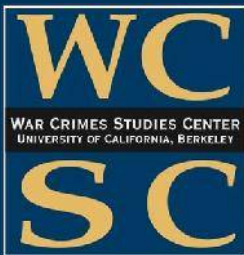




THE TRIAL OF CHARLES TAYLOR PART I: PROSECUTING “PERSONS WHO BEAR THE GREATEST RESPONSIBILITY”



BY JENNIFER EASTERDAY

UC BERKELEY WAR CRIMES STUDIES CENTER

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I. EXECUTIVE SUMMARY

This report is the latest in a series of periodic analytical reports issued by the War Crimes Studies Center as part of its permanent international monitoring program at the Special Court for Sierra Leone (SCSL or “Court”). Since the Court began in 2004, the War Crimes Studies Center (WCSC) has been the only international organization to have maintained an ongoing presence at the SCSL. Our monitors have covered all four trials, producing regular critical analysis on the development, jurisprudence, and functioning of the Court. The WCSC has issued over one hundred and twenty trial reports covering daily courtroom proceedings, and published numerous in-depth thematic reports evaluating discrete aspects of the “hybrid tribunal” model of international criminal justice. These reports have addressed such topics as the treatment of child witnesses, the treatment of sexual violence charges, and the internal operations of the Court’s Defense Office and the Office of the Prosecutor. This report is based on daily in-court monitoring of the Taylor trial’s open sessions, review of public filings and decisions, review of articles and other legal research materials, and interviews with key Court personnel.

The purpose of this report is to provide an update on the progress of the last active case at the Special Court for Sierra Leone—*Prosecutor v. Charles Ghankay Taylor*. The case against the former Liberian President has been one of the most anticipated trials in international criminal law, and it has been the most high profile proceeding at the Special Court for Sierra Leone. Nearly six years have passed since the Prosecution issued its initial indictment against Taylor. In the two years since trial proceedings began, the trial moved from Freetown to The Hague, the Accused has been represented by two Defense teams, the Court has experienced several delays, and the Prosecution has produced evidence from ninety-seven witnesses. At the close of the Prosecution’s case-in-chief, then-Chief Prosecutor, Stephen Rapp declared, “It has been demonstrated that it is possible to prosecute a former chief of state in a trial that is fair and efficient, even where the indictment covers wide-ranging crimes. We have seen international justice conducted in accordance with the highest standards.”¹ On close analysis of the proceedings thus far, however, the Prosecutor’s optimistic assessment of the *Taylor* trial at the midway point appears both overstated and entirely premature.

The *Taylor* trial has been plagued by political, logistical, and legal challenges as it has moved from indictment through to the presentation of the Defense case. Initially, there were political problems in securing Taylor’s arrest and transfer to the SCSL. This was followed by legal challenges to the Court’s jurisdiction over a former head of state. Traditionally, heads of state enjoy immunity from prosecution in foreign national courts for actions carried out while in office, though no such immunity from prosecution exists in international courts for international crimes. The Appeals Chamber overruled an immunity-based Defense challenge to jurisdiction, however, on the grounds that the SCSL was a court of “international character,” with full jurisdiction to try Taylor.² Following a resolution from the UN Security Council,³ the trial was subsequently transferred to The Hague, amidst controversy and criticism. According to Registry officials, the Court undertook this transfer in anticipation of potential security problems that might arise while trying Taylor in Freetown. Critics of the move argued that it undermined the purpose of creating a hybrid tribunal in the country where the conflict originated, and complained that the decision was made unilaterally and without a reasoned judicial determination that the move was necessary in the interests of justice. The move has created tremendous logistical challenges for the parties and for the Outreach and Public Affairs Office’s efforts to engage Sierra Leonean and Liberian civil society in the ongoing trial. Controversy continued after the transfer, with the Taylor Defense team

complaining loudly about inadequate resources and detention facility conditions that interfered with what should have been privileged attorney-client meetings in preparation of Taylor's defense.

Despite these controversies and challenges, the trial proceeded in The Hague, with opening arguments from the Prosecution in June 2007. As soon as the proceedings had begun, however, another major hurdle arose: on the first day of trial, Taylor dismissed his Counsel, prompting a dramatic scene in Court as Prosecutor Rapp rose to deliver the opening statement. Upon informing the Court of his client's decision to dismiss his defense team, Taylor's then-lawyer, Karim Kahn, briefly explained some of the ongoing, unmitigated circumstances (including a lack of resources and inadequate facilities for the preparation of Taylor's defense) that prompted Mr. Taylor to dismiss his defense team on the first day of trial. Following this dramatic televised opening session, the SCSL administration quickly took action to address Taylor's complaints.

It took six months to assemble a new defense team, allow them to prepare for trial, and resume the Prosecution's case.⁴ From January 2008 to February 2009, the Prosecution led evidence through 31 linkage witnesses, 60 crime-base witnesses, 4 in-court expert witnesses, and 385 exhibits, including 2 expert reports. The Defense attempted to weaken the Prosecution case by rigorously challenging testimonial and documentary evidence every step of the way, impeaching Prosecution witnesses where possible, and seeking whatever exculpatory evidence it could elicit in cross-examination.

The *Taylor* trial has seen many novel and important legal issues arise during the Prosecution's case-in-chief, including disputes over questions about witness protection and key modes of liability. During the Prosecution phase of the trial, the Court attempted to create a transparent and open process, and in so doing, took a fairly hard line against closed sessions. By not allowing for much testimony in closed or private sessions, the Trial Chamber tried to protect Taylor's right to an open and public trial, but had to balance this interest against issues of witness protection. The most significant jurisprudential development, however, arose in a contentious decision on the Prosecution's pleading of joint criminal enterprise (JCE). The decision, rendered after the Prosecution had rested its case nearly a year after the original defense motion was filed, changed the legal framework of the JCE at issue in *Taylor*, and will likely have significant consequences for the final disposition of the trial.

Administratively, the trial has not been as efficient as it could have been, in large part due to shortcomings in judicial management. Although the Judges of Trial Chamber II managed a punctual and generally efficient courtroom in day-to-day proceedings during the first half of the *Taylor* case, they lagged in deciding several important legal motions, including an important and pressing motion on the joint criminal enterprise theory of liability at the heart of the *Taylor* indictment. Moreover, the Trial Chamber appears to be overly passive when dealing with larger trial management issues, and as such has failed to take assertive action in setting the trial calendar, limiting evidence presentation, or otherwise using its discretionary powers to make the trial more efficient.

This report offers a synopsis of important developments in the *Taylor* trial and provides critical analysis of the parties' submissions, as well as the Court's performance managing the trial thus far.⁵ Section II begins by providing background to the *Taylor* case—from indictment to arrest to trial. Section III goes on to address the reasons why Taylor's trial was moved to The Hague, and to discuss the criticism and controversy the decision provoked. This Section further considers the practical challenges the move created for the Registry, particularly with respect to creating a robust outreach program that could carry the trial to a broad audience in Sierra Leone and Liberia. Section III concludes that although the initial decision to move the trial to The Hague was made in an opaque manner, the section of the tribunal

most heavily affected, the Outreach and Public Affairs Office, has done a commendable job mitigating the negative consequences of the move with regards to outreach and publicity.

Section IV examines the content of the proceedings during the first two years of the *Taylor* trial. This Section explains the “false start” in 2007, when Taylor dismissed his Counsel out of concern that he was not being given a fair trial. It then provides a detailed analysis of the most prominent legal disputes contested during the first half of the *Taylor* trial, over joint criminal enterprise, witness protection, the introduction of written testimony from crime-base witnesses, and confidentiality of journalistic sources. With regard to the latter, this report argues that the Trial Chamber’s decision on JCE in the *Taylor* trial substantially, and unfairly, shifted the legal characterization of the case against the Accused after the Prosecution rested its case. Next, Section IV evaluates Courtroom management and judicial efficiency, in particular with respect to written filings, noting a worrisome and potentially prejudicial tendency by the Court to delay adjudication of important legal issues raised by the parties. It then discusses the Prosecution’s case, analyzing the technical breakdown of the witnesses presented, and questions the wisdom and necessity of calling such a high number of crime-base witnesses to The Hague to testify. To this end, Section IV argues that there was insufficient use of judicial notice in the trial—a tool that could have helped narrow the case and prevented the great expense of calling victims to The Hague. The Section also provides a brief summary of the testimony heard against Taylor to date, and recounts the strategies the Defense used to cross-examine and impeach witness testimony.

The report concludes in Section V. This Section notes that in spite of Prosecutor Rapp’s comments at the close of the Prosecution’s case-in-chief, there is a distinct lack of evidence suggesting that Prosecution’s phase of the trial was the most fair and efficient it could have been. It notes that although the Court is meeting minimum international fair trial rights⁶, the Trial Chamber unfairly changed the legal nature of the case at an improperly late stage in the trial, and the Court has failed to adhere to important best practices for international criminal tribunals.

II. BACKGROUND

Charles Taylor was born in Monrovia, Liberia, in 1948. Raised in Liberia, he received a B.Sc. in economics in 1977 from Bentley College in Waltham, Massachusetts. After receiving this degree, Taylor returned to Monrovia for several years, serving in the government of then President Samuel Doe until 1983, when he fled back to the United States to escape charges of embezzlement from the Liberian Government (charges that he denies). Following a brief period of incarceration awaiting extradition proceedings in Massachusetts, Taylor mysteriously escaped from the maximum-security prison at the Plymouth County Correctional Facility in 1985. He made his way to Libya in 1987, where he began to train fighters for his newly formed National Patriotic Front of Liberia (NPFL). From 1989 until 1997, he led the NPFL in a bloody civil war in Liberia. At the conclusion of this protracted conflict, Liberia held national elections, and Taylor was elected President with more than seventy-five percent of the vote. Armed conflict returned to Liberia soon thereafter, however, with a new insurrection initiated in 1999 by a group called Liberians United for Reconciliation and Democracy (LURD). LURD slowly took control of much of northern Liberia, and by 2003, another rebel group, the Movement for Democracy in Liberia (MODEL), emerged in the south. The fighting severely constricted government control over a majority of national territory, prompting Taylor to attend peace-talks in Ghana in June 2003.

While Taylor was immersed in a battle to maintain control of Liberia, Sierra Leone was entering a stage of transition after its own eleven-year civil war. In an attempt to promote justice and end impunity for

the atrocities committed by warring factions, the United Nations (UN) and the Sierra Leone government jointly established the Special Court for Sierra Leone in 2002.⁷ Its mandate was to “try persons who bear the greatest responsibility” for atrocities committed in the territory of Sierra Leone after November 30, 1996.⁸ According to the SCSL’s Office of the Prosecutor, Charles Taylor was intimately involved in the Sierra Leonean conflict and accordingly was one of those most responsible for the atrocities committed.

In early March 2003, just over a year into its existence, the SCSL issued a seventeen-count indictment against Charles Taylor, but kept it under seal for several months.⁹ In June 2003, while Taylor was in Accra, Ghana, for peace negotiations with MODEL and LURD, David Crane, then-Prosecutor of the SCSL, strategically unveiled the indictment to coincide with Taylor’s first trip outside Liberia since the indictment was signed.¹⁰ Crane wanted Ghanaian authorities to execute an arrest warrant against Taylor.¹¹ Reportedly caught off guard by the request from the SCSL, Ghana did not cooperate. Taylor abandoned the peace talks and returned to Liberia an indicted war criminal, wanted by a fledgling hybrid tribunal in neighboring Sierra Leone.¹² The conflict in Liberia continued, with revolutionary factions pressing ever closer to the capital, Monrovia. Then, on August 11, 2003, two months after he had returned from Accra and under heavy international pressure, Taylor stepped down as President of Liberia and went into exile in Nigeria.¹³

While Taylor temporarily avoided apprehension by the SCSL, trials against leaders of the three armed factions involved in the Sierra Leone war began in Freetown. A joint trial of three leaders of the Civil Defense Forces (CDF) started in on June 2, 2004. A month later, on July 5, 2004, the case against the three leaders of the Revolutionary United Front (RUF) began. The following year, on March 7, 2005, the Court’s newly established Trial Chamber II began the case of three leaders of the Armed Forces Revolutionary Council (AFRC).¹⁴

The SCSL also moved forward in the case against Taylor, despite the fact that he continued to elude capture. As will be discussed in detail in the next Section, Taylor filed a motion in July 2003, from exile in Nigeria, seeking to quash his indictment by claiming head of state immunity. The Appeals Chamber convened to hear oral arguments on the motion later that same year, and ruled against Taylor. On March 16, 2006, two years into Taylor’s Nigerian exile, the Office of the Prosecutor (OTP) successfully sought to amend the indictment to reduce the number of counts charged.¹⁵ In the amended indictment, Taylor was charged with eleven counts of war crimes, crimes against humanity, and other serious violations of international humanitarian law, including terrorizing the civilian population, murder, forced labor and slavery, rape and sexual slavery, recruiting child soldiers, physical violence, looting and pillaging, and burning.¹⁶ The Prosecution alleged that Taylor should be held individually responsible for these crimes as a participant in a joint criminal enterprise with AFRC and RUF leaders, and/or based on command responsibility over the RUF and AFRC fighters who directly perpetrated various atrocities.¹⁷

Coincidentally, the same month Taylor’s indictment was amended, Ellen Johnson-Sirleaf, the newly elected President of Liberia, requested that Nigeria surrender Taylor so that he could stand trial at the SCSL.¹⁸ Nigeria complied.¹⁹ Taylor was repatriated to Liberia where he was handed over immediately to SCSL personnel and taken to Freetown to stand trial.²⁰

A. JURISDICTIONAL CHALLENGES: THE SCSL AS A COURT OF INTERNATIONAL CHARACTER

As noted above, Taylor challenged the jurisdiction of the SCSL long before he ever came into custody of the Court. On July 23, 2003, he filed a motion at the SCSL requesting that the Court quash the

indictment and render the arrest warrant against him null and void. He argued that he was personally immune from prosecution at the SCSL because he had been Liberia's head of state during the period in question.²¹ On October 31 and November 1, 2003, the Appeals Chamber heard oral arguments on this issue from Terrence Terry, Counsel appointed by Taylor, and Deputy Prosecutor Desmond de Silva. In addition to written and oral submissions from both parties, the Court appointed two *amicus curiae*, Professors Diane Orentlicher and Philippe Sands, QC, to present arguments to the Court.²² It also allowed an amicus brief from the African Bar Association.²³ The Prosecution and all *amicus curiae* argued that the Court was an international court (not a national court) and that therefore Taylor did not qualify for immunity from SCSL prosecution.²⁴

The Court dismissed Taylor's motion and held that Taylor's position as head of state did not bar his prosecution before the SCSL.²⁵ Although the SCSL Statute includes a provision that heads of states receive no immunity before the Court, the Appeals Chamber decision turned on the Court's finding that the SCSL was a court of "international character." A court of "international character" is distinct from domestic courts that are bound by the notion of the sovereign equality of states, and therefore could not historically abrogate the immunity of another sovereign leader.²⁶ The determination was not a foregone conclusion, because the "hybrid" nature of the SCSL made its institutional status unclear. Unlike the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which were created directly by the UN Security Council pursuant to its Chapter VII powers, the SCSL was created by a treaty between a State (Sierra Leone) and an international body (the UN). The Statute of the Court purposefully includes elements from Sierra Leonean law, as well as international law.²⁷ Taylor argued that the SCSL was not truly an international tribunal, and that as such, orders issued by the SCSL had the same effect as orders issued by a national court.²⁸ He argued that because national courts do not have jurisdiction over heads of foreign states, the SCSL did not have jurisdiction over him.²⁹

In reasoning that the SCSL was a "truly international" court, the Appeals Chamber noted that the Security Council entered into an agreement to establish the SCSL based on its powers under in Articles 1, 39 and 41 of the UN Charter.³⁰ The Court reasoned that, "the absence of the so-called Chapter VII powers does not by itself define the legal status of the Special Court."³¹ The Court said that Article 39 gives the Security Council power to determine the existence of any threat to global peace and security, as it did regarding Sierra Leone in Resolution 1315.³² The Court went on to say that reading Article 41 disjunctively, first allows the Security Council to decide what measures to take beyond using armed force to deal with threats to peace and security, and second, allows the Security Council to call on UN member states to apply such measures.³³ Therefore, the Court opined, the Security Council had the power to enter into the SCSL agreement with Sierra Leone, and had the power to force UN member states to cooperate with the Court. Whether or not the Security Council actually would call on UN member states to enforce or apply its measures was not significant, according to the Appeals Chamber.³⁴ The Appeals Chamber maintained that the Security Council acts on behalf of the members of the UN; thus, it reasoned, the agreement between the Security Council and Sierra Leone to establish the SCSL was "an expression of the will of the international community."³⁵ The Judges went on to note special characteristics of the SCSL, including the fact that it is not a part of the Sierra Leonean judiciary or a national court.³⁶

Having thus determined the international character of the tribunal, the Court noted, "The sovereign equality of states does not prevent a head of state from being prosecuted before an international criminal tribunal or court."³⁷ Accordingly, the Court held that Taylor was not immune from prosecution at the SCSL.³⁸

B. TAYLOR'S INITIAL APPEARANCE AT THE SCSL

On March 29, 2006, nearly three years after filing his unsuccessful motion to quash the indictment, Charles Taylor was brought to the SCSL detention facility in Freetown. During his initial court appearance, on April 3, 2006, the SCSL Principal Defender, Vincent Nmehielle, served as Taylor's duty counsel.³⁹ Generally, after hearing the counts against him, an accused will then enter a plea of guilty or not guilty.⁴⁰ However, after hearing the counts in his indictment, Taylor did not enter a plea. Instead, he protested the jurisdiction of the SCSL anew, and stated that he had "concerns" about how he had arrived at the Court. Justice Lussick, the designated Pre-Trial Judge, reminded Taylor that the Appeals Chamber had already decided the issue of jurisdiction and that accused cannot bring motions to the Court until after the conclusion of the initial appearance.⁴¹ Taylor responded by entering a not-guilty plea for all counts, stating that he "most definitely ... did not and could not have committed [the] acts against the sister Republic of Sierra Leone."⁴²

After Taylor had entered his plea, Nmehielle told the Court that Taylor had filed a declaration of means and had requested that the SCSL provide for his representation.⁴³ Nmehielle explained that, as per Taylor's declaration, Taylor was indigent and therefore eligible for representation.⁴⁴ Pursuant to this status, Nmehielle provisionally assigned counsel to Taylor on April 5, 2006.⁴⁵ Experienced international defense attorney Karim Kahn was assigned to Taylor's case.⁴⁶

III. MOVING THE TRIAL TO THE HAGUE: CONSEQUENCES AND CONTROVERSY

Certain parties within the Court and various civil society groups had grave security concerns about holding Taylor's trial in Freetown.⁴⁷ As such, talks between the SCSL and The Netherlands to move the trial were already underway as Taylor was being transported to Freetown from Liberia.⁴⁸ The SCSL issued a press release in March 2006 stating that the President of the SCSL, Justice Raja Fernando, had taken diplomatic steps to move the trial to The Hague. Taylor contested the move and legitimacy of President Fernando's actions.⁴⁹

Taylor opposed the move during his first appearance in Court. Speaking on Taylor's behalf, Principal Defender Nmehielle requested the Court to hold the trial in Sierra Leone. He argued that, were the trial to be held anywhere else, Taylor would not have access to his family or witnesses, and the trial would be unfair because Taylor's witnesses might not be allowed to enter another country.⁵⁰ In spite of these arguments, the Court chose to ignore the issue during Taylor's initial appearance. The Judges of Trial Chamber II ordered the Registrar to set a date for the start of the trial.

