts, Fofana was sentenced to fifteen years of imprisonment.[260]
- Count 4 for cruel treatment as a war crime[261] pursuant to Article 6(1) for aiding and abetting the murders committed in Tongo Fields and pursuant to Article 6(3) for superior responsibility for cruel treatment committed in Koribondo

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[253] CDF Appeal Judgment ¶ 40.
[254] *Id.* ¶ 18 (at least one appeals judge dissented on the Appeals Chamber's not guilty verdicts for collective punishment and enlisting child soldiers).
[255] SCSL Statute, art. 2.a.
[256] CDF Appeal Judgment § 5.
[257] SCSL Statute, art. 3.a.
[258] CDF Sentencing Judgment p. 33.
[259] SCSL Statute, art. 2.i.
[260] CDF Appeal Judgment.
[261] SCSL Statute, art. 3.a.

and Bo District. For these cruel treatments, Fofana was sentenced to fifteen years of imprisonment.[262]

- Count 5 for pillage as a war crime in violation of common Article 3 of the Geneva Conventions and Additional Protocol II[263] pursuant to Article 6(3) for superior responsibility for pillage war crimes committed in Bo District. For the war crime of pillage, Fofana was sentenced to five years of imprisonment.[264]

2. The Punishment

The CDF Trial Chamber held that "[a]ccording to the jurisprudence of the international criminal tribunals . . . the primary objectives of international criminal tribunals are retribution, deterrence and rehabilitation."[265] Notably, the judges are not limiting themselves here to merely stating the primary objectives of ICL, but are actually declaring what they find to be the international standard on the issue.[266] Conceptualizing retribution for atrocity crimes, the judges opined that retribution is not about "revenge" but about "duly expressing the outrage of the international community at these crimes."[267] The Trial Chamber elaborated that a sentence from an international criminal court "should make plain the condemnation of the international community of the behavior in question and show that the international community was not ready to tolerate serious violations of international humanitarian law and human rights."[268]

When it came to defining retribution, the judges in the CDF trial adopted a definition articulated by the Supreme Court of Canada: "appropriate punishment which properly reflects the moral culpability of the offender . . . requires the imposition of a just and appropriate punishment."[269] The explicit reference to a foreign country, culture, and legal system's understanding of retribution and declared intention to follow that understanding is probably explained by the fact that one of the judges in this case was Canadian.[270]

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[262] CDF Sentencing Judgment p. 33.
[263] SCSL Statute art. 3.f.
[264] CDF Sentencing Judgment p. 33.
[265] CDF Sentencing Judgment ¶ 26.
[266] *Id.* However, as discussed below, ICL sentencing jurisprudence generally does not treat rehabilitation as one of the primary purposes of ICL sentencing.
[267] *Id.*
[268] *Id.*
[269] *Id.* ¶ 27 (citing R v. M, [1996] 1 S.C.R. 500 (Can.), ¶ 80).
[270] THE SPECIAL COURT OF SIERRA LEONE, *supra* note 4.

The Trial Chamber considered rehabilitation less important in international tribunals than in domestic law and emphasized that "in the particular circumstances of Sierra Leone," the court should seek to "end impunity" and "contribute to the process of national reconciliation and to the restoration and maintenance of peace."[271] The Chamber also noted that "one of the main purposes" of sentencing is to inform the general public that international rules apply to everyone.[272] The Trial Chamber also observed that the principle of proportionality applied to sentencing allocations.[273]

The Trial Chamber considered the gravity of the offense, and any aggravating and mitigating circumstances in determining a proper sentence. Regarding gravity, the trial judges in the CDF case suggest a subtle shift: gravity is conceptualized in their "view" as an "important factor" in determining the length of a prison sentence, rather than a *primary* factor.[274] In the punishment of Charles Taylor and the RUF and AFRC fighters, gravity was more than an *important* factor; it was the *primary* factor determining sentencing allocations.[275] Underscoring this subtle shift is the distinction the CDF Trial Chamber makes between *their* view (gravity as an important factor) and the general sentencing jurisprudence, which regards gravity as "the litmus test" for a fair sentence.[276] It would be easy to dismiss this as a trivial difference in word selection. But as trained judges and lawyers, we understand how word choice creates conceptual space or signals significance. Are the judges in the CDF case signaling their intent to render a less severe penalty and laying the groundwork for the justification here?

For the remaining brief discussion on gravity, the judges in the CDF case followed the typical conceptualization of gravity by taking into account the particular circumstances of the crimes committed, specifically the "scale and brutality of the offenses committed, the role played by the Accused in their commission, the degree of suffering or impact of the crime on the immediate

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[271] CDF Sentencing Judgment ¶ 26.

[272] *Id.*

[273] *Id.* ¶ 31 (citing Prosecutor v. Tadic, IT-94-1-a, Judgment in Sentencing Appeals (AC) ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000) [hereinafter Tadic Sentencing Appeal]; Prosecutor v. Todorovic, IT-95-9/1-S, Sentencing Judgment (TC) ¶ 29 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2001); Prosecutor v. Kupreskic, Kupreskic, Kut reskic, Josipovic and Santic, IT-95-16-A, Judgment (AC) ¶ 445 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001); Prosecutor v. Furundzija, IT-95-17/1-A, Judgment (AC) ¶ 249 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000)).

[274] *Id.* ¶ 33.

[275] *See, e.g.*, Taylor Sentencing Judgment ¶ 19; AFRC Sentencing Judgment ¶ 19.

[276] *See* Taylor Sentencing Judgment ¶ 19; RUF Sentencing Judgment ¶ 19; Taylor Appeal Judgment ¶ 651.

victim, as well as its effect on relatives of the victim, and the vulnerability and number of victims."[277]

The "role of the Accused in the crime" is folded into the assessment of the gravity of the offense. The "role of the Accused" within this framework is determined by examining two prongs: (1) the mode of liability under which the accused was convicted and (2) the nature and degree of his participation in the crime.[278] While the sentencing judgment is thus far methodical in laying out its approach, the judges then introduced opacity into the sentencing determination: "In particular, the Chamber has considered whether the Accused was held liable as an indirect or secondary perpetrator."[279] This analytical approach depends heavily on the direct versus indirect dichotomy borrowed from domestic criminality for ordinary crimes. It is arguably ill-suited for criminality for atrocity crimes.[280] The doctrinal insufficiency of this approach is discussed below in greater detail.

At trial, Fofana was found guilty of aiding and abetting, pursuant to Article 6(1), for counts 2, 4, and 7 for crimes committed in Tongo. He was also held criminally responsible under Article 6(3) for counts 2, 4, and 7 for crimes committed by his subordinates in Koribondo and Bo District as well as for count 5 in relation to the latter.[281] More specifically, Fofana was found to have aided and abetted murder and mutilations in Tongo by giving "encouragement" to fighters who committed them.[282] The CDF Trial Chamber opined that the sentencing jurisprudence of the ICTY and ICTR imposed lesser sentences for aiding and abetting. Based on this, it justified a lower penalty for Fofana observing that he "only encouraged" the perpetrators but did not give them orders to commit such crimes.[283] The court's characterization is generous to say the least. Regarding his liability for the crimes committed by subordinates under his control, the judges found that his subordinates' crimes were large scale and "particularly serious" involving extreme brutality, targeted killing of vulnerable persons (many who were children and women), and gruesome murders of two women by inserting sticks into their "genitals until they come out of their mouths."[284] However, Fofana was not present at the scene of these crimes, nor

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[277] CDF Sentencing Judgment ¶ 33.
[278] *Id.* ¶ 34.
[279] *Id.*
[280] Shahram Dana, *Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY*, 4 INT'L CRIM. L. REV. 321, 339 (2004).
[281] CDF Sentencing Judgment ¶ 45.
[282] *Id.* ¶ 50.
[283] *Id.*
[284] *Id.* ¶ 4.

did he order them or aid and abetting in their commission.[285] According to the Trial Chamber, his criminal responsibility lies in his omission: his failure to punish the perpetrators who were under his control.[286]

Kondewa, for his part, shot and killed a town leader in Talia and forced children into soldiering and killing. Pursuant to Article 6(1), the Trial Chamber convicted him for "committing" murder and using child soldiers under Counts 2 and 8 respectively.[287] In addition, he was also found guilty of aiding and abetting the same crimes that Fofana was convicted of in Tongo and for failing to prevent crimes in Counts 2, 4, 5 and 7 pursuant to Article 6(3).[288] The Chamber found that Kondewa humiliated and degraded his victims, assisted in committing crimes that were large scale and barbaric, and targeted vulnerable women and children. The children he forced into soldiering were deprived of their families, education, and suffered "deep trauma."[289] The crimes committed by both Kondewa and Fofana had long-lasting and significant physical and psychological impact on the victims and the community.[290]

The Trial Chamber also considered factors in aggravation and mitigation. The judges began their consideration of aggravating factors by observing that ICL sentencing jurisprudence in general recognizes "leadership role of the Accused, premeditation and motive, a willing and enthusiastic participation in the crime, and the length of time during which the crime was committed" as appropriate aggravating factors.[291] Moreover, the Trial Chamber correctly held when a commander or leader has been found criminally responsible under Article 6(1), his leadership position will aggravate his sentence.[292] Moreover, a person's leadership position can aggravate their punishment in other ways. The CDF Trial Chamber identified "abuse of trust or authority"

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[285] *Id.* ¶ 50.
[286] *Id.* ¶ 51.
[287] *Id.* ¶ 52.
[288] *Id.* ¶¶ 52–53.
[289] *Id.* ¶ 55.
[290] *Id.* ¶ 56.
[291] *Id.* ¶ 37; Prosecutor v. Jokić, IT-01-42/1-A, Judgment on Sentencing Appeal ¶¶ 28–29 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 30, 2005); Prosecutor v. Obrenović, IT-02-60/2-S, Sentencing Judgment ¶ 99 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003); Prosecutor v. Babić,IT-03-72-A, Judgment on Sentencing Appeal ¶ 80 (Int'l Crim. Trib. for the Former Yugoslavia July 18, 2005).
[292] CDF Sentencing Judgment ¶ 38; Prosecutor v.Jokić, IT-01-42/1-A, Judgment on Sentencing Appeal ¶¶ 28–29 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 30, 2005); Prosecutor v. Obrenović, IT-02-60/2-S, Sentencing Judgment ¶ 99 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003); Prosecutor v. Babić,IT-03-72-A, Judgment on Sentencing Appeal ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia July 18, 2005); Prosecutor v. Deronjić, IT-02-61-A, Judgment on Sentencing Appeal ¶ 67 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2005).

as an additional way in which leadership position aggravates the sentence.[293] "Trust or authority" is defined as situations "where the Accused was in a position that carries with it a duty to protect or defend victims."[294] This includes government officials, police chiefs, and commanders, but can also include non-official positions of prominence in the community. Thus, both de jure and de facto positions can qualify for this aggravating factor—the former viewed primarily as breach of *authority* and the latter as breach of *trust*.[295]