The Taylor Defense later submitted a formal motion to prevent the move.⁵¹ Defense argued that the President's request to move the trial was premature, could create the appearance of unfairness because Taylor had not been heard on the issue, and required a judicial determination that the change of venue was necessary in the interests of justice. In the Defense's view, a change of venue for the *Taylor* trial would be discriminatory against Taylor, as it would be treating one defendant differently from the others, all of whom had been on trial for many months, without incident, in Freetown.⁵² Taylor's counsel also argued that the Defense had a right to be heard on the issue, and protested the lack of transparency that came from what they claimed was a unilateral decision by the SCSL President, rather than by a Trial Chamber.⁵³ The Prosecution opposed this motion, arguing that the decision to move the trial was administrative, not judicial.⁵⁴ Therefore, the Prosecution insisted, it was not appropriate for parties to be heard on the issue.⁵⁵ The Trial Chamber referred the issue to the Appeals Chamber, on the

grounds that the motion was a jurisdictional challenge and alleged an abuse of process.⁵⁶ The Appeals Chamber, however, also declined to address the merits of the motion. Instead, the Court concluded that the Trial Chamber's referral was inappropriate because it requested actions that were not within the power of the Chambers.⁵⁷ The Appeals Chamber held that the change of venue request was made under the sole powers of the President, in his administrative and diplomatic role.⁵⁸ Accordingly, the Appeals Chamber determined that neither they nor the Trial Chamber had the power to decide on the appropriateness of the decision or how it was implemented.⁵⁹

On April 13, 2006, the SCSL reached an agreement with the ICC regarding the use of ICC facilities for Taylor's trial. However, The Netherlands would not officially allow the trial to be moved to The Hague until the SCSL found a country willing to incarcerate Taylor in case of a guilty verdict. On June 15, 2006, the United Kingdom stepped forward and offered its detention facilities in the case of a conviction.⁶⁰ The next day, the UN Security Council unanimously voted to issue Resolution 1688 under Chapter VII of the UN Charter, mandating the transfer of Taylor's case to The Hague.⁶¹ The Resolution noted that the SCSL could not hold the trial at the ICTR in Tanzania due to the ICTR's completion strategy and full docket.⁶² According to the Resolution, there was no other adequate international criminal tribunal that could take on Taylor's trial. Declaring that holding the trial in West Africa "is an impediment to stability and a threat to the peace of Liberia and of Sierra Leone and to international peace and security in the region," the Security Council decided that the trial would be held in The Netherlands.⁶³

On June 19, 2006, the newly elected SCSL President, Justice George Gelaga King, ordered that the trial be moved to The Hague. Citing the Security Council's determination of security risks if the trial were to be held in Freetown, he stated that the "physical security of the Special Court, including its personnel, witnesses, other detainees, and the public, [was] of overriding concern and outweigh[ed] the other inconveniences and additional efforts" brought on by the transfer.⁶⁴

A. CONSEQUENCES OF THE MOVE

The change of venue caused concern amongst the international community, and has not been without consequences for the parties or the SCSL administration. All organs of the Court faced setbacks and unnecessary complications because of poor logistical planning by the Registry and difficulties with working "remotely" from the seat of the Court. Moreover, moving the *Taylor* trial to The Hague has only compounded the SCSL's ever-problematic financial struggles. Incarcerating the Accused in an ICC detention facility, renting courtroom space, and administering a satellite office in The Hague has been an expensive undertaking, especially for a court that was designed to work on a "shoe-string budget." Finally, by restricting access to the *Taylor* trial proceedings, the move threatened the SCSL's ability to achieve a legacy of positively influencing the Sierra Leonean justice system, as the tribunal originally set out to do. When the hybrid model for international justice was first conceived, one of the largest concerns was that victims and others affected by the conflict would be able to watch the proceedings unfold and directly engage with a tribunal located in the post-conflict zone. As James Goldston, executive director of the Justice Initiative, warned in 2006, "Moving the trial from Freetown to The Hague will impose considerable burdens on victims and witnesses, and increase the challenge of ensuring broad public engagement in Taylor's trial."⁶⁵ In this respect, the move to Europe worked at cross-purposes with what ought to have been one of the SCSL's institutional strengths. On the other hand, once the trial got started and the burdens of the move had been largely resolved, the Court performed commendably in managing an extremely difficult logistical challenge. In this regard, the SCSL

likely has many lessons-learned that it could share with other tribunals that could face similar challenges in the future.

Early in the trial, the Defense filed a motion concerning what it considered a prejudicial time lag between the time when the Court received documents and when the parties received electronic versions of those documents.⁶⁶ Nearly a year after Taylor had been transferred to The Hague, there were still no “effective procedures” in place to ensure that Defense counsel were properly served with Court documents and filings.⁶⁷ The Court took the Office of the Registrar to task for its inability to arrange for suitable procedures for processing filings in The Hague. It acknowledged that although “teething problems” were to be expected with the transfer of the trial, especially with regards to technical matters, “that these difficulties persist[ed] less than a week to the opening of the trial [was] ... inexcusable.”⁶⁸ The then-Acting Registrar noted that delays in receiving filings were due to understaffing in the Court Management Section, and the lack of a workable fax line.⁶⁹ Such logistical problems persisted well into the *Taylor* trial,⁷⁰ and seemed to stem from a lack of Registry preparation regarding the *Taylor* trial’s move to The Hague.

Holding the trial in The Hague has been more expensive than holding it in Freetown would have been.⁷¹ The SCSL must pay for the travel of witnesses, court personnel, and the Defense and Prosecution teams between Sierra Leone, Liberia, and The Hague. It must cover office space and security arrangements for all members of the Court that sit in The Hague. The SCSL must also pay for the rental and use of ICC facilities, while its facilities in Freetown will sit unused for the majority of the *Taylor* trial. In all, Herman von Hebel, the previous Registrar, estimated that the move to The Hague has led to millions of dollars in added costs for the SCSL.⁷²

Moving the trial to The Hague has also raised several logistical problems that the Court could have avoided. For example, after the Prosecution moved to have many crime-base witnesses testify via video-link, the Registry noted that it would take several months to address the technological needs of such a request. The then-Acting Registrar also said that video-link testimony would ultimately be more expensive than having the witnesses fly to The Hague to testify in person.⁷³ In dismissing the motion⁷⁴, the Court expressed surprise that neither the Prosecution nor the then-Acting Registrar had taken the initiative to secure a video link in a timely fashion in spite of the reasonable foreseeability of such technological needs after the trial transfer. “Despite the fact that both the Accused and the trial proceedings were officially transferred to The Hague a year ago, the Prosecution has waited until two months before the trial is set to commence to make this application,” the Court said.⁷⁵

However, according to Herman von Hebel, Acting Registrar during this time, the parties and the Registry had been involved in discussions regarding the use of video-link testimony as of the time the trial was officially transferred to The Hague. The Prosecution was in favor of this method, which could have avoided unnecessary travel of witnesses to The Hague. Taylor’s defense team at the time had “serious misgivings” about video-link testimony. As von Hebel noted,

Both in an informal and formal way, feedback was sought from the Trial Chamber as to whether they would allow the use of this method. The need for some guidance was a result of the fact that the setting up of the video link system was a costly affair and would not be justified if the link would not be used or only sporadically used. Furthermore, due to limitations in terms of bandwidth and number of available secured audio and video channels, it would not be possible to use the video link

in case of a protected witness. As the Chamber refused to provide any feedback on the matter, the method was finally never used.⁷⁶

This demonstrates an area where improved communication and cooperation between the parties and the organs of the Court, or an earlier formal motion by the Prosecution, could have led to fewer logistical problems and complications during trial.

B. CONTROVERSY OVER MOVING THE TRIAL

Beyond the added cost and logistical problems, one of the biggest challenges faced by the SCSL in holding the trial in The Hague has been to maintain the transparency of the trial and promote the rule of law in Sierra Leone by allowing citizens to see justice done. The SCSL was established in Sierra Leone in part because many believed that close access to the trials by those directly affected by the violence would contribute to an understanding of the conflict, while also promoting accountability, justice, and the rule of law in Sierra Leone.⁷⁷ In the view of numerous local civil society groups, however, moving the *Taylor* trial to The Hague undermined this central goal of the SCSL.⁷⁸ Several local civil society groups went so far as to submit an *amicus* brief to the Court asking for the trial to remain in Freetown.⁷⁹ The brief cited the hybrid nature of the Court as a strong factor in favor of holding the trial in Freetown.⁸⁰ It also cited the need to physically monitor the trial and the right of the victims to be involved in the reconciliation process.⁸¹ The *amicus* noted that there were no valid security concerns for holding the trial in The Hague, especially if the trial were to be held after elections in Sierra Leone.⁸² It argued the trial was moved in spite of “vehement” arguments from the Sierra Leonean government and civil society, and noted that the arrest and trial of Sam Hinga Norman, tried in the *CDF* case, posed more of a security threat to Sierra Leone than the trial of Taylor would.⁸³ The *amicus* requested that Sierra Leonean civil society be given “a detailed, open and honest appraisal of the security situation.”⁸⁴

That appraisal was not forthcoming. Even today, when asked about moving the trial to The Hague, Court officials simply cite the Security Council Resolution that mandated the decision. The proactive role of the President of the Tribunal in securing that resolution has been minimized, as has the fact that there was no review of the President’s decision. Moreover, the Security Council’s determination of “security concerns” in the region is considered sufficient—no independent analysis of the security situation has been undertaken. Even if an independent analysis had been undertaken, however, it is not likely that it would have had the effect of changing the Security Council’s determination. Moreover, security evaluations are by nature confidential, and thus the *amicus*’ request for a detailed, public appraisal would be implausible, if not impossible. However, even though the trial started three years after Taylor was initially arrested by the SCSL and is now in its third year, there has been no re-evaluation of the security situation, nor have there been discussions about moving the trial back to Freetown.⁸⁵

However, the SCSL Acting Registrar involved in the move, defended the transfer, saying, “the daily information about the security situation in Sierra Leone and Liberia and the weak legal and security infrastructure in both countries themselves are clear indicators that the transfer to The Hague is still the right decision. If the issue would have arisen today rather than three years ago, I would assume that the same decision would have been made.”⁸⁶ This indeed may be the case. What is perhaps more important, however, is how the Court handled the move and how it raised to the challenge of reduced transparency and access brought on by the transfer of the trial.

It is not clear what impact reduced access to the *Taylor* trial will have on rule of law development in Sierra Leone. The previous Registrar argued that the impact the move will have on the legacy of the SCSL will be minimal. He notes that although the current location of the trial in The Hague limits access to the trial and makes information about the trial harder for Sierra Leoneans to obtain, the Court's main capacity-building programs are still held in Freetown.⁸⁷ Indeed, most of the staff of the SCSL is based in Freetown, and it remains the headquarters of the Court. Capacity-building and legacy activities have taken place in Freetown during the *Taylor* trial, and because they were focused on the national justice system, their success was not dependent on the location of the *Taylor* trial. Furthermore, the *Taylor* trial is the last of four trials heard at the SCSL since it began hearings in 2004. Arguably, the majority of the impact and legacy of the court would have been felt over the life of the Court, and not dependent on the effects of one trial, albeit a very important one for the region. However, the focus of the SCSL at this point is on finishing out the *Taylor* trial in The Hague, and reductions in staff have begun in Freetown as the last trial there reached its conclusion in 2009. As the resources and activity of the Court are increasingly concentrated in Europe, the Outreach and Public Affairs office (OPA) will have to increase its efforts to ensure the trial of Charles Taylor remains accessible to people in Sierra Leone and Liberia and that the trial can have the maximum impact on improving the legacy of the Court in Sierra Leone.

Thus far, the OPA, part of the Registry,⁸⁸ has risen to the challenge to bring increased access of the *Taylor* trial to the people of Sierra Leone and Liberia. The OPA has created a robust outreach program for the *Taylor* trial that complements its efforts for the other three trials held in Freetown. There are still many challenges to access and the trial does not have as broad of an audience in Sierra Leone and Liberia as could be hoped. However, there have been commendable efforts on behalf of this department to bridge those gaps.

The outreach program utilizes various media—radio, television, the internet, videos, and visits to The Hague—to reach the broadest audience possible. Trial summaries are broadcast in Sierra Leone over ABC Television-Africa and the Sierra Leone Broadcasting Station (SLBS), and are paid for by the SCSL OPA. The Court issues fifteen to twenty minute audio trial reports to local Sierra Leonean radio stations. This type of radio and television coverage of the SCSL is best suited to reach rural areas and the large population of illiterate Sierra Leoneans. However, the OPA also produces and distributes written and Braille materials at outreach events held across the country. These efforts are bolstered by videos given by the outreach department to partner-organizations in Sierra Leone and Liberia that regularly host screenings and question/answer sessions about the tribunal for local residents. The *Taylor* trial, unlike other trials at the SCSL, is broadcast live on the internet. Due to the limited internet access in Sierra Leone, this broadcast is played at the SCSL building in Freetown, and members of the public are invited to come watch the proceedings in the public gallery. The SCSL also attempted to provide internet streaming of the trial in other areas of Freetown, but technological challenges of this proved to be too difficult for the Court, and this effort was discontinued.

The OPA also developed a practice of sending representatives from Sierra Leonean and Liberian civil society groups to The Hague for short trial monitoring trips. An independent civil society committee chose which groups would attend trial. Visitors have included district outreach officers, traditional chiefs, and women leaders from throughout Sierra Leone and Liberia. These groups provided written evaluations of their trips to the Outreach office, and generally reported that they were impressed with the fairness and efficiency of the *Taylor* trial.⁸⁹ In addition to attending trial, they would speak with members of the Defense and Prosecution teams, and have an opportunity to question them on the trial.⁹⁰ From the few civil society monitoring reports made available to the WCSC, these questions focused on the rights of the Accused, witness security, and the possibility of a tribunal to try mid-level

commanders.⁹¹ These visitors frequently participated in radio or television discussions to share their views and experiences with the SCSL. As of May 2009, sixty-three persons had travelled to The Hague as a part of this program.⁹²

Coverage of the *Taylor* trial in Liberia is also important. Unfortunately, outreach in Liberia has not been as robust as in Sierra Leone. According to Court officials, this is due in part to security concerns for SCSL outreach officers working in Liberia, technical problems, and the move of the Head of Outreach⁹³ to the SCSL Registry.⁹⁴ Many in Liberia were upset that the first day of Taylor's testimony was not broadcast on large public screens, as has been done in Sierra Leone, and as some claim the SCSL had promised to do.⁹⁵ To reach a Liberian audience, the SCSL Outreach and Public Affairs office pays for radio and TV slots in Liberia to broadcast trial summaries, and supplies the Defense team and partner organizations with raw footage of the trials so they can facilitate public screenings as well. However, there is no permanent SCSL staff person in the country, and the Court relies heavily on partner organizations to conduct outreach activities. Given the importance of the trial in Liberia and the potential legacy the SCSL can leave in the region as a whole, a more concerted effort at outreach in Liberia would have greatly benefitted Liberian civil society, and deepened the impact of the court in West Africa.

Besides inadequate outreach to Liberia, there are various other criticisms of the OPA's efforts. Notably, many have pointed out that the lack of reliable access to the internet in Sierra Leone means few can take advantage of the live trial streaming. Even for those with internet access, there are frequent reports of problems with the live streaming. Broadcasting the trial at the Court in Freetown mitigates this problem only for those who have the means, time, and interest to travel to Freetown to watch the trial. Outreach events are reportedly poorly attended, and the SCSL public galleries, both in Freetown and in The Hague, are usually nearly empty.⁹⁶ Other than the individuals who sporadically attend trial, and two regional journalists reporting for the BBC World Trust, there is little Sierra Leonean or Liberian presence in the public gallery. Video summaries of the trial found on the SCSL website were supposed to have been produced twice a month. Instead, only seven videos had been posted at the time this report went to publication, and only four of those include witness testimony—testimony that was limited to a few key witnesses appearing at the beginning of the trial.

Notwithstanding these problems, the Outreach office maintains that its efforts have largely been successful in Sierra Leone. It measures this success in part by qualitative evaluations of the changed perception of the court by those who attend outreach events. For example, when the SCSL had just been established, questions from civil society and local Sierra Leoneans included whether the Court could lead to future violence or whether it was a waste of money better used for rehabilitation of victims.⁹⁷ These questions have changed to asking why the court is not prosecuting mid-level commanders of the warring groups.⁹⁸ The Court cites this change in perception as a tangible result from their outreach efforts. The Outreach office also believes that it is making a significant impact in reaching a wide Liberian audience.⁹⁹

Overall, although the initial decision to move the trial to The Hague was made in an opaque manner, the section of the tribunal most heavily affected has done a praiseworthy job mitigating the negative consequences of the move with regards to outreach and publicity. The Court has also commendably handled the tremendous logistical problems associated with moving the trial to The Hague, although not without some initial problems. It is regrettable that there was no public discussion of the security concerns that prompted the move—even within the parameters of confidential security assessments, a more transparent approach could have mitigated the negative perception of some regarding the move. Moreover, such a discussion would also help new and future hybrid tribunals understand the decision-

making process that went into moving such a high profile case away from the seat of the Court, in spite of the risks the move entailed. Such a report would promote the transparent management of international tribunals, and would strengthen the legacy of the SCSL by setting a positive example of transparent justice to the people of Sierra Leone. Furthermore, the Office of the Registrar should have been more prepared to deal with day-to-day logistical problems that were foreseeable consequences of moving a trial to The Hague, and having multiple teams working out of offices in Freetown and The Hague. Finally, given the importance of the trial in Liberia and the potential impact on the region at large, more outreach initiatives in Liberia would have been a critical contribution to an otherwise robust outreach program.

Having discussed the background events leading up to Charles Taylor's trial, this report now turns to a detailed discussion of the proceedings during the Prosecution's case-in-chief. Based on daily attendance at the trial by WCSC monitors and a review of public trial materials, the following Sections provide comprehensive data and analysis of the most prevalent legal and procedural matters that arose during the Prosecution phase of trial.

IV. TAYLOR ON TRIAL: THE FIRST TWO YEARS

This Section provides a discussion of the dramatic dismissal of Taylor's lead counsel on the first day of trial in 2007. It then discusses important legal issues that arose during the first half of the *Taylor* trial, and successes and areas for improvement in courtroom management. It then gives an overview of the Prosecution's case, discussing the Prosecution's decisions regarding which witnesses it called to the stand, and the various themes and strategies the Prosecution employed to adduce evidence for the eleven counts it brought against Taylor. The final part of Section IV analyzes the Defense themes and strategies used during cross-examination of Prosecution witnesses.

A. FALSE START IN 2007

Over four years after the SCSL issued its indictment against Charles Taylor, the trial was finally ready to begin in The Hague on June 4, 2007. Taylor faced an eleven-count indictment, spanning seven years, for crimes allegedly occurring throughout Sierra Leone. International media attention, unlike any paid to the other trials at the Special Court, brought cable news cameras into the courtroom for the Prosecution's opening argument. Then, in a dramatic turn of events, Taylor dismissed his Defense team on the first day of trial, setting the start of the Prosecution's evidence back another six months.

Taylor did not appear in Court to make this announcement; rather, his recently terminated attorney, Karim Khan, read sections of a letter Taylor had written to the Court. The letter conveyed Taylor's concerns about his rights to a fair trial. He specifically complained about defense resources, including the small size of his defense team compared to the Prosecution's team, and the temporary presence of a security camera in the conference room where he met his attorneys.¹⁰⁰ In the letter, Taylor said he would not attend any further hearings "until adequate time and facilities are provided to my Defense team and until my other long-standing reasonable complaints are dealt with."¹⁰¹ Khan explained to the Court that Taylor was not disputing the Court's jurisdiction, but was instead concerned that he would not receive a fair trial. Taylor had also written a letter to the Registrar terminating Khan's representation and stating that he wished to represent himself.

Lead Prosecutor Stephen Rapp told the Court “in our view, there is nothing that prevents the Accused from being here today to listen to this opening statement, and if he had respect for this Court, that is where he would be.”¹⁰² Rapp went on to note that Taylor had been provided a counsel, co-counsel, two legal assistants who were attorneys, an international investigator, and a national investigator.¹⁰³ Khan responded to the contrary that he was the only counsel on record, and that he had three pro-bono legal assistants and two investigators working on his team.¹⁰⁴ Khan’s characterization of his team differed from the Prosecution’s only slightly, but underscored the lack of the Defense team’s financial resources.¹⁰⁵

The Court deemed that Taylor had waived his right to attend trial, and directed Khan to represent Taylor for the duration of that day’s hearings.¹⁰⁶ However, Khan responded that under Article 18 of the Code of Conduct before the SCSL, he could not continue to represent Taylor.¹⁰⁷ The Court responded that the Code of Conduct could not override a Court order or Rule 45(D) of the Rules of Procedure and Evidence.¹⁰⁸ A dramatic back and forth between Presiding Justice Sebutinde and Khan ensued, during which Justice Sebutinde threatened several times that Khan was “verging on contempt,” repeatedly ordered him to take his seat, and ordered the Prosecution to begin its opening statement.¹⁰⁹ Notwithstanding these threats and orders, Khan left the courtroom.¹¹⁰ To fill the empty Defense side of the courtroom, the Court directed Charles Jalloh, an attorney from the Office of the Principal Defender present in Court, to represent the interests of the Accused during the proceeding.¹¹¹ The Prosecution delivered its opening statement without further incident.

The next time the Court convened, on June 25, 2007, Taylor was absent once again. This session was largely dedicated to the logistical issues surrounding Taylor’s lack of legal representation. When Taylor initially terminated his attorney, he claimed he would like to represent himself at trial. On June 25, Principal Defender Vincent Nmehielle addressed the Court in his capacity as head of the Defense Office, not as counsel for Taylor. Nmehielle explained that Taylor was not satisfied with any of the attorneys on the list of qualified counsel made available by the Defense Office. Furthermore, he noted, budget restraints were impeding his office’s ability to attract adequately high caliber counsel to represent Taylor. The Prosecution argued that Taylor did not have an absolute right to choose his own counsel, a position previously affirmed by the SCSL Appeals Chamber: “The right to counsel of the Accused’s own choosing is not absolute, especially in the case of indigent accused.”¹¹² The Prosecution also suggested that Taylor had deliberately boycotted the proceedings in an effort to delay the trial, arguing that, “the Accused should not be allowed to unduly benefit from a situation of his own making.”¹¹³

In its ruling on the matter of Taylor’s representation, the Court agreed with the Prosecution, in part, stating that although his concerns about his rights to a fair trial are valid, Taylor’s refusal to appear was “tantamount to boycotting the proceedings.”¹¹⁴ Nevertheless, the Chamber also blamed the Registry for causing undue delays in the trial by failing to remedy the issue of adequate representation for Taylor:

The focus of the Registry has not been to provide the Accused with adequate representation as required by Article 17 of the Statute. Rather, the Registry’s focus has been conserving funds and working within budgetary constraints. In the Trial Chamber’s view, the whole issue has wrongly boiled down to availability of finances rather than fair-trial issues being addressed. The Trial Chamber wishes to emphasize that if this Court is expected to conduct a fair and expeditious trial, then the provision of adequate representation and adequate resources are inevitable. They must be provided.¹¹⁵

Presiding Justice Sebutinde emphasized that the Court has “frowned upon undue delay in this trial. That it would come from an institution within the Court is really regrettable, or [that] it would come from some kind of consideration of budgetary constraints, et cetera, is really regrettable, and I do not know how to underline that.”¹¹⁶ These comments underscore a larger problem that has plagued the SCSL from its inception—the tight financial constraints faced by a tribunal created specifically to operate on a “shoe-string” budget.¹¹⁷ The Trial Chamber’s response also demonstrates a commitment to conducting a fair trial and protecting Taylor’s rights.

Ultimately, Taylor was granted more generous resources through the Defense Office so that he could retain counsel with whom he was satisfied. On July 17, 2007, Mr. Courtenay Griffiths, QC, was assigned as Lead Counsel for Taylor. Mr. Andrew Cayley and Mr. Terry Munyard were assigned as Co-Counsel. The Trial Chamber granted an adjournment for the new legal team to get up to speed. Accordingly, a new start date was set for January 7, 2008.¹¹⁸

B. LEGAL ISSUES ARISING IN THE TAYLOR TRIAL

This Section provides an overview of the most salient legal issues that arose during the first two years of the *Taylor* trial. It begins with an in-depth, critical look at major developments with respect to JCE liability—an issue characterized by the parties and the Judges alike as of central importance to this case. It then turns to a discussion of legal arguments concerning witness protection issues, confidentiality of journalists’ sources, and Rule 92*bis*. These matters shaped the SCSL’s jurisprudence over the last two years, and are a vital part of understanding the state of the *Taylor* case thus far.

1. A CRITICAL LOOK AT JOINT CRIMINAL ENTERPRISE IN THE TAYLOR TRIAL

Joint criminal enterprise, or JCE, is a central tenet of the Prosecution’s case against Charles Taylor, as well as a controversial legal principle in international criminal law. The SCSL’s application of JCE has been particularly contentious, with both the form of pleading and the standard of proof contested by the parties in the *AFRC*, *RUF*, and *Taylor* trials. This Section of the report will begin by describing how the SCSL Trial and Appeals Chambers have interpreted the JCE pleading standard in past cases. It then explains how Trial Chamber II has applied earlier jurisprudence in the *Taylor* trial, including during the Defense motion for acquittal raised at the midway point of the trial. The Section concludes by discussing what implications these developments may have on the final *Taylor* judgment.

Before beginning a discussion of the particularities of JCE in the *Taylor* case, it is useful to review the law of this mode of liability. In *Prosecutor v. Tadić*, the ICTY Appeals Chamber first recognized JCE as a mode of liability under customary international law.¹¹⁹ Pursuant to this jurisprudence,¹²⁰ joint criminal enterprise is considered a form of “committing” under Article 6.1 of the SCSL Statute. *Tadić* identified three different forms of JCE, which have been applied to all subsequent international cases: the “basic” form (JCE I), the “systemic” form (JCE II), and the “extended” form (JCE III).¹²¹ Only JCE I and JCE III are at issue in the *Taylor* case, and thus this discussion will be limited to those forms of JCE. To prove liability under either of these forms of JCE, the Prosecution must establish the following three objective elements of the *actus reus* beyond a reasonable doubt:

1. A plurality of persons acting in concert;¹²²
2. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute;¹²³

3. “Significant contribution” by the Accused to the common plan, design or purpose.¹²⁴

Once a prosecutor establishes the three objective elements, assignment of liability under JCE I or III depends on the *mens rea* of the Accused. JCE I liability attaches when the Accused (along with all members of the JCE plurality) intended the commission of a crime or crimes in furtherance of a jointly agreed common criminal plan in which the Accused intended to participate.¹²⁵ Under this basic form of the JCE doctrine, any JCE member can be convicted of “committing” these crimes, whether or not he was directly involved in the physical perpetration of a particular act, so long as the objective elements of the *actus reus* are satisfied, and all JCE members intended the crimes in furtherance of the common criminal purpose.¹²⁶

JCE III is a form of liability that arises when additional crimes, foreseeable from the intended common criminal purpose, but not intended by the Accused and his co-perpetrators, are committed in furtherance of the JCE.¹²⁷ Like JCE I, JCE III requires that the Accused and all members of the JCE plurality have intended the same common criminal purpose. Unlike JCE I, however, JCE III liability can attach to the Accused for crimes outside the common criminal purpose, committed in furtherance of the common plan. Liability for these crimes is assessed pursuant to a different *mens rea*. Under JCE III, the Accused need not have intended additional crimes committed in furtherance of the common criminal purpose; it is sufficient that they were carried out in furtherance of the common plan, and were the natural and foreseeable consequence of that plan.¹²⁸

In the *Taylor* case, the Prosecution argues that the Accused is guilty of all counts under JCE I, and alternatively argues that he is guilty under JCE I for some counts, and JCE III for others.¹²⁹ The exact nature of the “common purpose” allegedly tying Taylor into a JCE plurality, however, has been a matter of tremendous controversy throughout the trial thus far.

a) PLEADING JCE

When alleging a JCE, the Prosecution is procedurally bound to expressly plead certain material facts in the indictment.¹³⁰ These include:

1. The nature or purpose of the JCE;
2. The time at which or the period over which the enterprise allegedly existed;
3. The identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category as a group;
4. The nature of the participation by the Accused in that enterprise.¹³¹

An indictment that fails to plead required material facts is defective because it gives the Defense inadequate notice of the case it has to meet.¹³² A defective indictment can be cured, however, by the provision of clear, timely, consistent information to the Defense, such that the Accused is not materially prejudiced in presenting his case.¹³³

Whether the Prosecution met these pleading standards for JCE in its indictments has long been a matter of controversy at the SCSL. After a series of relatively perfunctory pre-trial approvals of the form of the indictment¹³⁴, the first formal Trial Chamber pronouncement on the adequacy of the pleading (which was nearly identical across SCSL indictments in the *AFRC*, *RUF*, and *Taylor* trials)¹³⁵ came in the *AFRC* Trial Judgment. In the *AFRC* Judgment, Trial Chamber II held that the Prosecution had not properly

pleaded joint criminal enterprise.¹³⁶ The Court reasoned that the Prosecution had not adequately specified the nature or purpose of the JCE in its indictment.¹³⁷ This holding directly contradicted a holding by Trial Chamber I serving as the *AFRC* Pre-Trial Chamber, in which Trial Chamber I held that the indictment had properly pleaded JCE liability.¹³⁸ In the *AFRC* case, the Chamber stated:

With the greatest respect, the Trial Chamber does not agree with the decision of our learned colleagues that the Indictment has been properly pleaded with respect to liability for JCE, since the common purpose alleged in paragraph 33, that is, ‘to take actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas,’ is not a criminal purpose recognized by the Statute. The common purpose pleaded in the indictment does not contain a crime under the Special Court’s jurisdiction.¹³⁹

The Court relied in part on an SCSL Appeals Chamber decision affirming, “There is no rule against rebellion in international law.”¹⁴⁰ This failure to plead a material fact rendered the indictment defective with respect to JCE. The Court announced in the *AFRC* Judgment that it would not consider JCE liability for any of the counts because, even when taken as a whole, the indictment did not provide sufficient notice to the Accused to know the case against them.¹⁴¹

Trial Chamber II acknowledged that the common purpose of a JCE may simply “involve” the commission of a crime rather than “amount to” one.¹⁴² However, in the Trial Chamber’s view, the *AFRC* JCE pleading failed because there was no indication that the agreement “involved” international crimes at the inception of the JCE.¹⁴³ In its opinion, the JCE formed between the *AFRC* and the *RUF*, at its inception, did not involve the commission of crimes.¹⁴⁴ The Chamber agreed that a JCE common purpose can change over time, and may later come to involve criminal behavior.¹⁴⁵ However, it held:

It is more important for the Prosecution to provide material facts of this new or changed common purpose in the Indictment. [. . .] The Prosecution is required to know its case before the start of the trial and to know of the changing nature and purposes of the enterprises. [. . .] All those new and different purposes have to be pleaded in the indictment and the Prosecution cannot be permitted to mould the case against the Accused as the trial progresses.¹⁴⁶

This reasoning seemed to imply that if the Prosecution had clearly articulated a common purpose with a “legal” objective (taking political control of Sierra Leone) that later came to encompass specifically intended “illegal” activities (committing crimes against humanity), it would have been accepted by the Court.

The Appeals Chamber overturned these Trial Chamber holdings on JCE. In the *AFRC* Appeals Judgment, the Court held that the criminal purpose underlying the JCE can be derived from the means “contemplated” to achieve a non-criminal objective.¹⁴⁷ The Court held that “[t]he objective and the means to achieve the objective constitute the common design or plan.”¹⁴⁸

The *AFRC* jurisprudence on JCE holding has directly affected the *Taylor* trial. Taylor's Defense team has consistently argued that JCE was improperly pleaded in the *Taylor* indictment.¹⁴⁹ In December of 2007, the Taylor Defense filed a motion alleging that JCE had been defectively pleaded in the Prosecution's Second Amended Indictment on the same grounds as applied in the *AFRC* Trial Judgment.¹⁵⁰ Following the *AFRC* Appeals Judgment, the Trial Chamber allowed the parties in the *Taylor* trial to file additional submissions on JCE. In a new filing, the Defense argued that Taylor had not received sufficient notice of the case against him because the common plan alleged by the Prosecution had shifted throughout its case. Therefore, the Defense requested the Chamber to not consider JCE as a mode of liability under the indictment.¹⁵¹ The Prosecution responded by listing the various manifestations of the common plan it had argued during its case, maintaining that together, these multiple occasions had given the Defense sufficient notice.¹⁵² In its reply, the Defense repeated that the alleged common plan had shifted from an attempt "to take and maintain political and physical control over Sierra Leone in order to exploit its natural resources to a common plan to inflict a campaign of terror on the citizens of Sierra Leone."¹⁵³

These arguments have endured throughout the Taylor case. Although the argument has shifted from the initial JCE pleading issue in the *AFRC* case (pleading a non-criminal purpose) these new motions have shed light on another problematic aspect of the Prosecution's pleading practice—vague and convoluted articulation of the common purpose of the JCE.

A majority of the Trial Chamber and a unanimous Appeals Chamber held that the Second Amended Indictment, when read as a whole, properly pleads joint criminal enterprise liability.¹⁵⁴ In an interlocutory appeal decision, the Appeals Chamber reiterated its ruling in the *AFRC* case, saying that, "[T]he 'purpose of the enterprise' comprises both the objective of the JCE and the means contemplated to achieve that objective."¹⁵⁵ However, unlike the *AFRC* case, in the *Taylor* case, the issue is not whether the articulated common purpose included a crime within the statute, since that is settled jurisprudence at the SCSL.¹⁵⁶ Rather, the *Taylor* JCE decision turned on how the indictment should be read, and how clearly and consistently the purpose needs to be stated.

Although the Trial Chamber held that the JCE had been properly pleaded, and had not shifted during the trial, it adhered to the Defense's articulation of the common purpose¹⁵⁷, by dispensing with allegations of political control, and limiting the common purpose to terrorizing the civilian population.¹⁵⁸ In effect, the Trial Chamber re-characterized what the Prosecution had originally pled as one of several criminal "means," and declared that this was the objective of the common purpose instead.