Fofana played a central role in the CDF and held the position of Director of War. From Base Zero, he planned war strategies, selected commanders for battle, and issued orders to them.[296] As the "overall boss of the commanders," the Trial Chamber found that he held a position of "power and authority."[297] Moreover, he was also "the former Chiefdom Speaker" and "a community elder."[298] Accordingly, in committing atrocity crimes, Fofana failed his duty to protect or defend victims and the court held that he "breached a position of trust."[299]

Kondewa was a High Priest of the Kamajors who fought alongside of the CDF and held a "unique and prominent position in the community."[300] The judges "found that no Kamajor would go to war without his blessing."[301] They concluded that Kondewa was a superior and held a leadership position.[302] As a superior who directly committed murder and other atrocity crimes, the Trial Chamber determined that Kondewa should receive an increased sentence. The Trial Chamber also found that Kondewa held a position of prominence and breached the community's trust and determined this to also be an aggravating factor.[303]

In discussing mitigating circumstance, the judges in the CFD case, like their colleagues on the bench in other trials, noted that the only factor in mitigation that they are required to consider is the accused's cooperation with the prosecution.[304] The Chamber, however, noted that it would also

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[293] CDF Sentencing Judgment ¶ 39.
[294] *Id.*
[295] *Id.*
[296] *Id.* ¶ 59.
[297] *Id.*
[298] *Id.* ¶ 60.
[299] *Id.* ¶ 59.
[300] *Id.* ¶ 62.
[301] *Id.* ¶ 61.
[302] *Id.* ¶ 58.
[303] *Id.*
[304] *Id.* ¶ 80.

consider any expressions of remorse, good character of the accused, any good behavior while in detention and help provided to the victims. Fofana's attorney, Steven Powles,[305] made a statement on Fofana's behalf expressing regret for the crimes and suffering inflicted upon the people of Sierra Leone during the conflict. The Trial Chamber accepted his statement as showing "empathy" although the accused did not acknowledge his personal responsibility for the crimes. He participated in the peace process after the conflict and exhibited good behavior during detention.[306] Trial Chamber refused to accept "necessity" as a mitigating circumstance since it was not argued at trial and no evidence supported it.[307] Kondewa made a similar statement pleading for mercy but not recognizing his own participation in the crimes. Nevertheless, Trial Chamber accepted his statement as "real and sincere."[308] Trial Chamber recognized that neither of the accused had formal training to take on the leadership roles and considered this in mitigation.[309] Neither of the accused had prior convictions.[310]

The most legally significant element of the CFD trial sentencing judgment concerns what role fighting for "a legitimate cause" should have on the punishment.[311] The Chamber found that the accused were the leaders of a fighting force, the CDF and Kamajor, mobilized "to support a legitimate cause," namely to "restore the democratically elected Government of President Kabbah which had been illegally ousted through a Coup d'Etat . . . by a wing of the Sierra Leone Armed Forces."[312] The judges ruled that fighting for a legitimate cause justified mitigation of punishment even if the cause was achieved by committing horrendous atrocities and international crimes. According to the Trial Chamber, the forces led by the accused helped restore the rule of law by prevailing over the rebellion.[313] These considerations significantly impacted the Trial Chamber's decision to impose lower sentences on Fofana and Kondewa.[314]

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[306] CDF Sentencing Judgment ¶ 67.
[307] *Id.* ¶ 69.
[308] *Id.* ¶ 65.
[309] *Id.* ¶ 66.
[310] *Id.* ¶ 68.
[311] *Id.* ¶¶ 82–94.
[312] *Id.* ¶ 83.
[313] *Id.* ¶ 87.
[314] *Id.* ¶ 94.

While the statute of the SCSL directs judges to consider the general sentencing practices of the ICTR and national courts of Sierra Leone,[315] the CDF Trial Chamber, like other trial chambers at the SCSL, dismissed the relevance of Sierra Leonean experience and views of punishment.[316] The judges adopted a very narrow position that Sierra Leonean sentencing law and practice is relevant only when the defendant has been convicted of a domestic crime found in Article 5 of the court's statute.[317] The Trial Chamber explained that while it would consider, as mandated by the statute, the sentencing practices of the ICTR, it would also refer to practices of the ICTY if appropriate.[318] In reality, however, the SCSL judges cited and referenced to the ICTY sentencing jurisprudence far more often than ICTR cases. The Trial Chamber warned, however, that the use of the sentencing practices of these tribunals might be limited because they impose "global sentences" that do not indicate the specific sentence for each individual crime imposed.[319] Moreover, the Chamber noted that many of the sentences at the ICTR were imposed for genocide, a crime not within the jurisdiction of the SCSL.[320] The Chamber further explained that the SCSL statute does not provide for capital punishment or life sentences and refused the prosecution's urging that it impose either of these sentences.[321]

The Trial Chamber concluded that a "manifestly repressive sentence" would not serve the goal of deterrence and would be "counterproductive to the Sierra Leonean society" because it would not help achieve peace, justice or reconciliation.[322] Thus, Fofana and Kondewa received very lenient punishments compared to other war criminals before the SCSL. Fofana and Kondewa received imprisonment terms of six and eight years respectively, and received full credit for time spent in custody.[323] Despite the meager punishments for the pro-Kabbah fighters, the judges still hoped that the judgment would serve "to send a message to future pro-democracy armed forces or militia groups that notwithstanding the justness or propriety of their cause, they must observe the laws of war."[324]

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[315] SCSL Statute, art. 19(1).
[316] CDF Trial Sentencing Judgment ¶ 43.
[317] *Id.*; *see* SCSL Statute, art. 5 (allowing the SCSL prosecutor to charge crimes found in domestic law).
[318] CDF Trial Sentencing Judgment ¶¶ 41–43.
[319] *Id.* ¶ 41.
[320] *Id.*
[321] *Id.* ¶¶ 42–43.
[322] *Id.* ¶ 95.
[323] *Id.* at p. 34.
[324] *Id.* ¶ 96.

The Appeals Chamber revised upwards both Fofana and Kendowa's sentences for war crimes in counts 2, 4 and 5.[325] For the war crimes of murder and inhumane acts, the appeals judges increased Fofana's prison sentences from six years to fifteen years imprisonment and Kendowa's from eight to twenty years.[326] For the crime of pillage, the Appeals Chamber increased Fofana's prison sentence from three years to five years, and increased Kendowa's punishment from five to seven years.[327] It also reversed their acquittals for murder and, a crime against humanity, and entered new penalties of fifteen years for Fofana and twenty years for Kondewa.[328] In the end, the Appeals Chamber ordered that Fofana shall serve a total term of imprisonment of fifteen years, up nine years from his sentence at trial of six years.[329] It likewise ordered Kondewa to serve a total prison term of twenty years, a twelve year increase from the Trial Chamber's eight year sentence.[330] The Appeals Chamber ordered all sentences for both perpetrators to run concurrently.[331]

The Appeals Chamber strongly disagreed with the Trial Chamber's findings that the accused deserved sentencing reductions on the grounds that they acted to "restore democracy to Sierra Leone."[332] The Appeals Chamber concluded that the "Trial Chamber made an error of law by considering 'just cause' and motives of civic duty as a mitigating factor.[333] In the Appeals Chamber's view, these factors impermissibly became the primary factors influencing the trial judges' sentence. The Appeals Chamber emphasized that a primary consideration of international sentencing should be "the revulsion of mankind, represented by the international community, to the crime and not the tolerance by a local community of the crime; or lack of public revulsion in relation to the crimes of such community; or local sentiments about the persons who have been found guilty of the crimes."[334] The Appeals Chamber found no error with the other sentencing factors taken into consideration by the Trial Chamber.

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325 CDF Appeal Judgment at 189.
326 *Id.*
327 *Id.* at 190.
328 *Id.* at 191.
329 *Id.*
330 *Id.*
331 *Id.*
332 *Id.* ¶¶ 553–555.
333 *Id.* ¶ 554.
334 *Id.* ¶ 564.

TABLE 4: CHARGES, CONVICTION, AND APPEAL SUMMARY FOR CDF DEFENDANTS

CRIMINAL CHARGES IN CDF TRIAL	FOFANA TC	FOFANA AC UPHELD?	KONDEWA TC	KONDEWA AC UPHELD?
COUNT 1: Murder as CAH	NG	Reversed 15 years	NG	Reversed 20 years
COUNT 2: Murder as WC	6 years	Y increased to 15 years	8 years	Y increased to 20 years
COUNT 3: Inhumane acts as CAH	NG	Reversed 15 years	NG	Reversed 20 years
COUNT 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment as WC	6 years	Y increased to 15 years	8 years	Y increased to 20 years
COUNT 5: Pillage as a WC	3 years	Y increased to 5 years	5 years	Y increased to 7 years
COUNT 6: Act of terrorism as a WC	NG	NG	NG	NG
COUNT 7: Collective punishments as WC	4 years	Reversed NG	6 years	Reversed NG
COUNT 8: Enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities as WC	NG	NG	7 years	Reversed NG

IV. THE SPECIAL COURT FOR SIERRA LEONE'S SENTENCING LEGACY

The SCSL's sentencing legacy can be assessed from multiple perspectives. This section systematizes the sentencing jurisprudence, identifies important contributions of the SCSL to the emerging body of sentencing law in ICL, and examines how sentencing judgments construct narratives that shape official understandings and general perceptions about the war in Sierra Leone and accountability for atrocities. As noted above, the SCSL Statute's sentencing provisions are minimal:

ARTICLE 19: PENALTIES

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.
2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.[335]

The law of sentencing at SCSL is modeled after the sentencing provisions of the ad hoc tribunals for the former Yugoslavia and Rwanda.[336] The SCSL statute empowers international judges with broad discretion in fixing punishment, despite the fact that this approach failed to produce a coherent sentencing practice at other international criminal courts.[337] One novel aspect of Article 19 is the explicit reference to the sentencing practice of another international criminal court, the ICTR, as an appropriate source of sentencing law, and the deliberate exclusion of the ICTY's sentencing jurisprudence. Both the sentencing process and penalty allocations of the ICTY have come under heavy criticism for being unprincipled, unjustly lenient, and inconsistent.[338] Regarding the role of national law, the qualification "as appropriate" in Article 19, subparagraph 1, does not appear in sentencing provisions of other international tribunals, which plainly directed that "the Trial Chambers shall have recourse" to national law.[339]

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[335] SCSL Statute, art. 19.

[336] ICTR Statute, art. 23; ICTY Statute, art. 24.

[337] *See generally* Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUSTICE 683 (2007).

[338] *Id.*; Shahram Dana, *The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?*, 3 PENN. ST. J.L. & INT'L AFFAIRS 30 (2014).