For the SCSL's most complicated and highest profile case, it is surprising that the Prosecution would lead its case against Taylor with an indictment that even the Trial Chamber has difficulty deciphering. Although the Prosecutor's office was initially under significant time and financial limitations, the *Taylor* trial began nearly five years after the SCSL was established. In that time, and after the initial controversy over the indictment in the *AFRC* case, the Prosecution had ample opportunities to amend its indictment in the *Taylor* trial. Indeed, Justice Lussick held that he would have ordered as much in his dissenting opinion of the pleading of JCE in the *Taylor* case.¹⁵⁹ Below, this report will outline the various ways in which the Prosecution has argued that it sufficiently pleaded JCE in the *Taylor* case, and why it believes an amended indictment was not necessary. The effects of the Court's decision, and the Prosecution's complicated pleading of JCE, will be discussed in the final Section.

b) EVOLVING COMMON PURPOSE

At the heart of the JCE controversy in the *Taylor* case is the evolving nature of the common purpose. The Prosecution alleges, in paragraph 33 of the Second Amended Indictment that Taylor is liable under Article 6(1) of the Statute for crimes that “amounted to or were involved within a common plan, design or purpose in which the Accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.”¹⁶⁰

Discerning the purported common purpose has been difficult throughout the life of the case. The initial indictment, similar to the indictments in the *RUF* and *AFRC* cases, alleged that the RUF and AFRC were participants in a JCE to take political and physical control of Sierra Leone and its diamond mines.¹⁶¹ The diamonds and other natural resources “were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.”¹⁶² Taylor allegedly participated in the JCE by “provid[ing] financial support, military training, personnel, arms, ammunition and other support” to the RUF in order to “obtain access to the mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth of Sierra Leone, and to destabilize the State.”¹⁶³ Thus, the Prosecution contended, Taylor was guilty of the crimes in the indictment under Article 6.1 of the Statute.¹⁶⁴

In March 2006, the Prosecution amended the indictment, removing all specific mentions of JCE. The Amended Indictment and (the most up-to-date) Second Amended Indictment both plead JCE with the same language. The Amended Indictment did not clearly specify a common purpose, but alleged as part of paragraph 5 that Taylor acted in concert with the RUF, AFRC and others to commit the crimes charged “as part of a campaign to terrorize the civilian population” of Sierra Leone.¹⁶⁵ There is no mention of taking control of Sierra Leone, or of its diamonds or natural resources. In the case summary that accompanied the Amended Indictment, however, the Prosecution elaborated on its theory that Taylor shared a common plan to “take any actions necessary to gain and exercise political power and physical control over the territory of Sierra Leone, in particular the diamond mining area.”¹⁶⁶ The summary restated the allegation from the original Indictment that the natural resources of Sierra Leone were given to Taylor and others outside of Sierra Leone.¹⁶⁷

The Pre-trial Brief, submitted April 4, 2007, argued that the common plan was to take control of Sierra Leone via a campaign of terror, which encompassed the crimes alleged in the indictment.¹⁶⁸ This campaign of terror theory was articulated in the original indictment, but not in the context of a joint criminal enterprise, or in the context of taking control of Sierra Leone.¹⁶⁹ The Prosecution’s opening statement linked the two concepts, and embellished the JCE mode of liability. Prosecutor Rapp characterized all alleged crimes as “one over-arching crime ... and that crime is in and of itself a war crime, the crime of terrorism.”¹⁷⁰ Rapp went on to argue that “from its inception, the Accused and the other participants in the common plan used criminal means to achieve and hold political power and physical control over the civilian population of Sierra Leone. These criminal means involved the campaign of terror waged against the civilian population of Sierra Leone.”¹⁷¹

The characterization of the common purpose seemed fairly consistent from the Pre-Trial Brief through the opening statement. However, the Prosecution changed its position again in the revised case summary, filed after the Trial Chamber Judgment struck down the JCE pleading in the *AFRC* case in August 2007. Apparently alleging a different objective, the Prosecution claimed that Taylor participated in a common plan to engage in a campaign of terror “in order to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone.”¹⁷² This formulation of JCE would have withstood the requirement that the common plan articulate a crime

within the statute, and presumably enabled the *Taylor* pleading to survive in the event that the Appeals Chamber upheld the *AFRC* Trial Judgment with respect to JCE. However, the Appeals Chamber overturned, and nine months after filing the amended case summary, the *Taylor* Prosecution team shifted its arguments again.

In an April 2008 reply to Defense motions contesting the pleading of JCE, the Prosecution reverted to the concept of the common purpose as pleaded in the Second Amended Indictment and explained in the amended case summary—to take control of Sierra Leone by means of the crimes alleged in the eleven counts of the indictment.¹⁷³ Under the *AFRC* Appeals holding, this would be acceptable as a common purpose, combining a non-criminal objective with statutory crimes “contemplated” as the means to achieve the objective. It appears as though the Prosecution decided, after the Appeals Chamber issued a favorable Judgment, that it was no longer necessary to try framing the common purpose as an inherently criminal objective.

Nearly a year after this motion was filed, in February 2009, Trial Chamber II finally made a direct pronouncement on the pleading in the *Taylor* case.¹⁷⁴ Through a creative reading of the Second Amended Indictment, the Trial Chamber held by a majority that the common purpose of the JCE Taylor allegedly participated in was to terrorize the civilian population. Reading paragraph 5 together with paragraphs 9, 14, 22, 23, 28, 33, and 34, the majority of the Court concluded that the Prosecution had alleged that Taylor and others had participated in a “campaign to terrorize the civilian population of the Republic of Sierra Leone.”¹⁷⁵ The Trial Chamber noted that in particular, paragraphs 5 and 33 denoted the common plan of the JCE.¹⁷⁶ Although this finally settled the case on a clear common purpose, the Trial Chamber’s judgment embraces a theory of the common purpose distinct from the one the Prosecution had most recently been advancing. As such, the decision significantly changed the nature of the case against Taylor.

Justice Lussick, in a dissenting opinion, argued that the majority was incorrect to deny that there was any defect in the indictment. He noted that paragraph 5 not only fails to mention a common purpose for a JCE, but does not mention JCE at all—because, he notes, it is a paragraph that deals with terrorizing the civilian population.¹⁷⁷ Lussick reasoned that terrorizing the civilian population would “more likely be a means of achieving a common purpose” rather than a common purpose in itself.¹⁷⁸ In a scathing critique of the Prosecution’s indictment, Lussick noted that

[T]he Accused should not be required to undergo the brain-twisting exercise of reading together paragraphs 5, 9, 14, 22, 23, 28, 33 and 24 of the Indictment in order to fathom what liability facts are most likely to form the basis for his alleged joint criminal enterprise. An indictment that requires an accused to do so is obviously defective in that it fails to clearly inform the accused of the case he is required to meet.¹⁷⁹

Justice Lussick concluded that, were his decision the Majority ruling, he would have ordered the Prosecution to submit a revised indictment to cure the defect.¹⁸⁰

The Defense appealed Trial Chamber II’s JCE ruling.¹⁸¹ Following the decision, but prior to the Appeals Chamber’s interlocutory pronouncement on the matter, the Prosecution re-characterized the JCE in the *Taylor* case yet again, returning to the common purpose it argued in the revised case summary in August 2007. During Rule 98 oral arguments, heard in late April of 2009, the Prosecution maintained that the common plan between Taylor and others amounted to “a criminal means of a campaign of terror,

encompassing multiple crimes to forcibly control the territory and population of Sierra Leone and pillage the natural resources, in particular diamonds.”¹⁸² This conceptualization of JCE seems to distinguish between a common purpose—forcibly controlling Sierra Leone to pillage its natural resources—and the means contemplated to do so—engaging in a campaign of terror. This was the most complete and nuanced Prosecution discussion of JCE in the *Taylor* trial to date, yet it did not come until after the close of the Prosecution case-in-chief.

When the Appeals Chamber finally ruled on the Defense Appeal on JCE pleading, it upheld the Trial Chamber’s rationale, agreeing that, “notice to the accused does not require the objective and the means to be separately pleaded in the indictment as long as the alleged criminality of the enterprise is made clear, as it was in the Second Amended Indictment.”¹⁸³ A unanimous Appeals Chamber reasoned that because paragraphs 5 and 33 were the only places where all counts are mentioned collectively, they can be read together.¹⁸⁴ Like the Appeals Chamber holding on the matter in the *AFRC* trial, this effectively lowers the standard for pleading material facts of a JCE at the SCSL.

Subsequent to this Appeals Chamber Judgment, Trial Chamber II issued a ruling on the Rule 98 Motion for acquittal. In its Rule 98 decision, the Trial Chamber reiterated its conceptualization of JCE in the *Taylor* case. Recalling its February 27 decision in which it held that JCE had been sufficiently pled in the Second Amended Indictment, the Trial Chamber reiterated its understanding of the common plan: Taylor participated:

[W]ith others, namely members of the RUF, AFRC, RUF/AFRC junta or alliance and/or Liberian fighters, in a campaign to terrorise the civilian population of Sierra Leone between 30 November 1996 and 18 January 2002 and that the crimes charged in the indictment were part of a campaign of terror, or were a reasonably foreseeable consequence thereof.¹⁸⁵

It did not discuss whether this campaign of terror was undertaken with the ultimate goal of controlling Sierra Leone and its population or of pillaging its natural resources.

Trial Chamber II’s reading of JCE in the *Taylor* trial fits squarely within its reasoning in the *AFRC* Trial Judgment, even if the Appeals Chamber eventually overturned this reasoning. Its reading finds a common purpose that includes a crime within the SCSL Statute. Although the Prosecution’s arguments concerning JCE were inconsistent in form, they tended to move between three common elements: gaining political control over Sierra Leone, pillaging the natural resources and diamonds of Sierra Leone, and terrorizing the civilian population. The Trial Chamber, faced with the multitude of changing submissions on the issue, chose the only one that arguably appeared in some fashion in the actual Indictment.

As frequently occurs at the SCSL, Trial Chamber II’s decision is at odds with a Trial Chamber I decision on a similar matter that arose in the *RUF* case. Despite similar changes in Prosecutorial strategy in the *RUF* case and inconsistent JCE pleading, Trial Chamber I took a distinct approach from Trial Chamber II. The Prosecution originally argued that the RUF and AFRC were involved in a JCE with the common plan to take control over Sierra Leone.¹⁸⁶ After the *AFRC* Appeals Judgment, the Prosecution filed an unusual submission with the court, entitled “Notice Concerning Joint Criminal Enterprise.” This document, which purported to further clarify the common purpose of the JCE (but insisted that the pleading remained consistent with the indictment) articulated a two-pronged common purpose: 1) to engage in a campaign

of terror and collective punishments in order to pillage the diamonds and natural resources of Sierra Leone, and 2) to forcibly control the population.¹⁸⁷ Unlike in the *Taylor* trial, this re-conceptualization of JCE was impermissible to Trial Chamber I. In the final *RUF* Judgment, Trial Chamber I held that the Prosecution was not allowed to “unilaterally attempt to alter a material fact in the Indictment more than half-way through the trial.”¹⁸⁸ The Court accordingly restricted its JCE findings to the scope of the originally pleaded common plan, and was able to dispose quickly of any potential shifts in the Prosecution’s JCE common purpose arguments.¹⁸⁹

The evolving common purpose of Taylor’s alleged JCE has had important consequences for the *Taylor* trial. The nature of the Prosecution’s pleadings forced the Court to determine the case against Taylor, rather than the Prosecution, even though the Prosecution is required to know and plead its own case. It caused the Court to limit the common plan to terrorizing the civilian population, changing the legal framework of the case by replacing the non-criminal “objective” of the common plan with one of the criminal “means” contemplated to achieve that objective.¹⁹⁰ Given the Trial Chamber’s holding that the common purpose was to terrorize the civilian population, all crimes in the indictment must now be proven as the intended means used to carry out the common plan to terrorize, or as a natural and foreseeable consequence of this plan. This is a starkly different theory of the case from the original notion that the crimes were perpetrated in pursuit of gaining control of Sierra Leone and were motivated by political and financial greed. Further complicating the matter, terrorizing the civilian population is a specific intent crime, which means some counts may be difficult to prove under JCE. These issues are discussed in more detail in the following Section.

c) PROVING JCE

Much of the Prosecution’s case focused on its original theory that Taylor sought political control over Sierra Leone to have access to its diamonds and other natural resources. Now, because of inconsistencies in its own pleadings, the Prosecution will have to prove a case pieced together by the Trial Chamber, after it has already concluded its case-in-chief. Here this report will discuss the potential legal consequences of the JCE debate in the *Taylor* case.

The biggest JCE issue now at stake in the *Taylor* trial is whether all of the counts can be considered part of a campaign to terrorize the civilian population of Sierra Leone. Acts of terrorism, Count 1 of the Indictment, is a war crime. This crime has not often been charged in any of the international tribunals, and thus jurisprudence on the issues it raises is thin.¹⁹¹ According to Trial Chamber II in its *AFRC* Judgment, the Prosecution must prove that:

1. There were acts or threats of violence against persons or their property;
2. The perpetrator willfully made persons or their property the object of those acts and threats of violence; and
3. The acts or threats of violence were committed with the primary purpose of spreading terror among those persons.¹⁹²

This *AFRC* decision cited to the ICTY *Galić* case, in which the ICTY held that “spreading terror” should be conceived of as attacks that cause cases of “extensive trauma and psychological damage” and that are designed to keep civilians in a “constant state of terror.” The *Galić* Court held that the extensive trauma and psychological damage formed part of the acts or threats of violence.¹⁹³

The Court in the *AFRC* case also relied on the ICTY's Appeals Chamber's determination in the *Galić* case in holding that the requisite *mens rea* is the specific intent to create terror among the civilian population. The Court held that "[a]ctual terrorization of the civilian population is not an element of the crime. The requisite *mens rea* is composed of the specific intent to spread terror among the civilian population" and can be inferred from the circumstances of the acts or threats.¹⁹⁴ The Trial Chamber quotes *Galić*, which states that:

[t]he fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing, and duration.¹⁹⁵

Thus, a perpetrator could be guilty of terrorizing through the commission of other crimes, and could have had multiple criminal intents while committing one act. These issues are highly consequential for the *Taylor* case because, following on the Trial Chamber's JCE decision, terrorizing the civilian population is now an overarching criminal purpose within which the crimes comprising the other ten counts (each of which has its own required mental state) is subsumed. As long as spreading fear was one of the primary intents, the perpetrator can still be guilty of terrorizing.¹⁹⁶

Taylor is charged with eleven counts of crimes against humanity and war crimes. The Prosecution has argued that Taylor is liable for each of these counts pursuant to JCE I liability, because he intended each of the charged crimes as means to gain political and physical control of Sierra Leone and its diamonds. In the alternative, the Prosecution has argued that Taylor intended some of the crimes, and that others were foreseeable consequences of the common purpose, triggering both JCE I and JCE III liability. Under its alternative theory, the Prosecution has contended that Taylor and the JCE plurality intended the crimes of acts of terror, conscription, enlistment, and use of child soldiers, enslavement of civilians, and pillage.¹⁹⁷ Murder, violence to life, rape, sexual slavery, outrages upon personal dignity, violence to the physical well-being of persons, and other inhumane acts were foreseeable consequences of carrying out the common plan.¹⁹⁸ However, now the Prosecution must use its evidence to prove that all eleven counts were intended as means to terrorize, or alternatively, that some were intended as a means to terrorize and others were a natural and foreseeable consequence of that terrorization.

Thus, the Prosecution must now prove that the crimes were committed with the primary intent to spread terror—a significant departure from proving that the crimes were a contemplated means to take political and physical control. Trial Chamber II does have some SCSL jurisprudence to rely on regarding JCE liability for terrorizing the civilian population. In the *RUF* Trial Judgment, Trial Chamber I found that the crime of terrorizing the civilian population included many of the alleged crimes, and was intended as a means of achieving the common purpose of its JCE, which was to take over Sierra Leone.¹⁹⁹ Trial Chamber II, on the other hand, will have to find that the alleged crimes were a means to terrorize the civilian population. However, Trial Chamber II will not be able to use the broader characterization of the common purpose to encompass crimes that are not found to be covered by terrorism. These may include enslavement, the use of child soldiers, or pillage—crimes that are less obviously acts committed with the intent to spread terror. Trial Chamber II in the *AFRC* Judgment held that the use of child soldiers, abductions and forced labor, and sexual slavery were not acts that could be included under the crime of terrorizing the civilian population.²⁰⁰ The Trial Chamber in the *RUF* case found that these crimes were not part of terrorizing, but served to further the larger political goals of the RUF. Moreover, Trial

Chamber I in the *RUF* trial found that sex-based crimes were part of a campaign of terror, whereas Trial Chamber II found the opposite, characterizing them as crimes of opportunity.²⁰¹

These and other issues will be challenging for Trial Chamber II to overcome in its deliberations on JCE in the Taylor case. The SCSL's development of this body of jurisprudence has been characterized by divisions between each of the Trial Chambers, and between the Trial Chambers and the Appeals Chamber. It will be of critical importance that Trial Chamber II issue thoroughly reasoned decisions on these matters in the *Taylor* case, as the SCSL's contribution to international criminal jurisprudence nears an end and other tribunals consider whether to follow the SCSL.

On the whole, the JCE pleading in the *Taylor* trial has been problematic. The Court has had to wade through various manifestations of the common purpose to finally settle the issue of what the case against Taylor is: that he participated in a common plan to terrorize the civilian population of Sierra Leone. This decision came after the Prosecution had already concluded its case, and over a year after the Defense first argued that this mode of liability was improperly pled. Had the Prosecution taken a more direct, consistent approach to its indictments in the Taylor case, many of these problems could have been avoided.

2. WITNESS PROTECTION

Protecting witness safety and security has been an important issue since the inception of the SCSL. Throughout the *Taylor* trial, the Judges have faced the challenging task of balancing the need for transparency and the right of the Accused to a fair and public trial, against the imperatives of effective witness protection. In general, Trial Chamber II has applied a consistent approach to witness protection during trial, showing a slight tendency to favor transparent proceedings over some witness protection requests.

The Court has a variety of tools at its disposal to protect a witness's identity at trial.²⁰² The most commonly employed are the assignment of a pseudonym, use of voice and facial distortion, granting permission to testify behind a screen, and hearing testimony in closed session. Most problems with witness protection in the *Taylor* trial arose when witnesses sought to testify entirely in closed session, as happened during the testimony of witness TF1-371, the first protected witness the Prosecution called.²⁰³ The witness had testified previously in the *RUF* trial, under an order requiring an entirely closed session for his testimony. The Prosecution pointed to the SCSL rule that once a Trial Chamber gives an order for protective measures, it is binding and remains in effect for all subsequent proceedings.²⁰⁴ The Defense objected to the closed session, arguing that previous decisions by the other Trial Chambers cannot be binding, because, as a matter of fair trial rights, Taylor must be afforded the opportunity to challenge any such order. By a majority decision rendered orally, the Court held that under Rule 75(F), the prior order was binding, and that since it had not received a motion to rescind the protective measures of TF1-371, the witness would have to testify in closed session.²⁰⁵

Notwithstanding this early decision in favor of prior orders for protective measures, relatively few witnesses have given the entirety of their evidence in closed session. TF1-371 was the first of only four witnesses to testify in entirely closed sessions, a significant departure from other trials at the SCSL. This is because most witnesses opted to rescind their previously granted protective measures, possibly because of the Judge's stance tending to require open sessions, or because of changing security situations.