[339] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24, *available at* http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda (with Annexed Statute), art. 23, S.C. res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

This is most likely a direct response to censure of international judges for exceeding their authority and contravening the law of their tribunals by declaring that compliance with national sentencing law and practice is discretionary.[340]

Drawing upon Part III's analysis of the sentencing jurisprudence, the following quantitative picture emerges: The SCSL has imposed nine sentences ranging from fifteen years to fifty-two years with an average sentence of thirty-six years and median of forty-five years imprisonment. The average sentence for opponents of the government is forty-six years, and the average sentence for supporters of the government (CDF defendants) is 17.5 years. The CDF defendants also received the lowest individual sentences. Among the opposition groups, the AFRC was punished most severely with an average sentence of 48.3 years, comprising of individual sentences of fifty years for Brima and Kanu, and forty-five years for Kamara.[341] The average punishment for the RUF defendants was thirty-nine years.[342] Sesay received a prison sentenced of fifty-two years, the highest individual punishment rendered by the SCSL.[343] His RUF co-defendants Kallon and Gbao received forty and twenty-five years respectively.[344] All perpetrators convicted by the SCSL are serving their prison sentences in Mpanga Prison, Rwanda,[345] except for Charles Taylor who will serve his sentence in a more comfortable and hygienic prison cell in the United Kingdom.[346]

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[340] *See generally, e.g.*, Dana, *supra* note 5 (arguing that the watering down of this provision violated both the express language of this provision and its stated object and purpose).

[341] *See* AFRC Appeal Judgment ¶ 22.

[342] *Id.*

[343] *Id.*

[344] *Id.*

[345] Jalloh, *supra* note 2, at 409. For a discussion of the difficulty with enforcement of SCSL sentences see Roisin Mulgrew, *On the Enforcement of Sentences Imposed by International Courts: Challenges Faced by the Special Court for Sierra Leone*, 7 J. INT'L CRIM. JUST. 373 (2009).

[346] U.K. tax payers will pick up the costs of his imprisonment to the tune of £80,000 per year. *Warlord Charles Taylor Arrives in Britain to Serve 50-Year Sentence for Sierra Leone War Crimes*, DAILY MAIL (Oct. 15, 2013), http://www.dailymail.co.uk/news/article-2461032/Charles-Taylor-arrives-Britain-serve-50-year-sentence-Sierra-Leone-war-crimes.html.

A. Systematizing the Sentencing Jurisprudence

1. Punishment Philosophy

The SCSL generally identifies punitive rationales as the appropriate measure of sentencing allocation.[347] Its first sentencing judgment declared that "it is settled law that the goals and objectives" of international sentencing for atrocity crimes "derive essentially from the doctrines underlying penal sanctions in the domestic or national law setting."[348] Thus, SCSL considered the penology underlying national criminal justice for ordinary crimes as the appropriate source from which to construct a philosophical framework for international sentencing for atrocity crimes.[349] Consequently, the SCSL judges saw little justification in getting entangled with objectives purportedly unique to ICL, such as reconciliation, historical record building, or didactic and expressive functions, when determining sentencing allocations.[350] This may explain its practice of imposing more severe sentences than other international tribunals. Although, as will be considered in subsequent sections below, the higher sentences at the SCSL might be attributable to factors beyond law and penal philosophy.

All sentencing judgments identify retribution and deterrence as the primary goals of ICL sentencing.[351] The judges are fairly consistent in describing retribution as "duly expressing the outrage of the international community at these crimes."[352] They are careful to distance retribution from the notion of revenge.[353] As for deterrence ideology, the SCSL holds that the goal of deterrence also influences sentencing allocations. In the judges' view, "the penalties imposed by the Trial Chamber must be sufficient to deter others from committing similar crimes."[354]

The SCSL judges acknowledge that other objectives, such as prevention, rehabilitation, stigmatization, reconciliation, and norm building are found in

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[347] *See* AFRC Appeal Judgment ¶ 308; CDF Appeal Judgment ¶ 532; RUF Appeal Judgment ¶ 1229; Taylor Sentencing Judgment ¶ 79; RUF Sentencing Judgment ¶ 13.

[348] RUF Sentencing Judgment ¶ 12.

[349] *Id.*

[350] *See* Dana, *supra* note 338 (discussing the impact of these considerations on ICL sentencing).

[351] *E.g.*, Taylor Sentencing Judgment ¶ 13; CDF Appeal Judgment ¶ 532; RUF Sentencing Judgment ¶ 13.

[352] CDF Sentencing Judgment ¶ 26.

[353] *See* AFRC Sentencing Judgment ¶ 15; CDF Sentencing Judgment ¶ 26; RUF Sentencing Judgment ¶ 13; Taylor Sentencing Judgment ¶ 13.

[354] *See* AFRC Sentencing Judgment ¶ 16; RUF Sentencing Judgment ¶ 13; Taylor Sentencing Judgment ¶ 14.

ICL sentencing jurisprudence but they stop short of adopting them as relevant consideration for sentencing allocations.[355] For example, regarding the role of rehabilitation as a sentencing factor in ICL, the SCSL in its maiden sentencing judgment acknowledged that the past jurisprudence of the ICTR and ICTY regularly identified rehabilitation as a factor.[356] However, the SCSL immediately moved away from this position, holding that rehabilitation is more appropriate as a goal in relation to ordinary criminality in the domestic context and less relevant as a sentencing factor in international criminal trials.[357] Subsequent judgments followed the same general approach toward rehabilitation,[358] although the CDF Trial Chamber presented a confused treatment of it.

The CDF trial judges initially elevated the role of rehabilitation in influencing sentencing allocations to the same level as retribution and deterrence, positioning rehabilitation as one of the main purposes of international criminal justice.[359] However, two paragraphs later in the judgment, the judges turned around and declared that "rehabilitation . . . is of greater importance in domestic jurisdictions than in International Criminal Tribunals."[360] The CDF judges appear to be inarticulately repeating generic statements about rehabilitation found in other ICL judgments without really contemplating or integrating the concepts into their sentencing analysis and allocations.[361] Ultimately, the judges in the CDF case appear to be more committed to their initial position that placed rehabilitation on par with retribution and deterrence as a primary purpose of ICL punishment.

This focus on rehabilitation indicates that the CDF Trial Chamber's sentences were influenced by restorative considerations more so than punitive considerations. This is not surprising given the popular social narratives in Sierra Leone society eulogizing the CDF defendants as national heroes. Moreover, as discussed in detail below, the CDF Trial Chamber's restorative orientation limited the influence of the gravity of the crime in its sentencing allocations. Although the judges are not explicit about this, it is reasonable to deduce that their restorative philosophy shaped their views on aggravating and mitigating factors, for example, the unprecedented and

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[355] *E.g.*, RUF Sentencing Judgment ¶¶ 14–16.
[356] AFRC Sentencing Judgment ¶ 14.
[357] *Id.* ¶ 17.
[358] *See* RUF Sentencing Judgment ¶ 16.
[359] CDF Sentencing Judgment ¶ 26 (treating rehabilitation as a "primary" consideration in sentencing along with retribution and deterrence).
[360] *Id.* ¶ 28.
[361] *Id.* ¶¶ 26–31.

ultimately erroneous treatment of "legitimate cause" as a mitigating factor. The actual sentences imposed by the trial judges in the CDF case further reveal the influence of restorative ideology: Fofana and Kondewa were sentenced to six and eight years respectively, while the average sentence for opponents of the government is forty-six years.[362] However, the Appeals Chamber firmly disavowed this attempt to place rehabilitation on par with retribution and deterrence.[363] The judges on appeal increased the defendant's sentences to fifteen and twenty years imprisonment.[364]

Some SCSL judges, like those at the ICTR and ICTY, conflated the goals of international prosecutions in general with the justifications and aims of sentencing in particular.[365] At times, what is better understood as an important, even desirable, possible outcome of international criminal justice mechanisms is treated as a sentencing factor.[366] For example, judges frequently discuss the didactic or expressive function of international prosecutions as a "goal" or "function" of punishment, suggesting that it has a bearing on sentencing allocations.[367] In the CDF, AFRC, Taylor, and RUF cases, the trial chambers formalistically stated that the goal of "influenc[ing] . . . legal awareness" is a "main purpose of a sentence."[368] The Taylor Trial Chamber opined that one of the main purposes of a sentence is to "influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and

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[362] *See supra* TABLES 1–4, at pp. 631, 639, 644, 657.

[363] CDF Appeal Judgment ¶ 489.

[364] *See supra* TABLE 1, at p. 631.

[365] Dana, *supra* note 338, at 47.

[366] *See* CDF Sentencing Judgment ¶¶ 28, 30; AFRC Trial Sentencing Judgment ¶ 16; Taylor Trial Sentencing Judgment ¶ 16; RUF Trial Sentencing Judgment ¶ 15; CDF Appeal Judgment ¶ 489. For the same ruling at the ICTY see Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgment ¶ 40 (Dec. 18, 2003); Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeal Judgment ¶ 177 (Feb. 25, 2004); Prosecutor v. Orić, Case No. IT-03-68-T, Trial Judgment ¶ 772 (June 30, 2006).

[367] The expressive function has also gained traction among academics and observers of international criminal trials. *See* Lawrence Douglas, *Shattering Nuremberg*, HARV. INT'L REV., Nov. 21, 2007, *available at* http://hir.harvard.edu/archives/1651; Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court* , 33 MICH. J. INT'L L. 265 (2012); Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 CHI-KENT L. REV. 329 (2008); Robert Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN J. INT'L L. 39, 43 (2007); Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93 (2002).

[368] CDF Sentencing Judgment ¶¶ 28, 30; AFRC Sentencing Judgment ¶ 16; Taylor Sentencing Judgment ¶ 16; RUF Sentencing Judgment ¶ 15.

enforced. . . . Sentencing is intended to convey the message that globally accepted laws and rules have to be accepted by everyone."[369] Yet, this didactic function can be achieved merely by prosecution and *some* punishment. Ascribing to it does not inform the decision maker about *how much* punishment is appropriate or what a fair sentence would be. Even if influencing legal awareness is accepted as a "main" function of sentencing, it is does not guide the exercise of sentencing discretion, nor does it inform sentencing allocations. It does not tell us whether the perpetrator ought to get fifty years or twenty-five years. It would be difficult to claim that a higher penalty generates more *awareness* compared to a lower penalty. Thus, the language of sentencing judgments should avoid conflating the possible functions of international criminal justice mechanisms with principles that can in fact guide sentencing. Likewise, in the sentencing discourse itself, the justification for punishment and the aims of punishment should be kept distinct.