In determining whether a witness must testify in closed session or with other protective measures in place, the Court must balance Taylor's right to a fair and public trial with its obligation to protect the privacy and security of the witness.²⁰⁶ In a decision that denied closed sessions for seven Prosecution witnesses, the Court held that it would grant the "extraordinary protective measure" of closed session testimony only where three circumstances are satisfied:

1. there is a real and specific risk to the witness and/or his family,
2. the right of the Accused to a fair and public trial is not violated, and
3. no less restrictive protective measures can adequately deal with the witness's legitimate concerns.²⁰⁷

The Judges of Trial Chamber II held that the *Taylor* Prosecution had not given "full and exhaustive" consideration to using less restrictive witness protection measures.²⁰⁸ A month later, the Court applied the same rationale and, by a majority, denied entirely closed sessions for two other Prosecution witnesses.²⁰⁹ In its decisions, the Court did not stipulate what a "full and exhaustive" consideration of less restrictive means would entail.²¹⁰

Despite reports by certain Court officials that witnesses scheduled to testify in the *Taylor* trial had been subject to death threats, thereby deterring them from testifying in open court, the Trial Chamber denied a total of thirteen Prosecution requests for witnesses to testify entirely in closed session.²¹¹ These included key insiders Moses Blah and ZigZag Marzah.²¹² Seven of those who were denied closed session chose not to testify in the *Taylor* trial, although it is unclear whether these decisions had anything to do with the denial of protective measures; the withdrawal of these witnesses could have been due to unrelated considerations.²¹³

Eventually the Court found a middle ground between completely closed or open sessions. After a request by the Prosecution during the testimony of Abu Keita, witness TF1-276, the Court determined that it would entertain case-by-case applications for closed sessions for specific lines of questioning.²¹⁴ This method has been employed for a majority of the witnesses in the *Taylor* trial; witnesses testify in open session, and the Court moves into closed session for questions that may reveal identifying or otherwise sensitive information.

Another especially contentious witness protection issue, concerning the applicability of a decision by Trial Chamber I in the *RUF* case, arose during witness TF1-215's testimony. On July 5, 2004, Trial Chamber I had decided that witnesses were to be afforded certain protective measures depending on the witness category they fell into: Category 1 included various "witnesses of fact," and Category 2 included witnesses who had waived their right to protection, as well as expert witnesses.²¹⁵ All Category 1 witnesses were entitled to receive some form of protective measures, including a pseudonym, confidentiality of identifying information, and the right to testify behind a screening device that shielded their identity from the public.²¹⁶ Within Category 1, protective measures were available to witnesses depending on whether the witness fit into one of three special sub-categories. Victims of sexual violence were Category A, child witnesses were Category B, and insider witnesses were Category C. In addition to the basic protective measures, victims of sexual violence (Category A) and insider witnesses (Category C) were entitled to voice distortion. Child witnesses (Category B) were allowed to testify by closed-circuit television, with facial distortion on public monitors.²¹⁷ This set a standard for wide application of protective measures in the *RUF* trial. Many witnesses who testified in the *RUF* trial under this order for

protective measures also testified in the *Taylor* trial. It was up to Trial Chamber II to decide whether, and how, the July 2004 order would apply to these *Taylor* trial witnesses.

The issue boiled down to arguments about who exactly was covered by the original Trial Chamber I decision. Witnesses in subcategories A, B, and C had been included in a list Annexed to the July 2004 decision. However, the decision did not include a list of the other 179 witnesses who were considered non-subcategorized “Category 1” witnesses, or simply witnesses of fact.²¹⁸ In the case of witness TF1-215, who was not listed in the July 2004 decision as a Category A, B or C witnesses, the Prosecution argued that the July 2004 decision covered all witnesses of fact—not just those listed—based on earlier submissions in the *RUF* case.²¹⁹ The Court disagreed, holding that nothing in the prior decision pertained to TF1-215, or any other witness not specifically listed in the July 2004 decision, and therefore ruled that he would not receive any protective measures.²²⁰ The Prosecution refused to call the witness, and filed a motion to appeal the Court’s oral decision.²²¹

This appeal was still outstanding when the Prosecution began asking for rescission of protective measures for a vast majority of its witnesses. In these requests for rescission, the Prosecution maintained its position that the witnesses simply fell into Category 1, without specifying a sub-category A, B, or C. The Prosecution argued that the 5 July 2004 decision applied *mutatis mutandis* to the present case by virtue of Rule 75(F)(i).²²² The Defense did not object to applications to rescind protective measures. However, it maintained that these measures should not apply to witnesses who were not specifically listed in the Annexes to the 2004 decision.

This became a somewhat silly repetitive exercise in Court, whereby the Prosecution would apply for rescission of protective measures that the Bench did not believe existed in the first place, because these were non-subcategorized witnesses. The Defense would not object, the Chamber would decline to remove what it perceived to be non-existent protective measures, the Judges would dismiss the application as redundant, and the witness would testify without protective measures. The regular exchange could be confusing to an outside observer, since the Prosecution’s requests were consistently being denied, but in fact, the ultimate result (testimony without protective measures) was the ultimate purpose of the request for rescission.²²³

Eventually, witness TF1-215 decided to testify openly and the motion to appeal the Trial Chamber’s decision was withdrawn.²²⁴ However, the issue about the July 2004 decision was decided in separate appeal that was based on the same legal reasoning as the motion regarding TF1-215. In its decision, the Appeals Chamber held that the Trial Chamber had erred in law in determining that application of the July 2004 decision only applied to those witnesses specified as part of Category A, B, or C, and in failing to give effect *mutatis mutandis* to that decision.²²⁵ Highlighting frequent judicial tensions between Trial Chambers I and II, the Appeals Chamber went on to note

The Trial Chamber’s error is aggravated by the fact that it appears to have disregarded the possibility of consulting a Judge of Trial Chamber I regarding the scope of the protective measures Trial Chamber I ordered. This consultation is expressly provided in Rule 75(H) in order to ensure that necessary protections are maintained and to avoid the delays and errors that may result from misinterpretation of decisions in other proceedings.²²⁶

The Appeals Chamber reprimanded Trial Chamber II for its failure to consult with Trial Chamber I, and noted that the *Taylor* Court's imprudent and erroneous interpretation of the July 2004 decision could have adversely affected the protective measures ordered for as many as twenty Prosecution witnesses in the *Taylor* case.²²⁷

On balance and in light of the discussion above and other observations about protective measures decisions during the *Taylor* trial, it seems as though the Court prioritized Taylor's rights to a public trial over witness security. For example, the Court ruled that documents tendered as evidence during closed session would not automatically be treated as confidential exhibits.²²⁸ Another more controversial ruling came during the testimony of Alimamy Bobson Sesay. Sesay had testified in the *AFRC* and *RUF* trials under a pseudonym, but agreed to testify openly in the *Taylor* trial, in part, he suggested, because his identity was already known. During his cross-examination, the witness gave information about where some of his family members were located. Towards the end of his testimony, he told the Court that he had received a phone call telling him that his brother was being intimidated in Freetown because Sesay had been saying "bad things about the SLA."²²⁹ To protect the safety of Sesay's family, the Prosecution moved to have the identifying information redacted from the public record. Objecting, the Defense argued that there was no established relationship between that evidence and the phone call about Sesay's brother. The Court, by a majority, ruled orally that the information should remain in the public record, noting that the evidence did not include specific addresses.²³⁰ However, a WCSC trial monitor reported, "It would seem that the use of street names in Sierra Leone could sufficiently identify the location of the witness's family members. It was not clear why such evidence was necessary, and it appears that the Chamber over-valued the significance of publicity in this instance while potentially endangering the security of the witness's family."²³¹ This incident followed an earlier report from the BBC that a brother of Prosecution witness Varmuyan Sherif was threatened in his family's home in Monrovia.²³²

Balancing the protected witness with the strong interest in open sessions has been challenging for all parties, and the Trial Chamber's concern with transparency is laudable, if sometimes overzealous. Transparency is important given the location of the trial far from Freetown. Too many closed sessions would compound the physical distance and make it even more difficult for people in the affected region to engage meaningfully with the trial proceedings. On occasion, a witness testifying in open session will inadvertently give details that make it easy to determine the identity of protected witnesses,²³³ especially for those who are familiar with the events, personalities, and past testimony of witnesses. However, there is no evidence that these types of identifications are intentional, and the parties exercise extreme care in ensuring the continued protection of witnesses. The Court also takes such matters very seriously, and is generally diligent about ordering such information redacted from the public record and forbidding members in the public gallery who may have heard the information from reporting or otherwise disseminating it.

3. CONFIDENTIALITY OF JOURNALIST SOURCES

One novel legal issue that arose during the *Taylor* trial involved the rights of journalists to protect the confidentiality of their sources in an international tribunal. Hassan Bility was a Liberian journalist allegedly tortured by Charles Taylor's son. During cross-examination, the Defense asked Bility about a trip he took to Sierra Leone in August 1997. Specifically, Defense counsel sought disclosure of the person or persons who helped Bility arrange the trip. While the witness was willing to disclose that Nigerian ECOMOG soldiers had helped him, he refused to provide names based on journalist ethics of

confidential sources. Bility claimed that the soldiers were still members of the Nigerian armed forces and might suffer persecution if he revealed their names in Court.

The Defense made an application to the Court to compel the witness to provide the names of the sources. The Court heard oral arguments on the issue, and then requested written submissions. In its motion, the Defense argued that: 1) no privilege exists for those who merely act to facilitate movement between countries, as distinguished from one who provides information²³⁴; 2) journalistic privilege is not absolute and must yield where revealing a source is necessary to prove guilt or provide reasonable doubt about guilt of an accused²³⁵; and 3) under the relevant balancing test laid out in the ICTY *Brđanin* case, it is in the interests of justice to have all relevant evidence before the court.²³⁶ The Defense further submitted that although it considered the witness's claims about possible danger to the sources insufficient to warrant privilege, the Court could adopt less drastic means to protect the sources, should the Judges deem protective action necessary.²³⁷ Finally, the Defense argued that the Prosecution had failed to meet its obligations under Rule 66(B), because it did not make an application in advance for non-disclosure of this evidence, thus prejudicing the Defense.²³⁸

The Prosecution responded by arguing that: 1) the evidence sought by the Defense was not relevant;²³⁹ 2) the journalistic privilege applied in this case because the witness was acting in his scope as a journalist and because under international and domestic laws, the term "source" has been interpreted to include "facilitators" as well as direct sources of information;²⁴⁰ and 3) the privilege is not outweighed by the interests of justice.²⁴¹

The Trial Chamber denied the Defense motion.²⁴² In so doing, the Court balanced Bility's rights to journalistic privilege with the importance of the evidence the Defense sought.²⁴³ First, the Court determined that Bility was in fact acting in his capacity as a journalist during that trip to Sierra Leone, and that no principled distinction can be made between a "facilitator" and a "source," as was argued by the Defense.²⁴⁴ Citing the European Court of Human Rights, Trial Chamber II stated that the privilege of journalist sources "stems from the right to freedom of expression and services to protect the freedom of the press and the public interest in the free flow of information."²⁴⁵ However, the Court also noted that this privilege is not absolute, and that it must give way when the identification of a journalist's source is necessary to prove guilt or a reasonable doubt of guilt.²⁴⁶ Finally, it found that under the *Brđanin* balancing test, the evidence sought by the Prosecution was not of "direct and important value in determining a core issue in the case."²⁴⁷ Therefore, Bility was not required to reveal his sources.

4. 92BIS WITNESSES: WITNESS WELL-BEING AND TREATMENT

Another prevalent issue in the *Taylor* trial has been bringing crime-base witnesses to testify in The Hague. The Prosecution initially requested that crime-base witnesses be allowed to testify under Rule 85(D) via closed-circuit video sessions in Sierra Leone, to avoid difficult, stressful, and costly travel.²⁴⁸ The Court denied this motion, however. In order to prevent the stress of testifying and to make the trial more expeditious, the Prosecution subsequently sought to introduce the prior testimony of many witnesses under Rule 92bis. Rule 92bis provides that:

1. [...] [A] Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the Accused.

2. The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.²⁴⁹

A significant portion of the Prosecution's crime-base witnesses testified in previous cases, and thus theoretically could have had most of their prior testimony and related exhibits introduced as evidence, rather than repeat this evidence live in Court. The Defense objected to wholesale admission of this evidence, however, on the grounds that the prior testimony the Prosecution sought to introduce included evidence that attested to the conduct of the Accused, which was inadmissible under rule 92*bis*.²⁵⁰ Counsel for the Accused argued that in its 92*bis* submissions, the Prosecution indiscriminately provided entire transcripts that included cross-examination from Defense attorneys in the prior trials. This, Griffiths maintained, meant that if he agreed to the inclusion of these transcripts as evidence, he would be agreeing to linkage-based testimony raised during those prior cross-examinations.²⁵¹ The Taylor Defense team requested that these victims be brought to The Hague for additional cross-examination by Taylor's counsel if the Court was going to admit the prior testimony. The Prosecution argued that the Defense mischaracterized acts and conducts of others as of Taylor, and emphasized that at no point in the testimony was Taylor ever mentioned by name.²⁵² The Prosecution argued that while evidence relating to the acts of others may be used by the Court to determine key aspects of the Prosecution's case or as evidence relating to persons subordinate to or proximate to the Accused, it cannot be construed as evidence of acts and conduct of the Accused himself.²⁵³

In its decision on the matter, the Court drew a distinction between the "acts and conducts of those others who commit the crimes for which the Indictment alleges the accused is individually responsible" (*i.e.* the RUF and AFRC) and "the acts and conduct of the accused as charged in the Indictment which establish his responsibility for the acts and conduct of others" (*i.e.* Taylor himself).²⁵⁴ It noted that only proof of the latter is barred by Rule 92*bis*.²⁵⁵ The Court held that although Rule 92*bis* does not explicitly provide for cross-examination, it is within its inherent powers under Rules 26*bis* and 54 to order "that information 'going to a critical element of the Prosecution's case' is proximate enough to the Accused so as to require cross-examination."²⁵⁶ The Court also reserved the right to exclude transcripts or make witnesses available for cross-examination where evidence included in those transcripts refers to "subordinates who are in close proximity to the Accused."²⁵⁷ Based on this reasoning, the Court has consistently accepted prior testimony transcripts and documents from Prosecution witnesses, but held that these witnesses must also be made available to the Defense for cross-examination.²⁵⁸ The Defense, in turn, exercised its right to cross-examination with all but two 92*bis* witnesses. Taking advantage of their presence in The Hague, the Prosecution took many of these witnesses through an examination-in-chief; nineteen were called exclusively for cross-examination.

In terms of principle, the Court appears to have found a fair and balanced approach to the Rule 92*bis* issue. However, the Court's approach has not been without practical consequences. Crime-base witnesses traveled to The Hague at great administrative cost to the Court, to tell harrowing personal stories, yet some of these witnesses were only on the stand for a few minutes. This issue will be explored in greater depth in the next Section.

C. COURTROOM MANAGEMENT

Managing high-profile trials, especially those of former heads of state, presents unique challenges to trial chamber judges. In addition to balancing the rights of the Accused with efficiency in the courtroom,

judges often face unruly defendants whose primary defense is attacking the legitimacy of the court itself.²⁵⁹ Judges must appear fair, independent, and free from political influence.²⁶⁰ Moreover, because such trials are often long and complicated, the Judges must be proactive in managing the scope of the trial, including number of witnesses called, time allocated to each party, crime sites, and crime-base evidence.²⁶¹ Although Judges face different challenges in each trial and each carries its own considerations, it is clear that pro-active Judges are critical to efficient and fair trials.

Efficient and speedy trials are important because 1) the Accused has a right to be tried without undue delay under Article 17(4)(c) of the SCSL Statute, and 2) because the Court is operating on a limited budget and efforts should be made to increase efficiencies and reduce the cost of trials when possible, without sacrificing the quality of justice. These are difficult issues faced by both the Judges, tasked with trial management, and the Registry, who must administrate the Court's completion strategy and overall budget.²⁶² At the ICTY, the completion strategy was led by the President of the Tribunal, with significant input from the Judges. At the SCSL, however, some Judges hesitated to commit themselves to completing a trial within a certain timeframe—and others considered that the completion strategy comprised their judicial independence. Therefore, at the SCSL, the Registry was left to create a completion strategy with input from the parties, but with no input from Judges—those who have the day-to-day power in the courtroom to ensure that trials are as speedy and efficient as possible.²⁶³

All things considered, the Judges in the *Taylor* trial have not performed well in this regard. In-court efficiency and management, while previously problematic at the SCSL, have generally been good during the *Taylor* trial.²⁶⁴ The Judges and parties maintain a very professional atmosphere and generally conduct the in-court sessions with efficiency. Nevertheless, the Judges have been particularly passive with respect to overall trial management, and have not taken enough proactive measures to limit evidence and testimony, manage the trial calendar, or limit the scope of the trial. Moreover, the Judges have shown considerable delay in rendering important decisions on motions, and have demonstrated some insensitivity to the treatment of victim witnesses. These issues have been noted as areas of concern in past reports by independent monitors and experts,²⁶⁵ and unfortunately, the Trial Chamber has demonstrated no discernable improvement over the course of the *Taylor* case in many of these areas.

1. PROBLEMS WITH INEFFICIENCY IN TRIAL CHAMBER II

When it comes to day-to-day management of the proceedings, the Court has shown considerable improvement over previous trials at the SCSL, and maintains a prompt and professional courtroom. Although the Trial Chamber initially experienced some technical problems in the courtroom, these were quickly remedied and the logistical functioning of the court seemed smooth.²⁶⁶ The Court convenes on time and does not take extra time during breaks. When the Court needs to break early, the Judges will generally compensate for lost time by re-convening earlier than scheduled. Similarly, there have been occasions where the Court will sit for an extra session on Fridays if it is necessary to recuperate time lost during the week.²⁶⁷ The Judges and the parties conduct the proceedings with the utmost professionalism, and apart from the false start in 2007, there have been no major incidents that have delayed in-court proceedings.

However, there remains room for improvement with the overall management of the trial. As noted above, the Judges in the *Taylor* case are very passive when it comes to judicial intervention. As is common in the civil law systems of continental Europe, and as has become practice at the ICTY, judicial

intervention can direct and speed-up proceedings. Judges can curtail redundant or irrelevant lines of questioning on cross or direct-examination, and can actively limit the scope of a party's case if it is not prejudicial to do so. Nevertheless, the Judges of Trial Chamber II almost never interject into the line of questioning, and when they do, it is merely to clarify a small detail, such as a date or spelling.

If the Judges had taken a more active role during the Prosecution's case, this phase of the trial may have moved more quickly. For example, as discussed below, the Judges could have taken judicial notice of some key facts that would have reduced the extent of crime-base testimony. Furthermore, the Judges could have taken the opportunity in their decision on the Defense's motion for acquittal under Rule 98 to narrow the Defense's case.²⁶⁸ More judicial pro-activity may also have been beneficial with regard to setting the start of the Defense case, keeping witnesses on topic and focused on relevant issues, and deciding party motions in a timely manner. The last of these examples became a serious efficiency issue during the first half of the *Taylor* trial.