2. Constitutive Sentencing Considerations

Drawing on the Statute and the Rules of Procedure and Evidence, the SCSL's sentencing jurisprudence uniformly identifies four constitutive determinants central to identifying a just punishment: (1) gravity of the offense; (2) individual circumstances of the accused; (3) applicable aggravating and mitigating factors; and (4) where appropriate, the sentencing principles found in the practice of the ICTR and Sierra Leone.[370] In practice, however, the SCSL judges unimaginatively and uniformly collapse categories two (individual circumstances) and three (aggravating and mitigating factors).[371] As this article develops, this unexplained merger

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[369] Taylor Sentencing Judgment ¶ 16 (quoting Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgment ¶ 139 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003)); *see also* CDF Sentencing Judgment ¶ 30; AFRC Sentencing Judgment ¶ 16.

[370] Taylor Sentencing Judgment ¶ 18; AFRC Appeal Judgment ¶¶ 308, 313; CDF Sentencing Judgment ¶ 32; CDF Appeal Judgment ¶ 465; RUF Sentencing Judgment ¶ 17; RUF Appeal Judgment ¶ 1229.

[371] Taylor Sentencing Judgment ¶ 22 ("The Trial Chamber notes that 'individual circumstances of the convicted person' can be either mitigating or aggravating."); CDF Appeal Judgment ¶ 498 ("The Appeals Chamber considers that the level of education and training of a convicted person is part of his individual circumstances which the Trial Chamber is required to take into consideration as an aggravating or mitigating circumstance."); RUF Appeal Judgment ¶ 1296; Prosecutor v. Naletilić and Martinovi, Case No. IT-98-34-A, Appeal Judgment ¶ 592 (Int'l Crim. Trib. for the Former Yugoslavia May 3, 2006) (quoting Prosecutor v. Blaškić, IT-95-14-A, Appeal Judgment ¶ 679 (Int'l Crim. Trib. for the Former

represents a missed opportunity to develop a sentencing framework *sui generis* to international criminal law.

a. Unpacking Gravity: A Colorless Litmus Test

The SCSL holds that the "gravity of the offence" is the primary consideration in determining an appropriate sentence.[372] Judges declare it to be the key differential principle—the "litmus test"—of sentencing allocations.[373] The judges at the SCSL followed the general ICL practice of cataloging a list of "gravity" factors.[374] Depending on which judgment is examined, the list runs anywhere between six to eight factors including (1) the "scale" of the offenses committed; (2) their "brutality"; (3) the temporal scope of the crime; (4) the "role of the Accused" in their commission; (5) the "number of victims"; (6) the "degree of suffering" or impact of the crime on the immediate victim; (7) the crime's "effect on relatives" of the victim; and (8) the "vulnerability" of victims.[375] This approach, while consistent with the practice of the ad hoc tribunals, does not propel the quality of ICL sentencing.

The SCSL judges generally did not engage in the challenge of conceptualizing gravity in terms of theory or doctrine. This is not merely an academic exercise; the absence of a theoretical conceptualization of gravity has problematized ICL sentencing practice in several ways. First, as a practical matter, the failure to adequately conceptualize gravity may explain why ICL judges frequently vacillate between treating a particular factor as a gravity factor in one judgment, but as an aggravating factor in another. Since gravity and aggravating factors are not of equal weight in sentencing allocations, whether a factor is treated as the former or the latter may have a dissimilar impact on the sentence. The jurisprudential rhetoric suggests as much: "gravity" is the "litmus test" of a fair sentence, not aggravating

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Yugoslavia July 29, 2004) ("[T]he individual circumstances of the accused, including aggravating and mitigating circumstances.")).

[372] AFRC Sentencing Judgment ¶ 19; CDF Sentencing Judgment ¶ 33; RUF Sentencing Judgment ¶ 19; Taylor Sentencing Judgment ¶ 19; AFRC Appeal Judgment ¶ 308; CDF Appeal Judgment ¶ 465; RUF Appeal Judgment ¶ 1229.

[373] AFRC Sentencing Judgment ¶ 19; CDF Sentencing Judgment ¶ 33; RUF Sentencing Judgment ¶ 19; Taylor Sentencing Judgment ¶ 19.

[374] AFRC Sentencing Judgment ¶ 19; CDF Sentencing Judgment ¶ 33; RUF Sentencing Judgment ¶ 19; Taylor Sentencing Judgment ¶ 20.

[375] AFRC Sentencing Judgment ¶ 19; CDF Sentencing Judgment ¶ 33; RUF Sentencing Judgment ¶ 19; Taylor Sentencing Judgment ¶ 20.

factors.[376] Conceptual distinction between gravity factors and aggravating factors takes on greater significance before the ICC as demonstrated in Lubanga's sentencing.[377]

Of course, whether the sentencing practice lives up to the rhetoric is debatable, and herein lies a second problem: an examination of the actual sentences and the judges' reasoned opinions challenges the mantra that gravity is the litmus test of punishment allocations. A comparative analysis of Sesay and Gboa's sentences demonstrates the explanatory gap. Sesay and Gbao were convicted of crimes of similar gravity. For instance, both were convicted under Count 6 of the indictment for rape as a crime against humanity.[378] Yet, for that offense, Sesay was sentenced to forty-five years of imprisonment. Gbao received only fifteen years, a third of Sesay's punishment.[379] Thus, it is hard to accept that *gravity* is what determined their respective punishments given that both were convicted of rape as a crime against humanity. Of course, one could attempt to explain the difference by accounting for various aggravating and mitigating factors, assuming there is any difference in this regard. Nevertheless, even conceding for the sake of argument that there is some difference in their aggravating and mitigating circumstances, this explanation attempts to account for a 300% difference in the sentences. If aggravating and mitigating factors are in fact responsible for 300% increase in punishment for the same crime, it can hardly be said that gravity is the litmus test.

Moreover, far from being the primary sentencing consideration, the punishment of certain defendants suggests that gravity of the crimes played little role comparatively in their sentencing. For example, the CDF Trial Chamber conceptualized gravity as an "important principle" rather than the primary factor or "litmus test" for sentencing as it was applied in the RUF, AFRC, and Taylor cases.[380] This subtle shift is not trivial or accidental but a predictable flow from the trial chamber's restorative orientation and treatment of rehabilitation as a primary purpose of ICL sentencing alongside decisively punitive purposes, such as retribution and deterrence. It casts doubt on whether "gravity" of the offense is the controlling consideration for ICL punishments.

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[376] AFRC Sentencing Judgment ¶ 19; CDF Sentencing Judgment ¶ 33; RUF Sentencing Judgment ¶ 19; Taylor Sentencing Judgment ¶¶ 19–20.

[377] *See generally* Lubanga Sentencing Judgment ¶ 15.

[378] *See supra* TABLE 2, at p. 639.

[379] *See supra* TABLE 2, at p. 639.

[380] CDF Sentencing Judgment ¶ 33.

The Taylor Sentencing Judgment provided a glimmer of an attempt toward some conceptualization of gravity. It contributes an important nuance relevant to the future practice of the International Criminal Court and ICL sentencing in general. This nuance concerns the notion of *inherent* gravity.[381] The Taylor Trial Chamber discusses two aspects of the alleged criminality as integral to assessing "gravity of the *offense*": "the *inherent* gravity of the *crime* and the criminal conduct of the accused."[382] Regarding the former, determining "inherent" gravity calls for an abstract assessment of the seriousness of the elements of the crime; whereas the second aspect draws in a factual assessment of the perpetrator's mode of liability. Unfortunately, the Taylor Trial Chamber did not actually engage in an assessment of the *inherent* gravity of the *crime*. Instead, it reverted to a gravity-*in-fact* analysis of the crime by considering the applicability of each gravity factor, enumerated above, one by one.[383]

b. Individual Circumstances & Aggravating and Mitigating Factors: Rebuilding Collapsed Categories

All SCSL sentencing judgments, both trial and appeals, identify "individual circumstances of the accused" as an independent sentencing consideration, separate and distinct from aggravating and mitigating factors.[384] In practice, however, judges routinely collapsed these two categories in their sentencing analysis, despite the fact that they enumerated them as *separate* considerations when laying out the applicable legal framework.[385] This gross analytical deficiency accents a deep automatism in ICL judicial sentencing discourse. Consequentially, "individual circumstances of the accused" has unimaginatively become a dumping ground for aggravating and mitigating factors. In my opinion, this collapse represents a lost opportunity to develop a sophisticated *sui generis* penology for ICL. My theory seizes upon this lost opportunity and also gives sentencing judgments a voice capable of linking to broader narratives about atrocity crimes, responsibility, human nature, and war.

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[381] CDF Appeal Judgment ¶ 546; RUF Appeal Judgment ¶ 1229; Taylor Sentencing Judgment ¶ 19.

[382] Taylor Sentencing Judgment ¶ 19.

[383] The shortcomings of this approach are discussed *infra* Part V.*B*.

[384] AFRC Appeal Judgment ¶¶ 308–309; CDF Sentencing Judgment ¶ 32; CDF Appeal Judgment ¶ 465; RUF Sentencing Judgment ¶ 17; Taylor Sentencing Judgment ¶ 18.

[385] AFRC Appeal Judgment ¶¶ 308–309; CDF Sentencing Judgment ¶ 32; CDF Appeal Judgment ¶ 465; RUF Sentencing Judgment ¶ 17; Taylor Sentencing Judgment ¶ 18.

Regarding aggravating circumstances, the SCSL has followed the sentencing practice of ad hoc tribunals in holding a number of factors as aggravating, such as superior position, abuse of power, betrayal of trust, exploitation of war for personal financial gain, excessive brutality, attacking traditional places of sanctuary, and more.[386] However, the absence of a strong analytical sentencing framework has problematized the application of these factors. For example, as noted above, the Trial Chamber increased Taylor's punishment based on several aggravating circumstances: his leadership role; his special status as Head of State; his betrayal of trust; the extraterritorial reach of his crimes; and his exploitation of war for personal financial gain.[387] According to Professor Kevin Jon Heller, the judges' sentencing analysis here falls short of sufficiently distinguishing the first three aggravating factors, suggesting discernable error due to double counting.[388] For example, regarding betrayal of public trust as an aggravating factor, Taylor abused his position, authority, and power over "state machinery and public resources,"[389] including military assets, to assist in the commission of atrocity crimes. This same type of abuse of authority is germane to the judges' justification for aggravating his sentence on the account of his "leadership role" and "status as Head of State."[390]

On the other hand, the judges arguably correctly appreciated that these three factors—leadership role, crimes by a Head of State, and betrayal of trust—have converged to aggregately enhance both Taylor's culpability and the harms resulting from his wrongful conduct in a way that the combined damage is more than each factor could inflict in isolation. The judges sensibly understand and recognize that this warrants a more severe punishment, but the ICL sentencing framework is insufficient to capture and logically account for this form of criminality. Consequently, observers interpret the sentencing judgment as flawed for double counting or emotively fixating on status.[391] Adding to the confusion is the judges' imprecise language, which blurs the line between "gravity" considerations and aggravating factors.[392]

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[386] Taylor Sentencing Judgment ¶¶ 95–103.