Trial Chamber II has been exceptionally slow in rendering decisions during the trial of Charles Taylor. From May 2007 until February 2009, the Trial Chamber rendered sixty-six decisions.²⁶⁹ Twenty-nine of these decisions took more than two months to decide. This delay is not attributable to the Prosecution or the Defense, as both parties generally filed timely responses and replies to the various motions submitted during trial. Of the twenty-nine decisions that took longer than two months, about half took the Court between two and three months to decide.²⁷⁰ Worryingly, it took seven to eight months or more for the Court to decide five motions on very important legal questions.²⁷¹

It is clear that this delay has caused the parties some prejudice. In one instance, when the Court took four months to decide on the issue of Corinne Dufka's expert status,²⁷² the Prosecution felt it was being prejudiced by the Trial Chamber's delay. The Prosecution filed an urgent request for a decision on the matter, prompting a scathing response from the Chamber. The Court said that the Prosecution's request was "frivolous, an abuse of process, and without merit." It warned the Prosecution that it would face Court sanction under Rule 46 if it made similar filings in the future.²⁷³ Filed early in the trial, this response could have created a chilling effect, silencing similar motions under threat of Court sanction. Notably, there were no further requests or motions regarding the timing of judicial decisions for the remainder of the Prosecution's case-in-chief.

In the most obvious illustration of the Court taking an overly long time to decide a motion, it took ten and a half months for the Chamber to make a determination on the issue of pleading JCE.²⁷⁴ In its decision, published after the Prosecution rested its case, the Trial Chamber held that the common purpose of the JCE pleaded by the Prosecution was to terrorize the civilian population of Sierra Leone. This is a theory distinct from others argued by the OTP during its case-in-chief.²⁷⁵ JCE is a vital legal issue to the *Taylor* trial, and the excessive delay impairs both parties' ability to prepare and present a proper case. Because of the egregious delay in resolving this issue, and the Trial Chamber's finding in contravention of the Prosecution's original arguments about the common purpose, the Prosecution is faced with proving a different construction of its core liability theory than the one it argued during its case-in-chief. Had the Prosecution known it had to prove a common purpose limited to terrorizing the civilian population, it may have led different evidence or proposed different arguments, possibly putting it at an unfair disadvantage in the trial. Even more troubling, the decision means that Taylor sat through the entire Prosecution case before he fully knew the nature of the charges against him—an apparent violation of his fair trial rights.

Delayed decisions on motions are a problem that both Trial Chambers at the SCSL have encountered. In his expert report on the SCSL, Antonio Cassese noted it as an area that needed improvement.²⁷⁶ As Cassese commented, “delays in delivering decisions increase uncertainty in the proceedings and impair a party’s ability to prepare its case.”²⁷⁷ The motion practice in the *Taylor* trial suggests that Trial Chamber II has not improved upon its performance in this area. Indeed, the time that Trial Chamber II is taking on decisions in the *Taylor* trial is more remarkable when compared to the previous three trials at the SCSL. Comparing data from the *Taylor* trial motion practice to data included in the Cassese report on the *CDF*, *RUF*, and *AFRC* trials during 2006, it is clear that Trial Chamber II is taking noticeably longer with decisions than other SCSL Trial Chambers have in the past.²⁷⁸ Annex C shows a comparison between the *Taylor* trial and others. For example, for the three previous cases combined, only two decisions took six months or more to decide.²⁷⁹ There were also many more decisions in those cases that were rendered in less than a week (eighteen, compared to three in the *Taylor* case), and only twenty-four percent of those decisions took longer than two months, compared to forty-three percent in the *Taylor* case.

It should be noted that the volume of motions Trial Chamber II must rule upon in *Taylor* has been considerably higher than in previous SCSL cases. For *Taylor*, Trial Chamber II has rendered sixty-six decisions, compared with fifty-eight delivered in approximately the same amount of time by two trial chambers presiding over the other three trials at the SCSL (*RUF*, *AFRC*, and *CDF*).²⁸⁰ The heightened attention of the international community on the *Taylor* trial could perhaps explain why the Judges are being extra-cautious in their approach. Nevertheless, as noted above, there are a few egregious examples of delayed decisions for which there appears to be no valid explanation. The fact that the Court admonished the parties early in the trial to refrain from requesting expedited process further compounds this procedural problem insofar as it likely inhibited the Prosecution and the Defense from protesting such delays. Hopefully this area of judicial management will show significant improvement moving forward.

2. TREATMENT OF WITNESSES IN THE COURTROOM

Treatment of witnesses in the courtroom during the trial of Charles Taylor has generally been good, especially in light of criticisms of past trials at the SCSL.²⁸¹ In international criminal trials involving mass atrocities, there is a risk that asking witnesses to testify about traumatic events they witnessed or experienced can cause re-traumatization. This is especially true for crime-base witnesses. However, there were two issues that demonstrate that the Trial Chamber might not have been as sensitive as it could have been to witness-wellbeing in the *Taylor* trial.

To help prevent potentially negative effects of testifying, the SCSL has previously allowed for members of the WVS psychology team to sit next to witnesses during their testimony, in case a witness becomes distressed or otherwise requires assistance.²⁸² In the *Taylor* trial, however, this has not been the case. In September 2008, for example, a victim witness had requested the assistance of a WVS psychologist during an emotional breakdown after being asked about rebels killing her children and family.²⁸³ Neither the Defense nor the Prosecution objected, but the Court denied the request anyway.²⁸⁴

In refusing the September 2008 request, the Court expressed anxiety about the WVS representative sitting next to the witness on the stand, and the fact that this person might hear confidential testimony in closed session.²⁸⁵ The Court’s rationale seems misguided, since WVS personnel are employees of the Registry, which is a neutral body of the Court. Moreover, given their central role in making security assessments prior to witness testimony, WVS representatives are routinely privy to the most sensitive

information about each witness. These personnel are hired specifically to provide psychological assistance to witnesses. In many cases, WVS personnel know more about confidential witness information than the Judges do; Chambers does not always know whether a witness has been relocated, but WVS personnel are likely to know the specifics of these arrangements, and be closely involved with witnesses in personal and logistical matters. As such, it is not clear why the Court was concerned about WVS personnel hearing closed session testimony, or how they thought a neutral WVS representative might somehow influence the testimony of the witness. The Court's decision in this case was especially questionable in light of the fact that WVS assistance has routinely been allowed in past trials at the SCSL.²⁸⁶ In fact, shortly after this refusal, one of the few exceptions to this Chamber's rule arose during the testimony of Osman Jalloh. Jalloh, a double amputee, needed assistance due to his physical handicap. The Prosecution requested that a member from WVS be present in Court to assist the witness, and the Court granted the application with no objection from the Defense.²⁸⁷ Apparently, Trial Chamber II considered addressing the physical needs of witnesses as more important than psychological needs.

Another issue regarding witness well-being in the Court arose when the Court required injured witnesses to display their injuries and scars to the Court. Human Rights Watch has objected to this type of witness treatment in the past, and called upon the SCSL to be more sensitive to victim witnesses. Apparently, however, nothing has changed as a matter of courtroom policy in this respect.²⁸⁸ Indeed, it appears as though witnesses may have been more frequently asked to expose wounds and disabilities during the *Taylor* trial than they were in past trials.²⁸⁹ Requests often arose during the most emotional portion of a witness's testimony, and it was frequently physically awkward for the witness to comply. At times witnesses had to remove bandages or raise their clothing, and walk around the courtroom to display injuries to everyone present. Sometimes, the Judges would request viewing the injuries more than once and would question the witness about specifics if they could not distinguish the exact nature of the wound from a physical inspection. The Judges would then orally describe their impression of the injuries, for the record, in a startlingly clinical manner.

Although such requests were made in the interest of gathering a complete factual record for the trial, it seems that this information could have and should have been gathered in a more sensitive manner. Witnesses had already testified about the manner in which they were injured, the extent of the wounds, the type of medical treatment they had received, and the ongoing effects of their injuries on their private lives. Conspicuous physical inspection of the wounds by the Judges was arguably redundant, particularly when the injuries (such as obvious amputations) were already visible to all in the courtroom, without the explicit show-and-tell session. On one occasion, a witness was clearly taken off guard by the blunt request and became visibly upset while displaying his injuries.²⁹⁰ Other witnesses, who managed to maintain control of their emotions during testimony, became emotional and tearful when showing their injuries to the court.

These kinds of requests and this type of treatment of witnesses in the courtroom have serious potential to re-traumatize the witnesses.²⁹¹ It was surprising and disappointing to see the trial conducted in this manner. A major impetus for the establishment of the SCSL and other similar tribunals is to provide justice for victims of mass atrocity. It undermines this goal when the Judges subject witnesses to an experience more harrowing than necessary during trial. Although the courtroom is a place where facts need to be adduced, often through the emotionally difficult testimony of victim witnesses, the Judges at the SCSL should make sensitive interaction with victims of utmost priority.

Some of the inefficiency at the SCSL could have been avoided through better judicial training. As former ICTY Judge Patricia Wald noted in a study on managing trials of former heads of state,

In order to run an orderly trial of long and complex cases, judges need training in making allocations of time necessary for examinations in chief and on cross, reducing time spent on procedural motions, making overall time allocations for each party's case, using written testimony with and without the opportunity for cross-examination, computing the statistic on each party's use of allocated time, and employing numerous other trial management techniques.²⁹²

In particular, Wald notes the need for judges to limit the number of witnesses, allow for summaries of evidence for the crime-base, or even have a truth and reconciliation commission or an investigative judge make determinations on crime-base facts.²⁹³ These are the kinds of lessons already learned by experienced international tribunal judges, especially those that have presided over high-profile cases such as the *Taylor* trial. Training on these matters and others such as witness sensitivity could have greatly benefitted Trial Chamber II and the parties involved in the trial.

D. THE PROSECUTION'S CASE

When the trial began in earnest, the Prosecution called the first of the ninety-one witnesses it would lead in evidence over the course of thirteen months. The Prosecution has a difficult case to prove. To discharge its burden of proof, the Prosecution has to establish, beyond a reasonable doubt, that the crimes alleged were committed by RUF and AFRC forces in Sierra Leone, *and* that individual responsibility for the commission of these crimes could be imputed to Taylor under Articles 6.1 and 6.3 of the Statute.²⁹⁴ Evidence meant to prove RUF/AFRC atrocities is referred to as "crime-base" evidence. Evidence tending to establish Taylor's imputed liability, primarily based on JCE or command responsibility, is called "linkage" evidence. To establish both types of evidence, the Prosecution called victims of the crimes, as well as insider witnesses from rebel groups and Taylor's security forces. These insiders testified about Taylor's links to the leaders of the RUF and AFRC—the groups to which the principle perpetrators of the crimes belonged²⁹⁵—and the extent of Taylor's command over the RUF and AFRC forces. In cross-examination, the Defense focused primarily on systematically discrediting these insider witnesses, in order to focus the Court on its theory of the case—that Charles Taylor was a peacemaker, statesman, and scapegoat for various international governments with interests in West Africa.

This Section provides a technical breakdown of the Prosecution's case, identifying trends in its presentation of witnesses. It then goes on to discuss salient observations from this data, including the Prosecution's contentious decision to make extensive use of crime-base witnesses. Finally, this Section provides a discussion of substantive themes that arose during the Prosecution's case-in-chief.

1. TECHNICAL BREAKDOWN

In total, the Prosecution presented evidence from ninety-seven witnesses. The Prosecution presented a total of 91 live witnesses, comprising 4 expert witnesses, 31 linkage witnesses and 56 crime-base witnesses.²⁹⁶ Four other witnesses had their testimonies introduced under Rules 92*bis* or Rule 92*quarter*, and two expert reports were entered into the record without calling those witnesses to the stand.²⁹⁷ At first glance, this suggests that the Prosecution was more heavily focused on crime-base evidence than on linkage evidence. This may have been a questionable use of Court resources and time by the Prosecution, given that the Defense purportedly accepts atrocities were committed in Sierra

Leone, and accordingly claims they do not dispute most of the crime-base evidence. It should be noted, however, that the Prosecution spent nearly three times longer with linkage witnesses than it did with crime-base witnesses.²⁹⁸ About one third²⁹⁹ of the Prosecution's witnesses ultimately filled more than two thirds³⁰⁰ of trial time during the Prosecution's case-in-chief.³⁰¹ This shows that in terms of substance, the Prosecution focused considerably more time eliciting linkage evidence than it did establishing crime-base evidence.

The Prosecution's case took a total of 906 hours and 53 minutes in Court.³⁰² The Prosecution and Defense spent about equal amounts of time on direct and cross-examinations. The total Prosecution time spent on direct examination was 438 hours and 20 minutes, plus 27 hours and 34 minutes of re-examination.³⁰³ The Defense took 440 hours and 59 minutes for cross-examination.³⁰⁴ Including re-examination, there was a 1 to 1.06 ratio of Defense cross-examination to Prosecution examination of witnesses.³⁰⁵ This demonstrates an improvement from previous trials at the SCSL, where one monitor noted that the Chamber allowed Defense teams too much leeway on cross-examination, as demonstrated by the disproportionately long cross-examinations.³⁰⁶ However, in this case, the Court did not intervene to limit cross-examinations. Rather, it seems that this equality in time spent with witnesses was due to the actions of the attorneys, not the Judges.

The Prosecution has called more witnesses and logged more courtroom hours during the *Taylor* case than in the case-in-chief of any of the other SCSL trials. In the *AFRC* case, the Prosecution case lasted 8 months³⁰⁷, with evidence from 59 witnesses, amounting to 315 hours and 2 minutes of testimony.³⁰⁸ The Prosecution's case in the *RUF* trial lasted approximately 2 years³⁰⁹ and included 75 witnesses. In the *CDF* case, the Prosecution case lasted approximately 1 year, and included 75 witnesses.³¹⁰ In all of these previous cases, there were three accused; in the *Taylor* case there is only one.

Like the Prosecution, the Defense focused more heavily on cross-examining linkage witnesses than it did on questioning crime-base witnesses. However, the ratio of time spent on linkage witnesses versus crime-base witnesses was higher for the Defense than it was for the Prosecution. In keeping with its contention that it does not contest the crime-base evidence, Counsel for the Accused spent nearly four times longer cross-examining linkage witnesses as compared with crime-base witnesses. By comparison, the Prosecution spent relatively more time with crime-base witnesses.³¹¹ Despite the fact that the OTP claims it brought crime-base witnesses to The Hague exclusively for the benefit of Defense cross-examination, the Prosecution understandably took the opportunity to lead some of these witnesses on direct, spending 1.37 times longer with crime-base witnesses than did the Defense.³¹² Many crime-base witnesses were on the stand for fewer than thirty minutes. One testified for just thirteen minutes.³¹³ Four others testified for between thirty minutes and one hour, and thirteen for between one and two hours.³¹⁴

These statistics are meant to give a quantitative background to the qualitative arguments made by both parties, discussed in detail below.

2. CRIME-BASE AND LINKAGE WITNESSES: QUESTIONS OF EFFICIENCY AND JUDICIAL NOTICE

The apparent focus of the Prosecution on crime-base witnesses was a contentious issue throughout the Prosecution's case-in-chief. The parties were unable to agree to facts related to the crime base for inclusion in the agreed facts.³¹⁵ Therefore, the Prosecution had to prove these facts as part of their case. However, the Defense blames the Prosecution for wasting the Court's time with witnesses who are

providing evidence on what it claims are uncontested facts.³¹⁶ The Prosecution has responded by arguing that to avoid calling these witnesses to testify, they attempted to admit the majority of the crime-base evidence through written materials under the Court's Rules 92*bis* and 92*ter*.³¹⁷ According to the Prosecution, the Defense refused to consent to this submission of written testimony, and persisted in contesting the crime-base evidence the Prosecution sought to introduce—despite the Defense's claims that it accepted that the crimes took place.³¹⁸ Each side made it clear that it felt the other was primarily responsible for putting witnesses through an unnecessary courtroom ordeal. In an interview on October 17, 2008, Griffiths blamed the Prosecution's handling of Rule 92*bis* witnesses for the victims' harrowing experiences of testifying in The Hague. He opined that unnecessary funds were spent on transport for the victims, and insisted that, "anything which could have avoided that spectacle, we were willing to agree to."³¹⁹ However, they were not willing to agree to the Prosecution's Rule 92 submissions, because they were allegedly overly broad and included testimony that went to prove Taylor's guilt. Chief Prosecutor Stephen Rapp promptly replied to these allegations in a press release on October 20, 2008. He accused the Defense of causing hardship to victims whose testimony is not in dispute, by requiring them to come to The Hague to testify and not agreeing to stipulated facts about the crime base and challenging these witnesses' testimony in Court.³²⁰

It is true that the parties were unable to agree to facts about the crime base that would have dispensed with the need for much crime-base evidence, whether introduced via Rule 92 or in-court testimony. Thus, technically the facts are contested, regardless of what the current Defense team claims its position is: the Prosecution must prove that the crimes were committed in Sierra Leone, and that they were widespread and systematic. Taylor's original Defense team is responsible for the decision on agreed facts. When it came to the Rule 92 issue, it seems that Taylor's current Defense team and the Prosecution both took a hard-line position on the issue and could not find a position of compromise. Better communication and cooperation between the parties could have led to stipulated facts acceptable to both the Prosecution and Defense, or to admission of some crime-base evidence through Rule 92. However, in order to discharge its burden of proof³²¹, the Prosecution ultimately called fifty-six witnesses to provide crime-base evidence. The Prosecution has variously claimed that the Defense position had no impact on their decision of which witnesses to call,³²² and that as a consequence of this Defense strategy, it reduced the total number of witnesses it called, including both linkage and crime-base witnesses, to ensure a timely and efficient closure of the trial.³²³

The Prosecution did take the opportunity to question many 92*bis* witnesses under direct examination about various pieces of linkage evidence, including the dress of rebel soldiers, whether they spoke Liberian English, and whether the witness had ever heard of Charles Taylor.³²⁴ The Prosecution examined all but nineteen of the Rule 92*bis* witnesses. For its part, the Defense tended to keep its cross-examination narrowly tailored to generally impeaching witnesses' credibility and to eliciting evidence on the issues of linkage and responsibility for the crimes the victims allegedly witnessed. Consistent with the Defense claim that it did not dispute the veracity of most crime-base evidence, Counsel for the Accused largely avoided questioning the specific details of a witness's factual account of atrocities and made a specific point of telling the witnesses that he did not deny that the witness was a victim of a crime.