[387] *Id.*

[388] Kevin Jon Heller, *The Taylor Sentencing Judgment: A Critical Analysis*, 11 J. INT'L CRIM. JUSTICE 835 (2013).

[389] Taylor Sentencing Judgment ¶ 97.

[390] *Id.*

[391] *E.g.*, Heller, *supra* note 388, at 12; Mark Drumbl, *The Charles Taylor Sentence and Traditional International Law*, OPINIO JURIS (June 11, 2012), http://opiniojuris.org/2012/06/11/charles-taylor-sentencing-the-taylor-sentence-and-traditional-international-law.

[392] Taylor Sentencing Judgment ¶ 102.

Perhaps it is not surprising that absent an articulated sentencing framework, a coherent theory, and a more exacting analysis, some commentators attributed the SCSL's fifty year sentencing of Taylor as the product of a "fetish" with Head of State status rather than sound sentencing principles.[393] But even if reasonable minds disagree on the soundness of permitting a "leadership" position to aggravate a perpetrator's punishment in more than one way, to attribute this approach to a "fetish" with Head of State status ignores the rest of the court's sentencing jurisprudence. In fact, this approach by the SCSL was not unique to Taylor. For example, in the CDF case, when a Kamajor leader was found criminally responsible under Article 6(1), the Trial Chamber considered multiple ways in which his leadership position could aggravate his sentence.[394] Thus, far from fixating the application of this principle on Charles Taylor because he was a Head of State, the SCSL applies this approach (whether correct or erroneous) to government officials, police chiefs, commanders, and significantly, also to non-official positions of prominence in the community. Thus, both de jure and de facto positions can qualify for this aggravating factor—the former viewed primarily as breach of *authority* and the latter as breach of *trust*.

Regarding mitigating factors, the SCSL essentially follows the general ICL jurisprudence. Mitigating factors need not be related to the offense.[395] Exercising their wide discretion, the SCSL judges have held a number of factors to constitute mitigating circumstances: expression of remorse;[396] good character with no prior conviction;[397] acknowledgment of responsibility;[398] the accused's lack of education or training;[399] advanced age of the accused;[400] duress;[401] indirect participation,[402] and "legitimate cause."[403] The latter two are particularly problematic conceptually and theoretically. In other cases, the court's method of analysis and application of an otherwise

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[393] Drumbl, *supra* note 391; Heller, *supra* note 388.

[394] CDF Sentencing Judgment ¶ 38; *see also supra* Part III.*D.2* (discussing the CDF defendant's punishment).

[395] RUF Sentencing Judgment ¶ 28; Taylor Sentencing Judgment ¶ 31.

[396] AFRC Sentencing Judgment ¶ 25; CDF Sentencing Judgment ¶ 40; CDF Appeal Judgment ¶¶ 489–490; RUF Sentencing Judgment ¶ 29; Taylor Sentencing Judgment ¶ 34.

[397] CDF Appeal Judgment ¶ 511; Taylor Sentencing Judgment ¶ 34.

[398] AFRC Sentencing Judgment ¶ 25; CDF Sentencing Judgment ¶ 40; CDF Appeal Judgment ¶¶ 489–490; RUF Sentencing Judgment ¶ 29; Taylor Sentencing Judgment ¶ 34.

[399] CDF Appeal Judgment ¶ 498; RUF Sentencing Judgment ¶ 29; Taylor Sentencing Judgment ¶ 34.

[400] AFRC Sentencing Judgment ¶ 25.

[401] *Id.*

[402] *Id.*

[403] CDF Sentencing Judgment ¶ 254.

conceptually sound mitigating factor raises concerns or exposes doctrinal deficiencies.

Treating "indirect participation" as a *mitigating* factor unsettles the sentencing matrix because, under the SCSL's approach, the accused's mode of liability is already accounted for in its assessment of *gravity* of the offense. The SCSL's treatment of remorse is likewise problematic. The SCSL judges were comfortable mitigating an accused's punishment on the basis of remorse, even where the expression of remorse was tainted with persistent denial of responsibility.[404] It is highly questionably whether an expression of remorse meets the requirements of "genuine and sincere" when it comes without accepting responsibility for the wrongdoing. Under this approach, remorse as a mitigating factor is largely indistinguishable from sadness felt by a layperson reading a newspaper report on atrocities. Moreover, applying remorse in this manner is not supported by any philosophical justification.

The ruling is especially misplaced if we consider the fact that the SCSL held bifurcated guilt and sentencing proceedings. Given that the accused at the time of the sentencing hearing has already been found guilty by a court of law, the perpetrator who professes remorse while denying wrongdoing and personal responsibility is effectively continuing to challenge the court's findings that he has acted wrongfully and caused grave harms to many victims. It appears to be the antithesis of remorse. This raises the important question: what does the perpetrator have to be remorseful about? It also fundamentally challenges the veracity of remorse as a weighty mitigating factor.

Perhaps more significant in relation to the maturation of ICL sentencing principles and law is how uncritical and unimaginative judicial opinions, intended for the public, on punishment and sentencing have become in international criminal justice. They reveal a concerning level of divorce between the law as stated and its application and between optimal policy and legal principles. For example, the SCSL judges draw upon some ICTY judgments to credulously incorporate into their own jurisprudence the notion to mitigate punishment on the purported grounds of remorse, even in the face of denial of wrongdoing. Further, they do so without any reflection on optimal institutional policy or consideration of variations in their respective procedural rules. For example, the fact that some ICTY trial chambers allowed mitigation for remorse in the absence of acceptance of responsibility should be understood in light of the fact that ICTY proceeding did not

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[404] CDF Appeal Judgment ¶ 490; CDF Sentencing Judgment ¶ 25.

separate the trial and sentencing phases.[405] Since the defense would have to present any claim for sentencing mitigation grounded on remorse prior to the court's determination of guilt, the judges had no choice but to broaden the notion of remorse if they desired to retain it as a mitigating factor. Given that the SCSL held separate sentencing hearings after a finding of guilty, replicating this approach in the SCSL's sentencing practice is unnecessary, if not unjustified.

3. Contributions to the Law of Sentencing in ICL

The SCSL's contributions to ICL sentencing can be broadly grouped into two categories: crystallization of ICL sentencing law and new developments. ICL sentencing philosophy continues to lack cohesion but is crystalizing as having a more punitive orientation than a restorative one. With the contribution of the SCSL, retribution and deterrence are in full ascendency over other ideological approaches to ICL sentencing. Other international tribunals, particularly the ICTY, advanced numerous and conflicting rationales for ICL sentencing. In addition to retribution and deterrence, judges at the ad hoc tribunals also claimed that the purposes of ICL sentencing include reconciliation, rehabilitation, general affirmative prevention, expressivism, historical recording building, and more.[406]

Moreover, the judgments of the ad hoc tribunals go beyond identifying these various ideologies as achievable goals of international prosecutions, but they also considered them fundamentally to be factors that can influence sentence allocations. Thus, the SCSL significantly contributed towards settling international criminal law sentencing on retributive and deterrence punishment rationales. The SCSL generally identifies punitive rationales as the appropriate measure of sentencing allocations.[407] A few trial judges departed from this and placed rehabilitation on equal footing with retribution

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[405] *See* Jens David Ohlin, *Towards a Unique Theory of International Criminal Sentencing*, *in* INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW (G. Sluiter ed., 2009) (arguing in favor of the bifurcated model of international criminal proceedings).

[406] *See* Dana, *supra* note 338, at 6, 11–30.

[407] *E.g.*, Taylor Sentencing Judgment ¶ 79; CDF Appeal Judgment ¶ 100b; RUF Sentencing Judgment ¶ 100b.

and deterrence,[408] but it was promptly reorientated back to a primary focus on the latter two principles by the Appeals Chamber.[409]

The SCSL jurisprudence also solidifies some general principles of international criminal law; some are drawn directly from general principles of law in national jurisdictions.[410] Some examples include: (1) where a factor has already been taken into consideration in assessing the gravity of the offence, it cannot be considered as an additional aggravating factor and *vice versa*;[411] (2) if a factor is an element of the underlying crime, it cannot be used as an aggravating factor;[412] (3) aggravating factors must be related to the commission of the offense;[413] (4) mitigating circumstances need only be proven by a preponderance of the evidence;[414] (5) mitigating circumstances need not be related to the offense;[415] and (6) aggravating factors must be established beyond the reasonable doubt.[416] In some instances, the SCSL goes beyond mere rule articulation but also declares these principles to be general principles of international criminal law. Significantly, the ICC followed the same rules in its discussion of aggravating factors in its first sentencing judgment.[417]

The SCSL sentencing legacy also includes important rulings on the nexus between modes of liability and sentencing. In its final judgment, the SCSL held that domestic and international criminal law do not support the finding that, as a matter of general principle, aiding and abetting warrants a lesser sentence than more direct forms of participation. The court refused to introduce a hierarchy of modes of liability for the purpose of sentencing, just as the judges at the ad hoc tribunals declined to impose a hierarchy of crimes. This is not surprising as any such ruling would curtail the wide discretion ICL judges enjoy in sentencing matters, a discretion they guard very watchfully. Previously, the Taylor Trial Chamber had painted itself into a corner by erroneously declaring that "aiding and abetting *as a mode of*

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[408] CDF Sentencing Judgment (treating rehabilitation as a "primary" consideration in sentencing along with retribution and deterrence); AFRC Sentencing Judgment ¶ 13 (also regarding rehabilitation as a primary goal of ICL sentencing along with retribution and deterrence).

[409] CDF Appeal Judgment ¶ 100b.

[410] *See* Lubanga Sentencing Judgment ¶ 15.

[411] Taylor Sentencing Judgment ¶ 25 (listing aggravating circumstances).

[412] *Id.* ¶ 28.

[413] *Id.* ¶ 24.

[414] *Id.* ¶ 34 (listing mitigating circumstances).

[415] *Id.* ¶ 31.

[416] *Id.* ¶ 24.

[417] Lubanga Sentencing Judgment.

liability generally warrants a lesser sentence,"[418] but yet handed out a fifty year sentence on par with direct perpetrators in the RUF and AFRC trials. In a somewhat unconvincing manner, the trial chamber then subsequently attempted to justify its departure from the rule it just stated by relying on the "unique circumstances of this case."[419]

The sentencing judgment, however, would have benefitted from explaining this point more clearly. The judges could have strengthened their position by noting that the argument that "aiding and abetting warrants a lesser sentence" does not apply to planning, ordering, and possibly even instigating atrocity crimes (depending on the facts) because ICL jurisprudence treats these as separate and distinct modes of liability,[420] even though in a particular sense they might also amount to assisting in the commission of a crime. Neither "planning" nor "ordering" as a mode of liability requires, *sensu stricto*, the actual commission of the crime. Thus, a broad stroke calling for lesser punishment for aiders and abettors based on a presumed notion that such culpability is less serious is misplaced in the context of ICL and atrocity crimes. Likewise, the judges could have further strengthened their holding by relying on the "enabler responsibility" theory[421] to close the explanatory gap between their ruling on aiding and abetting and their fifty year sentence (the second highest handed down by the SCSL).

In addition to contributing to the solidification of ICL sentencing law and principles, the SCSL also makes innovative contributions to the jurisprudence. For example, SCSL was the first international criminal court to treat as an aggravating factor a Head of State's use of power to engage in extraterritorial crimes.[422] The harm here goes beyond public international law concerns regarding state sovereignty. Taylor's criminality contributed decisively to sustaining and enabling the commission of crimes against humanity and war crimes. Thus, when such extraterritorial criminality is committed by a person in control of a foreign state's armed forces or military

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[418] Taylor Sentencing Judgment ¶ 21 (emphasis added) (overruled on appeal. *See* Taylor Appeal Judgment.).

[419] *Id.*

[420] SCSL Statute, art, 6(1); Rome Statute of the International Criminal Court, art. 25, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(1), *available at* http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda (with Annexed Statute), art. 6(1), S.C. res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[421] *See infra* Part V.*C*.

[422] Taylor Sentencing Judgment ¶ 27.

resources, it appears reasonable to treat the extraterritorial nature of that person's crimes as an aggravating factor. The court's ruling should not be viewed as a go around the principle of legality to punish Taylor for the crime of aggression, which is not within the court's jurisdiction. Before this factor can be triggered to aggravate the sentence, the accused criminal liability for a crime within the court's jurisdiction must first be established. In Charles Taylor's case, however, extraterritorial criminality as an aggravating factor cannot alone explain the substantially higher sentence. The sharp increase is better explained by the enabler responsibility theory, discussed further below.

The Taylor Trial Chamber also contributes an important nuance to our understanding of "gravity" for the purpose of sentencing. It conceptualizes "gravity of the offense" as the combined severity of two aspects of the alleged criminality: "the inherent gravity of the crime and the criminal conduct of the accused."[423] Determining "inherent" gravity calls for an abstract assessment of the seriousness of the elements of the crime; whereas the second aspect draws in a factual assessment of the perpetrator's mode of liability. To positively utilize this conceptualization of gravity, however, requires an adjustment in how judges narrate their sentencing opinions. The formulistic recitations of a list of enumerated fact-based gravity factors of general applicability must be replaced with a gravity assessment of the elements of the crime. This is after all what an "inherent" examination calls for. Likewise, the proper application of this conceptualization of gravity requires clarity in the conceptualization of the modes of liability.[424] Another contribution of the SCSL is a tacit acceptance of institutional limitations of international criminal justice mechanisms. The sentencing practice of the SCSL implies judicial acceptance of limitations of the punitive model for transitional justice, recognizing that international criminal courts have limited capacity for large-scale social engineering.

B. The Misconceived Notion of Global Sentence

A "global sentence" refers to situations in which the accused is convicted of multiple crimes, but the judges issue only a single aggregate sentence without first imposing and articulating individual sentences for each conviction prior to rendering a final overall sentence. Global sentencing was introduced into the modern practice of international criminal justice in

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[423] *Id.* ¶ 19.

[424] These matters are examined more fully in my forthcoming scholarship see Dana, *supra* note 75.

violation of then existing tribunal rules.[425] Global sentencing is also contrary to general principles of law arising from national penal law and practice. Significantly, global sentencing is also inconsistent with Sierra Leone's criminal laws.[426]

Moreover, in 1998, when the ICC statute was finalized, states definitively disavowed the notion of global sentencing for ICL sentencing and ended it. The ICC statute prohibits global sentencing.[427] The negotiations and drafting history of the ICC statute, as reflected in the *travaux préparatoires* of the Rome Treaty, indicate that there was no objection or disagreement with the requirement of rendering individual sentences, and thereby eliminating the practice of global sentencing. This suggests that pronouncing individual sentences for each conviction is not only a general principle of law, but also a norm of customary international law for imposing individual criminal responsibility. Although the practice of global sentencing was discredited, some SCSL judges subsequently opted to continue it. Thus, the SCSL is split on the appropriateness of global sentencing for atrocity crimes. Judges in the RUF and CDF trials issued individual penalties for each crime before ordering a total sentencing against the accused for all his crimes. In the *Taylor* case and the AFRC case, judges imposed only a single global sentence. The practice of global sentencing inhibits the maturation of international sentencing and makes punishment less transparent. It also arguably denies both the prosecutor and the defendant the right to an effective review of the trial sentence. Specifically, in the case of Charles Taylor, had the Trial Chamber imposed individual sentences for each conviction, we could better understand to what degree "aiding and abetting" influenced his penalty as compared to "planning."

In sum, global sentencing is unsound as a matter of criminal law policy and contrary to international standards. It is at odds with general principles of criminal law, the understanding and practice of the international community as adopted in the Rome Treaty, and the criminal law of the Sierra Leone. For these reasons, the continued application of global sentencing by some SCSL judges constitutes a shortcoming in the court's legacy.

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[425] Dana, *supra* note 5, at 917–19.

[426] *See* CDF Sentencing Judgment.

[427] Rome Statute of the International Criminal Court, art. 78(3), *opened for signature* July 17, 1998, 2187 U.N.T.S. 3.

C. Missed Opportunities to Localize International Justice

The SCSL largely ignored Sierra Leonean approaches to punishment, and even sidelined the ICTR jurisprudence, in favor of an obsession with the way the ICTY does things. For example, the AFRC sentencing judgment cites the ICTY fifty-two times and the ICTR only five times.[428] The SCSL judges are constantly citing the European located court, and when they are not doing that, they are citing the Canadian Supreme Court and its "learned justice."[429] Regarding their treatment of Sierra Leonean perspectives, the SCSL took the narrow position that Sierra Leonean sentencing law and practice is relevant only when the defendant has been convicted of a domestic crime found in Article 5 of the court's statute.[430] Since Fofana and Kondewa were not convicted or indicted under Article 5, the judges refused to consider any aspect of Sierra Leonean sentencing law.

Such a narrow approach to Article 19's incorporation and reference to the national experience is not supported by a textual and teleological understanding of the SCSL's statute. In fact, it runs counter to both. Their approach is also inconsistent with how other international tribunals have interpreted similar national law provisions in their statutes.[431] The ICTY and ICTR held that the domestic approach to punishment and local practice regarding prison sentences was at least guidance to the judges, even if not binding.[432] They took national sentencing law into account even though their statutes didn't even provide for the possibility of charging domestic crimes.[433] Ironically, the negotiated efforts of the government of Sierra Leone and the United Nations to create a court that would better bridge international law and domestic law, compared to the ICTY and ICTR, by giving the SCSL specific power and authority to charge domestic crimes was undermined. The Prosecutor elected to never charge domestic crimes, as a matter of policy.[434] But the judges went even further, unjustifiably, to turn that policy decision of the Prosecutor into a jurisdictional exclusion of Article 19's statutory provision instructing judges to consider national approaches to punishment, even though Article 19 is broadly applicable to all crimes in the court's jurisdiction, domestic and international. The statute

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[428] *See* AFRC Sentencing Judgment.
[429] CDF Sentencing Judgment ¶ 27.
[430] *Id.* ¶¶ 42–43.
[431] Dana, *supra* note 5, at 889–97.
[432] *Id.* at 896.
[433] *Id.*
[434] *See supra* TABLES 1–4, at p. 631, 639, 644, 657.

does not limit the national sentencing law provision to domestic crimes only.[435] Consideration of Sierra Leonean approaches to punishment was an opportunity to advance the sociological impact of the court's work.

To add insult to injury, not only were perspectives of Sierra Leone, the ICTR, and other African courts unworthy of mention, but the Canadian approach was highlighted. In the CDF case, the SCSL judges turned to the Canadian Supreme Court's definition of retribution.[436] This foreign court's understanding of retributive punishment was the only source of law drawn upon by the SCSL judges on this point and preferred over other sources, including Sierra Leonean authorities.[437] To be clear, there is nothing unique or noteworthy about the Supreme Court of Canada's definition of retribution. The same basic articulation can be found in legal authorities and sources from Sierra Leone, African scholars, and other African courts, including national courts, the African Court on People's and Human Rights, and the ICTR.[438] Given that the audience for the written judgments includes Sierra Leoneans, might not a greater effort to draw upon sources closer to home better contribute to the mandate of the court rather than promoting the views of a colleague from one of the international judge's home country?

It is amusing to observe the show and gestures involved here which includes not only recognition of the Supreme Court of Canada, but also mentions by name a particular "learned" Canadian Justice. This approach to writing and reasoning judicial opinions, designed for a public audience, unwittingly risks giving the impression of cultural arrogance or superiority. One wonders what Sierra Leoneans think of it and the impression it leaves them, especially since the statute of court explicitly directs the judges to national law and practice of Sierra Leone. Theses judges have firmly messaged that they are uninterested in the laws and practice of Sierra Leone when making their decisions. The narrative implied here is that how the Europeans or Canadians do it and their views on punishment are worthy of mention, consideration, and adoption, but not those of Sierra Leone.

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[435] *See* SCSL Statute.

[436] CDF Sentencing Judgment ¶ 27.

[437] The CDF Sentencing Judgment also cites the famous English case of *The Queen v. Dudley and Stevens*, 14 Q.B.D. 273 (1884). In fairness, it appears to have been initially raised in one of the parties' brief.

[438] *See, e.g.*, S. v. Makwanyane, 1995 (6) BCLR 665 (CC) (S. Afr.) (describing retribution as a way for society to express its outrage at the crime committed). *But see, e.g.*, S. v. Nkasi 2010 (2) NAHC 33 (CC 02/2010) (12 April 2010) (Namibia High Ct.) ¶ 15 (describing retribution in non-revenge terms); Prosecutor v. Rutaganira, Case No. ICTR-95-1C-T, Judgment and Sentence, ¶¶ 23–24 (Mar. 14, 2005).

Some may question: what does it matter, especially if Sierra Leonean, or other African authorities, conceptualizes retribution essentially the same way? From one perspective, one could argue that it does not matter, assuming that the more local authority understands retribution substantively the same way. On the other hand, even if the concept is understood in legally similar ways, there remains something to be gained sociologically when the public judgment incorporates local laws and conceptualization of punishment where appropriate. It may enhance the judgment's social legitimacy.