In light of these arguments, the breakdown in communication between the parties, and the statistics presented above, it is worth asking whether the Prosecution—and the Judges—ought to have made more effective use of judicial notice in the *Taylor* trial. This Section discusses the requirements and ramifications of such an approach, and concludes that, had the Prosecution made use of a Rule 94(B)

motion and had the Judges been more active in their trial management, some of these issues could have been circumvented by judicial notice of certain key facts.

Although the parties have been the focus of this debate, the Judges could have also played a more active role in limiting the scope of evidence in order to reduce the number of crime-base witnesses the Prosecution needed to call and speed the pace of the trial. Rule 94 of the Rules of Procedure and Evidence gives the Judges the ability to take judicial notice of certain facts. Rule 94(A) mandates that the Judges “shall not require proof of facts of common knowledge.”³²⁵ Under Rule 94(B), the Judges have the power to take judicial notice of adjudicated facts or documentary evidence from other SCSL trials that relate to issues in the *Taylor* trial.³²⁶ This rule states explicitly that the Judges can take this notice of their own accord; they do not need to wait for a party to request judicial notice of previously adjudicated facts.³²⁷

The parties have raised the issues of judicial notice two times in the trial. Early in the case, the Prosecution submitted a motion requesting the Court to take judicial notice under Rule 94(A) for 107 facts that it maintained were of common knowledge.³²⁸ The Defense objected to the majority of the proposed facts, arguing that it would be improper for the Court to take judicial notice of facts that are subject to reasonable dispute, including the specific nature of atrocities committed against civilians.³²⁹ This position regarding crime-base evidence sits in stark contrast with the Defense’s public claims that it does not contest that crimes were committed in Sierra Leone.

In its decision, the Trial Chamber considered “facts of common knowledge” to be “those facts which are not subject to reasonable dispute including common or universally known facts, such as general facts of history, generally known geographical facts and the law of nature,” and facts that are generally known within the SCSL’s jurisdiction.³³⁰ It held that to be considered common knowledge, the facts must:

1. be relevant to the case at hand;
2. not be subject to reasonable dispute;
3. not include legal findings; and
4. not attest to the criminal responsibility of the Accused.³³¹

The Trial Chamber also noted that judicially noticed facts under Rule 94(A) cannot be contested during trial.³³² It held that the thirty-nine facts the parties could agree to were judicially noticed. The ten facts that the Defense claimed indicated Taylor’s criminal responsibility were not admissible, nor were the sixty-six facts the Defense objected to, as the Court reasoned that this objection meant the facts were “open to reasonable dispute” and therefore not judicially noticed.³³³ This holding gave the Defense considerable power in controlling which facts could be noticed—any objection to a fact disqualified it from judicial notice under this test. The facts included in the judicial notice were exclusively geographical, political, and historical facts.³³⁴ The excluded facts include UN and NGO observations of crimes committed in Sierra Leone, links between the Liberian and Sierra Leonean conflicts, and many facts related to the crime base.³³⁵

This determination shows that the Prosecution did attempt to introduce some crime-base evidence as judicially noticed facts, and that the Court did consider whether those facts would be admissible as “common knowledge.” However, it is not clear why the Prosecution opted to constrain its submissions to Rule 94(A) (common knowledge), and why it did not attempt to submit judicially noticed facts under Rule 94(B) (previously adjudicated facts). When the Prosecution submitted its motion, the SCSL had not yet rendered any judgments in any cases.³³⁶ However, the Prosecution could have submitted a new

motion at any time during its trial—during the six-month period between the opening statement and the start of witness testimony, during which the *CDF* and *AFRC* Trial Chamber Judgments were handed down, or after the Appeals Chamber judgments in those cases, which were rendered during the Prosecution’s case-in-chief. Indeed, the Prosecution could have made such a motion at any time during its case, as the Trial Chamber specifically noted that there is no limitation as to when motions for judicial notice must be filed, and has held that limiting the timing of such filings would be unacceptable.³³⁷

The Defense, by contrast, availed itself of Rule 94(B) and filed a motion for judicial notice of facts adjudicated in the *AFRC* trial.³³⁸ In its motion, the Defense argued that taking judicial notice of these facts would adhere to what it characterized as the two-fold rationale behind the rule: one, to promote judicial economy by eliminating the need for parties to prove facts or allegations already proven in SCSL proceedings, and two, to bring SCSL jurisprudence in the *Taylor* trial into harmony with past SCSL decisions.³³⁹ The Prosecution objected to the judicial notice, arguing that it would not promote judicial economy and would be contrary to the interests of justice.³⁴⁰

Rule 94(B) does not define what constitutes an adjudicated fact. At the SCSL, the following criteria must be met before the Court can take judicial notice:

1. the fact must be distinct, concrete and identifiable;
2. the fact must be relevant and pertinent to an issue in the current case;
3. the fact must not contain legal conclusions, nor may it constitute a legal finding;
4. the fact must not be based on a plea agreement or upon facts admitted voluntarily in an earlier case;
5. the fact clearly must not be subject to pending appeal, connected to a fact subject to pending appeal, or have been settled finally on appeal;
6. the fact must not go to proof of the acts, conduct, or mental state of the accused person;
7. the fact must not be sufficient, in itself, to establish the criminal responsibility of the Accused;
8. the fact must not have been re-formulated by the party making the application in a substantially different or misleading fashion; that is to say, the fact must not differ significantly from the way the fact was expressed when adjudicated in the previous proceedings, it must not have been abstracted from the context of the original judgment in an unclear or misleading manner, and it must not be unclear or misleading in the context in which it is placed in the application.³⁴¹

The Court held that judicially noticed facts under Rule 94(B) create a rebuttable presumption at trial, in contrast to those noticed under Rule 94(A), which need not be proven again at trial.³⁴² This means that these facts would still be open to challenge and could be disproven at trial. The Chamber also noted that in making its determination, it must consider the interests of justice, the rights of the Accused and judicial economy.³⁴³ The Chamber, by a majority, held that it would take judicial notice of thirteen of the fifteen proposed facts.³⁴⁴

Many of these facts, enumerated below in Annex A, include statements about the relationship between the AFRC and the RUF, which the Prosecution argued should have been denied because of the central importance of this issue in the *Taylor* trial, and would therefore be against the interests of justice.³⁴⁵ If issues of such central debate such as the relationship between the two rebel factions in Sierra Leone are allowed as judicially noted facts under Rule 94(B), one can imagine that facts about the occurrence of crimes and violence in Sierra Leone, which the parties maintain they do not dispute, would also have been accepted under such a motion.

It is also noteworthy that Rule 94(B) allows the Court to take judicial notice of previously adjudicated facts of its own accord.³⁴⁶ This is an important provision, since the onus to maintain judicial efficiency lies with the Trial Chamber directly.³⁴⁷ Before the Defense started its case, the SCSL had Appeals Chamber judgments in the *CDF* and *AFRC* cases, and a Trial Chamber judgment in the *RUF* case.³⁴⁸ Moreover, the Prosecution introduced most of its crime-base evidence towards the end of its case-in-chief. An Appeals Chamber judgment in the *RUF* case was handed down during Taylor's examination-in-chief.³⁴⁹ All of the crime-base evidence relevant to the *Taylor* case in these three cases should fall within the rubric of previously adjudicated facts. Each of those trials has found that either AFRC or RUF rebels committed crimes alleged in the indictment against during the indictment period.³⁵⁰ It would have been well within the Trial Chamber's abilities to order judicial notice that the crimes were in fact committed—something that although the Defense maintains it does not dispute, it could still refute during trial—and thus limit the scope of the case the Prosecution is obligated to prove. Specifically, as is the practice at the ICTR and ICTY, the Trial Chamber could have taken judicial notice of chapeau requirements for crimes against humanity.³⁵¹ This would have reduced the Prosecution's burden to call enough crime-base witnesses to prove that crimes were widespread and systematic, amongst other things.³⁵² The Prosecution could have then brought a more limited number of crime-base witnesses to testify if there were certain aspects of the events or particular facts that they needed to introduce into the record. To ensure fairness, the Judges could have called for each party to submit arguments related to judicial notice, to ensure fairness in any *proprio motu* initiative they might have made regarding previously adjudicated facts.

The Judges could have further promoted efficiency by limiting redundant evidence under Rule 90(F)(ii). This rule allows the Court to exercise control over the presentation of evidence to avoid wasting time.³⁵³ Although the presentation of crime-base evidence is certainly not a categorical waste of time, because it is necessary for the Prosecution's burden of proving beyond a reasonable doubt that the actual crimes were committed, a vast majority of the crime-base evidence dealt with one region of Sierra Leone—Kono District. Based on monitors' observations and notes from daily trial attendance, twenty-three of the fifty-six crime-base witnesses testified primarily about Kono District. Although Kono is one of the named districts in all eleven counts, evidence pertaining to this region appears to have been offered to an extent grossly disproportionate with evidence adduced about the other named districts. For example, Freetown and the Western Area also appear in all eleven alleged counts, yet the Prosecution called only five witnesses to deliver evidence about this region.

Although the Prosecution's case did focus more overall time and resources on linkage testimony, changes to the Prosecution's case strategy and more judicial intervention could have reduced the number of crime-base witnesses that testified in The Hague. The Prosecution has focused exclusively on the *92bis* issue when defending of its decision to call all these crime-base witnesses. However, one of the best ways to reduce the number of crime-base witnesses would have been to take advantage of the Court's power to judicially notice previously adjudicated facts. The Prosecution should have made a motion to do so, or alternatively, the Court should have raised the issue *proprio motu*. By being less

passive and actively seeking to manage the trial in an expedient and fair manner, the Trial Chamber could have saved the Court money, time, and resources.

3. PROSECUTION THEMES AND STRATEGIES

The Prosecution began its case by setting the stage and providing context for what was to come in the *Taylor* trial. Accordingly, it focused on the testimony of expert witnesses, who testified about diamond mining in Sierra Leone and Liberia, widespread human rights abuses in Sierra Leone during the conflict, and the historical context of the Sierra Leonean and Liberian conflicts. The Prosecution then shifted its focus, and began to present high-level linkage witnesses in an attempt to prove that Taylor was linked to the crimes the RUF and AFRC committed in Sierra Leone, even if Taylor was never present in the country. In September and October of 2008, the Prosecution began calling almost exclusively crime-base witnesses to establish that the crimes were in fact committed by RUF and AFRC forces in the locations pled in the indictment, and that the crimes were widespread and systematic. It ended its case with a mix of crime-base and linkage witnesses, reinforcing the evidence it claims proves beyond a reasonable doubt that Taylor is guilty.

a) EXPERTS SETTING THE STAGE: ACCESS TO DIAMONDS

The Prosecution began by framing the backdrop for its case against Taylor by calling conflict-diamond expert Ian Smillie as its first witness. Smillie's testimony described RUF labor camps in diamond mines in Sierra Leone and how Sierra Leonean diamonds were funneled through Liberia, a country he said generally produces lower quality diamonds.³⁵⁴ Dr. Stephen Ellis, an expert in African studies, testified about the historical context of the Sierra Leonean and Liberian conflicts, and Taylor's longstanding ties to Sierra Leone.³⁵⁵ Corinne Dufka, introduced as an expert witness but later classified as a "witness of fact,"³⁵⁶ testified about human rights abuses and atrocities committed in Sierra Leone. Dufka claimed that the Liberian government—and therefore by implication Taylor—was likely on notice about the events unfolding in Sierra Leone due to reports she wrote for Human Rights Watch³⁵⁷ that included direct recommendations to Liberia and Taylor.³⁵⁸ This set the scene for the Prosecution's argument that Taylor was deeply involved in and knew about the Sierra Leone conflict and related atrocities, and that he supported the RUF so that he could have access to Sierra Leone's diamonds.

b) INSIDERS: "PA TAYLOR" TRADING GUNS FOR DIAMONDS

The Prosecution's first linkage witnesses were high-level insiders called early in the trial. After introducing its case and attempting to answer all of the relevant "big questions," the Prosecution delved into its linkage evidence. By the third month of its case, the Prosecution was calling almost exclusively linkage witnesses, a mix of former RUF, AFRC, NPFL, and SSS soldiers, commanders and radio operators. These witnesses testified about longstanding links between Taylor and the RUF, the technical aspects of diamond mining, Taylor's provision of war materiel in exchange for Sierra Leonean diamonds, and Taylor's command over the RUF and AFRC.

Throughout the Prosecution's case-in-chief, linkage witnesses testified about Taylor providing arms, ammunition, troops, supplies, and finances to the RUF.³⁵⁹ Several witnesses spoke of an airstrip that was constructed in Buedu with the specific intent of facilitating the transport of arms and ammunition.³⁶⁰ In particular, these witnesses provided considerable evidence to suggest that Taylor provided troops, arms, and ammunition before the Freetown invasion of January 1999.³⁶¹ This will be important evidence to link

Taylor to the atrocities committed during that attack, as the Trial Chamber in the *RUF* case recently held that the RUF was not liable for the Freetown invasion.³⁶² In light of the fact that there is considerably more evidence linking Taylor to the RUF than to the AFRC, the Prosecution will need to depend on this evidence to support their allegations that Taylor directly planned and assisted with the Freetown attack.³⁶³

The Prosecution wanted to show that Taylor provided this material support to the RUF in exchange for diamonds. As demonstrated by calling a diamond expert as its first witness, diamonds have played a central role in the Taylor case. Diamonds were allegedly the RUF's means of payment for guns, ammunition, and other supplies. Several witnesses claimed to have witnessed Sam Bockarie bringing diamonds to Taylor in a mayonnaise jar.³⁶⁴ Witnesses also alleged that Taylor would instruct the RUF to capture towns with diamond mines.³⁶⁵

Control of the diamond mines in Sierra Leone was, according to the Prosecution theory, Taylor's motive for committing atrocities in Sierra Leone. Consequently, the Prosecution led a great deal of technical evidence on diamond mining. Witnesses described the mining process and the RUF's use of forced labor to mine the diamonds.³⁶⁶ This testimony included descriptions of the "two pile system" of mining, whereby diamonds were funneled to RUF leadership, who traded them for arms and ammunition.³⁶⁷ Under the "two pile system," miners would create two piles—one for themselves and one for the rebels. This suggests that civilian miners were remunerated for their work, although there was also testimony that the RUF always kept the larger diamonds, and that civilians were beaten or killed if they did not turn over their diamonds to the RUF.³⁶⁸ This body of evidence can help prove the crime of forced labor, and can be useful to establish motive and serve as evidence of the "common plan" the Prosecution alleged Taylor had with the RUF, which was to plunder the natural resources of Sierra Leone.

Insider witnesses testified extensively about Taylor's leadership of the RUF, providing evidence that Taylor was called "father" by RUF leader Sam Bockarie, and held a position of authority over RUF leaders, who referred to him as "Commander-in-Chief."³⁶⁹ Key linkage witnesses testified that Taylor was directly involved in RUF activities—which he allegedly orchestrated from Liberia—including diamond mining, military operations, and leadership decisions.³⁷⁰ There was also testimony about Taylor's longstanding relationship with Foday Sankoh and regular cooperation between the two from the time when they allegedly met at a training camp in Libya through the Sierra Leonean conflict.³⁷¹ Some witnesses testified that Taylor gave advice to Sankoh and assisted the RUF on its first incursion into Sierra Leone in 1991.³⁷² Others gave evidence that Taylor had instructed Sankoh to work with Johnny Paul Koroma, leader of the AFRC.³⁷³ The Prosecution attempted to show that relations were good between the RUF and AFRC for most of the indictment period, and that the two factions continued to work closely together in spite of later difficulties that arose between senior members of each group.³⁷⁴ The Prosecution elicited evidence from radio officers that Taylor and his security staff had frequent radio and satellite phone contact with RUF leadership.³⁷⁵ Witnesses claimed that Taylor played a direct role in brokering the RUF leadership change from Sam Bockarie to Issa Sesay.³⁷⁶ Much of this evidence could be used to prove Taylor's guilt under both a JCE theory and a command responsibility theory of liability.

The Prosecution evidence also focused on drawing a link between Taylor and the RUF/AFRC by demonstrating that there were many Liberians fighting in Sierra Leone. The Prosecution alleged that these Liberians were operating under Taylor's direct command, thus demonstrating his control over the forces and connection to atrocities.³⁷⁷ The Prosecution attempted to prove the existence of Liberians in Sierra Leone by adducing evidence that some RUF or AFRC soldiers spoke Liberian English.³⁷⁸ Witnesses

testified that although you could not physically distinguish between a Liberian and a Sierra Leonean, you could easily discern a Liberian by their accent. For example, many witnesses claimed that Liberians would say “ma meh,” a phrase they claimed is very distinctive to Liberian English and not used in Sierra Leone.³⁷⁹

The Prosecution led a large quantity of evidence related to events falling outside of the temporal and physical jurisdiction of the SCSL.³⁸⁰ For instance, the Prosecution argues that Taylor became involved in a JCE long before the beginning of the Court’s jurisdiction, with an agreement between Taylor and Foday Sankoh in the 1980s to provide mutual assistance for their respective revolutions.³⁸¹ Early in the trial, the Defense contested the introduction of evidence outside the temporal and geographical scope of the SCSL’s jurisdiction. They have maintained that this evidence should not be relied on by the Court. The Prosecution, however, argues that the evidence is relevant to establishing the context and background to Taylor’s involvement in the Sierra Leonean conflict, including the nature of the relationship between Taylor and RUF leader Foday Sankoh.³⁸² The Court has generally sided with the Prosecution on this matter, allowing evidence of events prior to the indictment period according to the low threshold “relevance” standard applied at the SCSL.³⁸³ However, the Court did occasionally limit evidence about events occurring after January 2002, reasoning that these facts provided no context or background for crimes Taylor allegedly committed.³⁸⁴

c) CRIME-BASE TESTIMONY: ATROCITIES

Although a few crime-base witnesses were called in the first weeks of trial, when international media attention was most closely focused on the proceedings, the Prosecution began calling crime-base witnesses in earnest in September 2008.³⁸⁵ From September through October, the Prosecution brought thirty-nine crime-base witnesses to testify in The Hague. Many of these witnesses were brought under Rule 92*bis*, and so were only cross-examined by the Defense. In addition to adducing evidence about the crimes committed in Sierra Leone, the Prosecution also elicited some linkage testimony. For example, the Prosecution questioned the witnesses on the types of clothing or uniforms the armed groups wore, in an effort to distinguish between RUF fighters (allegedly typically dressed in civilian clothing) and AFRC (allegedly typically dressed in fatigues or military clothing).³⁸⁶ The distinction matters because the Prosecution alleges that Taylor had direct control over both the RUF and the AFRC, acting in concert, and thus must show that these groups committed crimes together.³⁸⁷ Most witnesses could recall the type of clothing worn by the combatants they encountered, and the testimony tended to indicate an even mix of fighters with civilian clothing and army fatigues, or combatants wearing a combination of the two.³⁸⁸ The Prosecution could use this body of evidence to demonstrate that the AFRC and RUF worked together, and that their leaders are jointly responsible for the commission of the crimes in Sierra Leone.