More importantly, the explicit incorporation of foreign authority into the SCSL public sentencing judgments, while at the same time ignoring local authority, will very likely have a negative impact on the court's perceived legitimacy. It messages to the people of Sierra Leone (and the world for that matter) that Canadian or western understandings are more worthy of mention and incorporation into international sentencing jurisprudence than Sierra Leone or local understanding. Likewise, the SCSL constant blustering and frequent consideration of authorities from the ICTY, while at the same time making little reference or recognition of the ICTR judgments, sends the message, whether unintentionally or not, that a court sitting in Europe is more authoritative, and unfortunately by extension more "right," than an African court.

V. NORMATIVE CRITIQUES OF SCSL'S SENTENCING LEGACY

A. Legalizing Social Narratives

The SCSL had to struggle with what is the appropriate punishment, if any, for "good guys" who do very bad things in war.[439] Or should we view them as "bad guys" who happen to be fighting for the *right* side? Ian Fleming captured this moral conundrum in the character James Bond. Is Bond a good guy who has to do bad things in order to save Queen and country? Or is Bond actually a bad person who gets license to act out his violent impulses because he is fighting for the "right" team? This is probably the most significant moral and legal question the SCSL had to face, and it is one that has long reaching implications for the entire enterprise of international criminal justice. Many Sierra Leoneans considered the CDF defendants to be national heroes, in particular Samuel Hinga Norman, but also Moinina Fofana and Allieu Kondewa, because all three fought with, and

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[439] CDF Sentencing Judgment ¶¶ 82–94.

were in fact leaders within, the CDF and Kamajor forces fighting to restore a democratic government, its President, and constitutional institutions.[440] They were also fighting against an evil, the RUF and AFRC, that had terrorized the Sierra Leonean people for a decade.

The SCSL had found Fofana and Kondewa criminally responsible for very horrendous crimes of great gravity.[441] When it came time to determine a just punishment for them, the trial judges faced a question that has been a persistent foe of moral philosophers: do the ends justify the means? In the CDF trial, it manifested as a legal question of whether the ends justify mitigation of punishment, or even excuse wrongdoing. More specifically, do Fofana and Kondewa deserve a reduction in their prison sentence because they were fighting for a "legitimate cause" as determined by SCSL judges—some who were local Sierra Leoneans judges, other judges were foreigners? The trial judges answered in the affirmative, ruling that fighting for a legitimate cause justified mitigation of punishment even if the cause was achieved by committing horrendous atrocities and international crimes.

The tone of this narrative in the sentencing judgment is often not one of condemnation but of redemption. The judges speak of how fighting for the right side "atones" for the "grave and very serious" crimes of the CDF defendants.[442] The judges construct a triumphant narrative around the criminality of the "the Accused Persons"[443] who "defeated and prevailed over the rebellion that ousted a legitimate Government." They lauded the perpetrator's overall conduct as an "achievement" that "contributed immensely to re-establishing the rule of law in this Country where criminality, anarchy, and lawlessness . . . had become the order of the day."[444] At the same time, the SCSL judges diminished the criminality, anarchy, and lawlessness brought on by the CDF defendants themselves. They further bolstered these "Accused Persons" by aligning them with the goals of the Organization for African Unity and the United Nations.[445]

At times, the CDF trial judges further the "good guys" narrative by praising Norman, Fofana, and Kondewa as "selfless" heroes, making "supreme sacrifices." The Trial Chamber notes that they received national

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[440] *Id.* ¶¶ 83, 86.

[441] Norman died in custody after closing arguments but before the verdict was issued.

[442] CDF Sentencing Judgment ¶ 87.

[443] Interestingly, it appears that the judges prefer to use "the Accused Persons" in order to intentionally include Samuel Hinga Norman wherever their written judgment constructs a positive narrative of the CDF.

[444] CDF Sentencing Judgment ¶ 87.

[445] *Id.*

awards of the highest order, but does not connect this fact to any legally relevant sentencing criteria. Furthermore, from a sociological legitimacy perspective, it is interesting to note that the judges seem to prefer to use the label "the Accused Persons" in order to intentionally include Samuel Hinga Norman wherever their written judgment constructs a positive narrative of the CDF.

Clearly, the SCSL judges in the CDF trial were mindful of the popular narrative surrounding Norman and the CDF fighters. This sociological narrative influenced their sentence, resulting in significant reduction of the defendants' penalty, and shifted the judgment's discourse away from the rules that demand serious punishment for grave crimes. On this point, the Appeals Chamber overruled the trial judges, holding that fighting a legitimate cause is not a mitigating circumstance. Although the Appeals Chamber increased their sentences, this can only correct the legal error. As far as the narrative is concerned, however, the bell cannot be un-rung.

B. Punitive Model Reorientation

Generally speaking, international criminal tribunals, especially the ICTY, vacillated between punitive and restorative approaches exerting an uneven and unpredictable influence on sentencing allocations.[446] Although the sentencing judgments ostensibly claimed retribution and deterrence to be the primary rationales influencing the severity of punishment, actual sentencing allocations frequently undermined both, or at a minimum, are counter-intuitive to a punitive orientation. Judges at the ad hoc tribunals supposedly positioned retribution and deterrence in pole position regarding allocating the appropriate amount of punishment.[447] But as the judges drove laps through their sentencing deliberations, retribution and deterrence rarely crossed the finishing line first in actual influence.[448] Along the way, additional considerations including reconciliation and record building gained ground, often disproportionately, diminishing the influence of punitive rationales for punishment of atrocity crimes.[449] The ambivalence toward punitive justice is reflected in the ICTY's average sentence—between sixteen and seventeen

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[446] *See* Dana, *supra* note 338, at 62–68; *see generally* Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U.L. REV. 539, 560–61 (2005); MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007).

[447] Dana, *supra* note 338, at 63.

[448] *Id.* at 66.

[449] *Id.* at 93.

years imprisonment—for perpetrators of genocide, crimes against humanity, and war crimes.[450]

The SCSL re-orientates ICL sentencing towards a punitive model. Four observations support this claim. First, the SCSL consistently prioritizes punitive justifications for sentencing by repeatedly identifying retribution and deterrence as the primary purpose of sentencing for atrocity crimes.[451] Second, the SCSL judges deliberately distance themselves from restorative ideologies such as rehabilitation and reconciliation.[452] They acknowledge rehabilitation as a factor in domestic criminal justice, but the SCSL judges consistently articulate why it is inapplicable to international criminal law. Third, the SCSL has rejected a number of mitigating factors that do not fit within a punitive framework for ICL punishment, including family circumstance, age, and others. Finally, the actual sentences reveal a firmly punitive approach to ICL punishment, especially in comparison to the ICTY. The average SCSL sentence is thirty-eight years, more than double the sixteen years average at ICTY.[453] Thus, the SCSL's sentencing judgments indicate that the judges have adopted a punitive orientation to international criminal justice as reflected in their sentencing narratives and punishment allocations. This reorientation is a positive contribution to international criminal law and transitional justice. Higher penalties, and prioritizing the punitive approach over a restorative model toward transitional justice, may help explain why the SCSL enjoys greater social legitimacy than other international criminal tribunals.[454] Punitive responses to accountability for perpetrators of atrocity crimes better reflect organic notions of justice. Moreover, the ensuing narrative becomes more consistent with our expectations of criminal justice mechanisms.

There was a temporary departure from the punitive model in the sentence at trial of the CDF defendants. Norman, Fofana and Kondewa were popular war heroes for many Sierra Leoneans.[455] The dominant social narrative positioned them as good guys fighting for a legitimate cause, namely the restoration of Sierra Leone's constitutionally elected government and

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[450] Dana ICTY Sentencing Database (on file with author).

[451] CDF Appeal Judgment ¶ 532; RUF Sentencing Judgment ¶ 13; Taylor Sentencing Judgment ¶ 13; *see also supra* Part IV.*A.1*.

[452] CDF Appeal Judgment ¶ 532; RUF Sentencing Judgment ¶13; Taylor Sentencing Judgment ¶ 13; *see also supra* Part IV.*A.1*.

[453] The nine convicted defendants were sentenced to terms of imprisonment as follows: Fofana received 15 years; Kondewa 20; Gbao 25; Kallon 40; Kamara 45; Brima, Kanu and Taylor got 50 years each; Sesay received 52 years. *See supra* TABLES 1–4, at p. 631, 639, 644, 657.

[454] KALDOR & VINCENT, *supra* note 1.

[455] Gberie, *supra* note 19.

president. The Trial Chamber's sentencing narrative reflected this popular narrative. The trial judges gave legal effect to the social narrative by ruling that "legitimate cause" in fighting constituted a mitigating factor in sentencing, even where the perpetrator had committed heinous and brutal crimes in achieving their cause.[456] Under the influence of this social narrative, the Trial Chamber sentenced Fofana and Kondewa to six and eight years imprisonment respectively.[457]

The CDF Trial Chamber's restorative ideology is manifest at every turning point in its sentencing analysis. First, the judges placed rehabilitation on equal footing with punitive rationales of retribution and deterrence as one of the "primary" rationales influencing sentencing allocations. This was contrary to the jurisprudence of SCSL which holds that retribution and deterrence are the two primary rationales to be considered when determining a sentence. The SCSL judgments also consistently hold that rehabilitation is ill suited as a sentencing rationale for ICL punishments.[458] Next, after adjusting the sentencing scales towards a restorative outcome, the CDF Trial Chamber subtly lessens the role of "gravity of the offense" in determining sentencing allocations.[459] Whereas the ICL jurisprudence treats "gravity of the offense" as the *primary* consideration in sentencing, the CDF trial judges treated it as merely an "importance principle" among other important principles rather than treating it as the *primary* factor. A restorative orientation continued beyond the judge's assessment of gravity to influence their acceptance of an unprecedented mitigating circumstance—fight for "a legitimate cause."[460] The CDF perpetrators had committed crimes of comparable gravity to the RUF and AFRC, including murder, terrorism, collective punishment, and enlisting children into armed forces.[461] Nevertheless, the judges found that because the CDF defendants were fighting to restore the "constitutional order" of the country, their crimes should be assessed on a different scale for the purposes of punishment than that of the anti-government defendants.

Thus, the popular social narrative of the CDF perpetrators as national heroes spawned legal legitimacy via judicial narratives expounded in their

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[456] CDF Sentencing Judgment ¶¶ 85, 92–93.

[457] *See supra* TABLE 4, at p. 657.

[458] *E.g.*, AFRC Sentencing Judgment ¶ 17; RUF Sentencing Judgment ¶ 16; Taylor Sentencing Judgment ¶ 13; CDF Appeal Judgment ¶ 532; RUF Trial Sentencing ¶ 13. *See also supra* Part IV.*A.1*.

[459] The CDF Sentencing Judgment discusses "scaling the sentences" as it departs from established ICL sentencing principles. CDF Sentencing Judgment ¶ 82.

[460] *Id.* ¶ 83.

[461] *See supra* TABLE 4, at p. 657 and Part III.*D.1* (discussing CDF crimes).

public judgment, and ultimately, in the sentence itself. The court justified very lenient sentences that appealed to the constituencies committed to this particular social narrative. It first framed the purpose of ICL to capture rehabilitation and restorative goals as equally important as retribution and deterrence. The judge then tipped the scales further towards a lenient punishment by lighting the punitive weight given to the gravity of the crimes. Finally, it anchored its low sentences by finding that leniency in punishment was necessitated by the unique and unprecedented mitigating factor of fighting for a "legitimate cause." In essence, the judicial narrative here claims that the crimes of the CDF merit lesser punishment and that the harm to their victims is less significant merely because the perpetrators of these atrocity crimes were pursuing a just cause or a just war.

The Appeals Chamber disagreed with translating this popular narrative into a legally relevant mitigating factor.[462] Reasserting a punitive approach to ICL sentencing, the Appeals Chamber reversed the Trial Chamber's holding that legitimate cause qualifies as a mitigating factor and more than doubled the sentence of each CDF defendant.[463]

The SCSL reasserts the primary function of international criminal courts to determine criminal responsibility for atrocity crimes and punish accordingly. This is a positive development. Punishment is what criminal justice mechanisms are intended for, and thus they are inherently punitive and their sentences must reflect that nature. This is not to say restorative processes should not form part of a broader response to atrocities. While the SCSL acknowledges that prosecutions for atrocity crimes can bolster efforts towards reconciliation and developing a historical record, it properly limits, and arguably even excludes, their influence on sentence allocations.[464] I do not discount the significance of reconciliation and an accurate historical in post-conflict processes. In fact, they are arguably so important as to merit initiatives focused directly on achieving those goals, with independent institutional structures, rather than awkwardly and ineptly forcing restorative goals into a punitive model for responding to atrocity. Thus, a possible enduring legacy of the SCSL is reorientation of international criminal justice mechanisms towards a punitive response to genocide, crimes against humanity, and war crimes.

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[462] CDF Appeal Judgment ¶¶ 528, 534 ("Allowing mitigation for a convicted person's political motives, even where they are considered by the Chamber to be meritorious, undermines the purposes of sentencing rather than promotes them.").

[463] *Id.*

[464] *Id.* ¶¶ 20–26B.

C. Sentencing Framework Deficit

While the SCSL advanced a punitive model for ICL sentencing, it failed to develop a sentencing framework capable of implementing this approach. Instead, the SCSL judges follow the general ICL practice of articulating a laundry list of factors relevant to sentencing under loose labels such as "gravity" and "aggravating and mitigating factors."[465] Yet, judges even treat these labels as fungible. The absence of a viable analytical framework problematizes sentencing allocations and weakens the narrative force of international sentencing judgments. Without a legal framework, a pattern of problems appears. First, we have the problem of conceptual collapse. Another problem is the practice of tossing out "established principles" that cannot be squared with an otherwise desired sentence.

The problem of conceptual collapse compromises the foundation of the SCSL's sentencing practice. The jurisprudence identifies four constitutive considerations for a just punishment: (1) gravity of the offense; (2) individual circumstances of the accused; (3) applicable aggravating and mitigating factors; and (4) where appropriate, sentencing principles found the practice of the ICTR and Sierra Leone.[466] One positive aspect of the SCSL's sentencing practice is that the judges consistently, in all their judgments, articulate these four considerations, which are found in the court's constitutive legal texts, as relevant for determining of a fair sentence. The problem is that they do not follow it. Judges collapse the second and third into a single consideration. All SCSL sentencing judgments do this.[467] The category of "individual circumstances of the accused" becomes a dumping ground for "aggravating and mitigating factors." This deprives the judges of a tool to make sentencing distinctions when needed while maintaining consistency in the desired narrative.

Unfortunately, the collapsing of important concepts does not stop there. They also blur the conceptual significance and distinction between "gravity" and "aggravating factors." Separate, but related, is the judicial obsession to narrate everything in terms of "gravity." Thus, the concept of "gravity of the

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[465] *See supra* Parts IV.*A.1–3*.

[466] Taylor Sentencing Judgment; RUF Sentencing Judgment; RUF Appeal Judgment; AFRC Sentencing Judgment.

[467] Taylor Sentencing Judgment ¶ 22 ("The Trial Chamber notes that 'individual circumstances of the convicted person' can be either mitigating or aggravating."); CDF Appeal Judgment ¶ 498 ("The Appeals Chamber considers that the level of education and training of a convicted person is part of his individual circumstances which the Trial Chamber is required to take into consideration as an aggravating or mitigating circumstance."); RUF Appeal Judgment ¶ 1296.

offense"—the championed "litmus test" for a fair sentence—has become a dumping ground for a wide range of factors, even ones that have a distinct home elsewhere, such as "aggravating" factors. The lack of intellectual rigor and legal analysis is comforted with caveats that double counting will be avoided. Just punishment and fair sentencing is no longer a disciplined legal exercise of judgment, but a gut check emotion. Emotive sentencing is always dangerous, but particularly so in international criminal justice where the context giving rise to the defendant's trial is likely to be gruesome and well publicized.

Another consequence of an insufficient sentencing framework is the ease by which purported "established principles" are cast aside without meaningful explanation. For example, Professor Heller observes that after adopting the position that aiding and abetting warrants a shorter sentence, the Taylor Trial Chamber summarily swept it aside.[468] The SCSL judges often proffer a principle in an attempt to frame their sentencing decisions, but do not actually follow them in practice. The practice suggests that either there is no sentencing framework, or what is there is insufficient to cope with the complexities of atrocity criminality. The failure of the SCSL to develop a workable sentencing framework is a shortcoming in its legacy.

In a separate article, I propose a comprehensive legal framework for ICL sentencing.[469] In doing so, I clarify and re-conceptualize concepts at the core of understating culpability for atrocities crimes, including gravity, modes of liability, and the role of the accused. I also advance an original theory for ICL, called "enabler responsibility," which is both explanatory and instructive. The enabler responsibility theory posits that, when sentencing, international judges factor in the accused's responsibility or role, if any, for creating, maintaining, and/or sustaining the situation or environment for mass atrocity criminality. These perpetrators enable an environment that normalizes or encourages criminal wrongdoing on a large scale. I argue that enabler responsibility influences the sentence, especially of atrocity perpetrators at the very top of the hierarchy, even if unarticulated as a factor. Although neither the SCSL nor the general ICL sentencing jurisprudence explicitly identifies enabler responsibility as a distinct sentencing factor, the notion is often present in judicial narratives.[470]

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[468] Heller, *supra* note 388, at 10.

[469] Dana, *supra* note 424.

[470] *See, e.g.*, Tadic Sentencing Appeal ¶¶ 55–58 (instructing trial judges to "consider the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict"); Prosecutor v. Rukundo, ICTR-2001-70 Trial Chamber, Judgment ¶ 605 (Feb. 27, 2009).

The "enabler responsibility" theory closes the explanatory gap in sentencing judgments, including Charles Taylor's punishment. Some commentators argue that Taylor's fifty year sentence is excessive given the fact he was guilty of merely aiding and abetting in the crimes.[471] A closer examination of the judgment however reveals that the judges consider Taylor to have not merely aided and abetted in the crimes but in fact *enabled* the atrocities.[472] Thus, the SCSL viewed Taylor as an enabler of the atrocities in Sierra Leone and the sentencing outcome—fifty years imprisonment—suggests that the judges consider enabler responsibility to merit a high sentence. However, in their sentencing judgment, the judges do not revisit the "enabler" narrative. Taylor's enabler responsibility is a crucial dynamic of his criminality that solidly justifies their relatively more severe punishment of Taylor. Accordingly, the enabler responsibility theory also offers a pathway towards congruency between judicial sentencing narratives and actual punishment allocations. It is also instructive to future sentencing determinations by the ICC and other international tribunals.

VI. CONCLUSION

This year marks the twenty-first anniversary of the re-birth of international criminal justice and accountability for atrocity crimes. Two years ago marked the tenth anniversary of the International Criminal Court and The Special Court for Sierra Leone. There has been a proliferation of international criminal courts and tribunals of many varieties; likewise, academic scholarship on the subject has steadily grown. The notion of international justice holds a hope and promise like no other. It also aggravates and frustrates its supporters, much less its critics, like no other. As this nascent firmament on the horizon of international justice gains footing, it is important that components fundamental to its success are nurtured and developed. Justice in punishment is essential. Equally so are the narratives that sentencing judgments construct about justice, human nature, and conflict. Thus, ICL sentencing jurisprudence must live up to both, and it can only do so if it is anchored by a coherent framework and

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[471] *See* Drumbl, *supra* note 391; Heller, *supra* note 388. This position is factual problematic in its premise because Taylor was also convicted of "planning." It is also legally problematic because the SCSL rejects the suggestion of a hierarchy of modes of liability or the notion that an aider and abettor per se warrants a lesser sentence than a principle perpetrator.

[472] *See, e.g.*, Taylor Trial Judgment ¶¶ 5834–5835, 5842, 6913–6915 (finding that "Taylor's acts and conduct had a substantial effect on the commission of the crimes because they: (i) enabled the RUF/AFRC's Operational Strategy; (ii) supported, sustained and enhanced the RUF/AFRC's capacity to implement its Operational Strategy.").

driven by sound theory. It is with the hope of contributing to the maturation of the law of sentencing in international criminal justice that this contribution is offered.

The SCSL contributed some important rulings that international lawyers and scholars will long continue to examine. Some novel features include the trial and punishment of a (former) Head of State; the consideration of exterritorial criminality as an aggravating factor; and mitigating the punishment of atrocity perpetrators on the ground that they were fighting for a legitimate cause. The latter holding did not survive on appeal but the narrative may still survive for historians seeking to understand the conflict. One positive contribution with potential to serve as lasting legacy is the SCSL's reorientation of international criminal justice toward a punitive model in response to atrocities. It remains to be seen whether this punitive reorientation is followed by other international judges, especially at the ICC. Additionally, the SCSL's narrative surrounding Charles Taylor's criminality opens the door to exploration of a crucial dynamic that international criminal law has ignored or underrepresented in its judicial narratives: perpetrators who are enablers of atrocities.

For its many positive contributions to the ICL, the judges of the SCSL failed to give adequate attention to advancing ICL sentencing law. No meaningful sentencing framework is constructed and the general practice of unarticulated sentencing judgments by international judges continues. This Article aimed to draw out the key contributions of SCSL to the law of sentencing in ICL and to provide some normative assessments of the SCSL's legacy. The SCSL sentencing jurisprudence provides a rich and fertile landscape upon which to build a coherent ICL sentencing framework and theory. It is with the hope of stimulating debate and discourse on both that this contribution is offered.