The Prosecution consistently ended each examination-in-chief by asking the witness to describe how the crimes committed against them had affected their lives. Witnesses testified about their inability to work, ongoing medical and psychological problems, and general stress and anxiety.³⁸⁹ This evidence, while prompting sympathy for these witnesses, could also support the Prosecution’s allegation of terror.³⁹⁰

The conclusion of the Prosecution’s case-in-chief touched upon linkage evidence and documentary authentication, before returning to a review of the key atrocities that constitute the crime-base.³⁹¹ Ending its case on a dramatic note, the Prosecution called four crime-base witnesses, one from each major victim group in Sierra Leone: a victim of looting and a witness of burning; a man who worked closely with child soldiers; a victim of rape and forced marriage; and an amputation victim.³⁹² By ending

its case with a broad swath of testimony about atrocities allegedly committed by the RUF and the AFRC during the indictment period, the Prosecution likely sought to conclude with the maximum emotional impact on the Judges, and remind the Court of the human face of the injuries suffered across Sierra Leone as a result of Taylor's alleged involvement in the civil war.

Further reflecting this prosecutorial tendency, a press release issued by the OTP at the close of evidence focused more on the emotional drama of the final witness's story than on the strength of the overall evidence linking Taylor to the atrocities committed or the legal developments that had arisen during the Prosecution's yearlong case.³⁹³ The OTP neglected to provide even a cursory summary for the press of the linkage evidence and the theories of liability upon which the Prosecution rests its case against Taylor.³⁹⁴ This is both surprising and disappointing, given the high profile nature of the trial and the fact that it is the first international criminal trial brought against an African head of state. While proving the commission of crimes in Sierra Leone is an important part of the Prosecution's case, Taylor's personal responsibility for the commission of these crimes is ultimately the most critical element of the case, and arguably the more difficult element to establish beyond a reasonable doubt. To the extent that the Prosecution is confident it has met its burden of proof in this respect, one would have expected the OTP to highlight such evidence in its press release at the close of evidence, rather than relying on emotionally charged rhetoric about victims. After 205 days—or 41 full weeks—of court sessions, examination of the Prosecution's 91st and final witness concluded on January 30, 2009, Prosecutor Stephen Rapp said his team had "achieved what [they] set out to do."³⁹⁵

E. DEFENSE TACTICS AND STRATEGIES DURING PROSECUTION CASE-IN-CHIEF

During a prosecutor's presentation of the case-in-chief, the defense role is limited primarily to cross-examination, with an emphasis on impeaching Prosecution witnesses and eliciting evidence that might exculpate the Accused. Through this process of cross-examination, the Defense theory of the case generally became apparent. In the *Taylor* case, Defense Counsel concentrated on eliciting evidence under cross-examination that would tend to suggest the Accused was a peacemaker in the Sierra Leone conflict, that there were multiple regional powers involved in the guns and diamond trade, and that the RUF and AFRC were not working together during critical periods of the conflict.

1. DISCREDITING WITNESSES THROUGH IMPEACHMENT

During the cross-examination of Prosecution witnesses, the Defense consistently focused on discrediting witnesses through prior inconsistent statements, bias, lack of personal knowledge, and allegations that witnesses had been coached or paid to testify. The witnesses, in large part, held up well under cross-examination. When faced with inconsistencies, they had ready explanations that included distress from events they had witnessed, not having been asked about certain things in earlier meetings with the OTP, or transcription mistakes in OTP interview notes.³⁹⁶

However, several key witnesses, including Moses Blah, former Vice President under Taylor, admitted to not having personal knowledge of facts they had testified about.³⁹⁷ During his cross-examination, the Defense elicited testimony from Blah that he had no knowledge of direct orders from Taylor to forces in Sierra Leone. Blah further acknowledged that he did not know of any cash support from Taylor to the RUF or AFRC, nor diamond transactions between Taylor and these groups. He went on to deny personal knowledge of radio communications between Taylor and the Sierra Leonean armed groups, except for one instance early in the days of the RUF and far outside of the temporal jurisdiction of the SCSL.³⁹⁸

The Defense also attacked the personal knowledge of witnesses relating to Liberian English. Counsel for the Accused asked witnesses whether they had ever been to Liberia; how they knew what they had heard was Liberian English; and what specific differences the witness perceived between Sierra Leonean Krio and Liberian English. The results of this line of questioning were mixed. Witnesses tended to answer vaguely, with general observations of foreign accents or phrases and the assumption that this meant the fighters were Liberian. The Defense established through this line of questioning that apart from the language, there was no way of distinguishing between a Liberian and Sierra Leonean based solely on appearance. Very few witnesses had personal knowledge of Liberian English and several had been told by others that the language they heard was Liberian. Those witnesses who had been captured by the armed groups and kept as child soldiers or wives tended to have more personal knowledge of the nationality of fighters because they had lived for some time amongst the combatants, and testified that Liberians were present among the rebel fighters.³⁹⁹

The Defense also rigorously tried to discredit witnesses by showing bias or suggesting that they had been coached to provide evidence against Taylor. The Defense focused on tribal affiliations for Liberian linkage witnesses, in an attempt to show that historic tribal tensions in Liberia meant that the witnesses of certain tribal backgrounds were biased against Taylor.⁴⁰⁰ Several specific themes reappeared frequently during testimony, which, according to the Defense, suggested that these witnesses had been speaking to one another about their testimony (such communication is forbidden) or had been coached by the Prosecution. For example, some phrases or facts would arise for the first time in one witness's testimony, only to be repeated verbatim in the testimonies of subsequent witnesses; often these facts or details had not previously appeared in interview notes or other evidence. Similarities that raised Defense suspicion included witnesses referring to Taylor as "ex-President," allegations of cannibalism, references to the mayonnaise jar of diamonds, and the prominence of Liberian English among the rebels. These witnesses always denied having been coached or having spoken with other witnesses, and defended their testimony as complete and true.⁴⁰¹ Although witnesses are instructed by the Judges at the end of each session not to discuss their testimony, and Court officials maintain that witnesses living in safe houses in The Hague know they cannot discuss testimony amongst themselves, it is impossible to control them at all times and it is possible that they discuss their testimony. Moreover, many witnesses have been following the trial closely, and may have heard or read past testimony. Regardless of the explanation of these thematic reappearances, the Judges will have to assign weight to each piece of evidence taking into consideration these and other factors.

The Defense employed a somewhat different impeachment strategy with linkage witnesses than it did with crime-base witnesses. With the former, Defense counsel attempted to discredit the witness by asking about crimes they had committed.⁴⁰² With crime-base witnesses, the Defense strategy shifted over time. Initially, the Defense declined to cross-examine crime-base witnesses at all. Counsel for the Accused claimed the Defense was not in a position to contest the veracity of crime-base evidence.⁴⁰³ However, starting in September 2008, when the Prosecution began calling almost exclusively crime-base witnesses, brought to The Hague at the Defense's request for cross-examination, this strategy obviously changed. However, the Defense did not tend to question the crime-base witnesses on the specifics of the crimes or truth of their statements, but focused largely on issues of inconsistencies, lack of memory, or embellished testimony based on previous witnesses' testimonies.⁴⁰⁴

a) WITNESS PAYMENTS

As in previous trials at the SCSL, the Defense also heavily questioned witnesses about payments they had received from the Prosecution's Witness Management Unit (WMU) and the Registry's Witnesses

and Victims Section (WVS), suggesting that their testimony was “bought” by the Prosecution.⁴⁰⁵ The Defense alleges that the Prosecution’s unit, the WMU, has impermissibly paid witnesses to testify in the Taylor trial. The Prosecution countered that these payments were legitimate and had been disclosed to the Defense, and that suggestions of wrongdoing were incorrect and misplaced.

Payments to witnesses for expense reimbursement related to giving testimony and interviews are standard practice throughout all other criminal tribunals and courts. Indeed, the Defense at the SCSL also offers payments to its witnesses through the WVU. There is no question that witnesses should be reimbursed for expenses related to giving evidence, and in fact, the Defense notes that it has no objection to legitimate expenses being reimbursed. At the SCSL, the Prosecution will provide funds to persons it contacts and interviews during its investigation—potential witnesses and sources. After the Prosecution decides to call an individual as a witness, the person is processed by WVS, a department in the Registry, which then is responsible for reimbursing the witness’s expenses. The dispute arises over the WMU/OTP payments, how the amount and category of payments should be determined, a concern that some payments have been illegitimate, and worries that such payments can lead to a culture of legality in Sierra Leone in which witnesses expect to be paid for testifying in Court.⁴⁰⁶ Analysis over the larger problems about the practice of witness payments in international tribunals and the effect this has on the countries the courts operate in is beyond the scope of this report. Below is an analysis of the arguments heard before the SCSL as well as some discussion of the practice at other courts. However, further investigation into the practice in general and its larger implications is warranted.

Chief Prosecutor Stephen Rapp has explained that witness compensation from the OTP is individualized and is determined by a witness’s circumstances.⁴⁰⁷ This implies that OTP Officers make subjective judgments about the needs of a witness based on his or her circumstances. It also implies that more savvy witnesses can negotiate a better “deal” from the Prosecution, asking for more benefits or assistance than others might. It does not appear that there is an internal protocol for investigators or WMU personnel to follow in making determinations of providing witness assistance. If the Prosecution were to follow strict public internal protocols or use WVS to disburse reimbursements to potential witnesses or sources, it would alleviate the claims of witness tampering—and make the process less opaque. It would also prevent the Defense from being able to place doubt in the minds of the Judges by accusing witnesses during the cross-examination of being paid improperly for testimony.

When asked about its practices relating to witness payments, the OTP consistently refuses to provide detailed answers to questions relating to internal protocol, organizational structure, and criteria for providing funds to witnesses.⁴⁰⁸ The Prosecution maintains that the Head Prosecutor oversees the WMU, and that all internal protocols are protected by the privilege granted under Rule 70(A) of the RPE. It cites Rule 39(ii) as allowing it to take “any special measures to provide for the safety, the support and assistance of potential witnesses and sources.”⁴⁰⁹ Moreover, the Prosecution argues that it has disclosed all witness payments to the Defense, which has the information and power to question witnesses about those payments, and that witness credibility is an issue for the Trial Chamber alone to decide.⁴¹⁰

The Prosecution has released and disclosed all of the payments to witnesses and the reasons for those payments. However, these disclosures are limited to line item descriptions of the reason and amount of the payment. There is no explanation of how the amount is calculated or what the terms used in the reports mean. Examples from similar submissions in an *RUF* motion regarding witness payments show many lump sum payments made for “meals,” “transport,” and “time wasted.”⁴¹¹ However, there are also witness payments reported for school fees⁴¹², payments made to foster parents⁴¹³, and subsistence allowance.⁴¹⁴ Large payments include US \$3000 for “property” related to temporary protective

measures,⁴¹⁵ \$250 for “maintenance,”⁴¹⁶ and a total of 3.5 million Leones (approximately \$890) paid to one *Taylor* trial witness for “miscellaneous.”⁴¹⁷ This witness admitted that the “miscellaneous” payment was in part for computer classes he took in Freetown.⁴¹⁸ Another *Taylor* trial witness had both WVS and WMU pay rent for the same year, suggesting that the witness received twice as much as he should have for that expense.⁴¹⁹ There are also payments made for “information,”⁴²⁰ which lends weight to the Defense’s position that the Prosecution is paying for testimony. The Prosecution contends, however, that these payments were made to individuals who were acting as paid informants for the OTP—a normal investigative tool—that then later became witnesses for the OTP and processed through WVS.⁴²¹

Most of this type of cross-examination was directed at linkage witnesses.⁴²² These witnesses are not innocent victims, but are RUF, AFRC, and SSS insiders that have at times directly participated in the criminal acts about which they are testifying. It is not difficult to see why the Defense makes the insinuation that these witnesses would sell their testimony, or even fabricate their stories to receive some sort of benefit, whether it is cash or even immunity from prosecution. The Defense questioned some crime-base witnesses on records of payment for “lost wages,” when the witness had testified that they were unemployed.⁴²³ Witnesses typically responded that they had not received “payments” of any kind from the OTP, only reimbursement for travel, and that they did not know why “lost wages” would be given as the purpose for monies received.⁴²⁴ On one occasion, during the re-examination of witness Sahr Bindi, the Prosecution noted that payments were always made in combined amounts not for only lost wages, but for lost wages, transportation, and meals.⁴²⁵

The issue of payments to witnesses, while common practice in international courts as well as domestic courts, has not been as contentious of an issue at other international criminal tribunals as it has at the SCSL. This is perhaps because although courts such as the ICTY and ICTR have similar rules allowing for witness reimbursements, all such payments are carried out by those courts’ WVS equivalents—a body of the Registry, which is neutral and processes Defense and Prosecution witnesses alike. Moreover, the ICTY and ICTR rules pertaining to witness payments focuses on the safety of the witnesses, whereas the SCSL rule provides for the safety, support, and assistance of witnesses.⁴²⁶

Part of the problem at the SCSL seems to stem from the fact that the WMU department, an organization within the Office of the Prosecutor, received a large lump sum fund for investigations that it alone manages.⁴²⁷ The Defense does not have a similar body or similar resources. It also must reimburse individuals during the investigation stage—but does not have separate funds to do so. Therefore, the Defense teams process potential witnesses as official witnesses so that they can be reimbursed for lost wages, transportation, and meals by WVS during the investigation stage, even if they are not ultimately called as a witness.⁴²⁸

In the end, leveling the playing field by giving the Defense the same resources, both monetarily and institutionally, would ameliorate some of these concerns and offer the Defense the same amount of control over its budget as the Prosecution. There also seems to be room for improvement in how the payments are processed administratively, such as by providing lump payments under vague categories such as “miscellaneous.” More accurate and detailed records of payments and their reason would help the Judges and parties determine whether payments were legitimate or not. In spite of the contentious arguments about these issues, the Trial Chamber in the *RUF* case declined to hear evidence on the WMU payments, holding that the Defense motion was not raised at the “earliest opportunity.”⁴²⁹ There has been no similar motion from the Taylor defense team. Therefore, there is limited information available on how the OTP’s WMU unit works and how payments are made. More transparency on the part of the Prosecution, detailing the internal functions of the WMU and the criteria or protocols involved in

determining witness payments, would help demystify the process. More information on this issue could help other Courts determine “best practices” for investigation and processing witnesses. The SCSL Registry or another neutral body should investigate and address arguments that providing sums of money for participation in SCSL trials can negatively influence the concept of justice in Sierra Leone. Through outreach and clear explanation of the processes witnesses can expect, the SCSL can set expectations, ensure that all witnesses are treated equally and receive no special treatment, and help promote participation in the trials as a matter of justice, and not as a matter of personal gain.

b) ASSESSING THE CREDIBILITY OF WITNESSES

Any attempts to discredit witnesses, however rigorously pursued by the Defense, can only work to the extent that the Trial Chamber is willing to thoroughly assess credibility on a case-by-case basis. In the *AFRC* Trial Judgment, Trial Chamber II stated that it considered a number of factors in evaluating witness credibility, including:

the witnesses’ demeanor, their conduct and character (where possible), their knowledge of the facts to which they testified, their proximity to the events described, their impartiality, the lapse of time between the events and the testimony, their possible involvement in events and their risk of self-incrimination, and their relationship with the Accused.⁴³⁰

However, as one *Taylor* trial monitor noted, the Chamber in the *AFRC* trial tended to focus on courtroom demeanor more so than on the other factors. For example, “the Chamber concluded that key insider witness TF1-334 – known as Alimamy Bobson Sesay in the *Taylor* case – was credible for presenting ‘a truthful demeanor’ while also finding that he had sexual intercourse with captured women.”⁴³¹ The Chamber held that “the mere suggestion that a witness might be implicated in the commission of crimes is insufficient for the Trial Chamber to discard that witness’s testimony.”⁴³² Although this may seem like a contradictory conclusion, especially to those who suffered at the hands of witnesses like Sesay, it is true that engaging in potentially criminal behavior does not necessarily mean that a person is also a liar.

The Chamber also noted that inconsistencies in evidence or with prior statements do not necessarily mean that evidence must be thrown out. The Trial Chamber has the discretion to accept or reject “fundamental features” of the evidence, taking into account the passage of time between events and testimony, possible influence of other persons, discrepancies, or the stress or terror experienced by witnesses during the events they testified about.⁴³³ The Trial Chamber was lenient about prior inconsistent statements in interview notes, pre-trial statements, or prior testimony. The Court noted, “Information given in such a statement will not always be identical to the witness’s oral evidence. This may be because the witness was asked questions at trial not previously asked, or may in his or her testimony remember details previously forgotten.”⁴³⁴ The Chamber concluded that in general, it would not treat “minor discrepancies” in a witness’s evidence as discrediting their evidence “where the essence of the incident had nevertheless been recounted in acceptable detail.”⁴³⁵

Similarly, Trial Chamber II did not give much weight to Defense attempts to discredit witnesses in the *AFRC* trial by suggesting their testimony had been bought. In that case, the Court held that allegations of inappropriate payments made by Defense counsel were without merit, as the Chamber was satisfied that the payments had been made in a “transparent way and in accordance with the applicable Practice Direction.”⁴³⁶ Accordingly, the Trial Chamber opted not to give “undue weight” to the alleged “incentives” when assessing witness credibility.⁴³⁷ Based on this position taken by Trial Chamber II in the

AFRC case, it is unlikely that the Defense will succeed in discrediting Prosecution witnesses to the extent that large portions of their testimony will be disregarded. However, this determination is completely within the discretion of the Judges and they alone will determine what evidence is credible or not.

2. ELICITING EXCULPATORY EVIDENCE

During cross-examination of key linkage witnesses, the Defense also attempted to elicit evidence that could raise a reasonable doubt as to Taylor's guilt. For example, the Defense sought information from witnesses that would highlight Taylor's role as a peacemaker and mediator in the Sierra Leone conflict. The Defense has argued that during Taylor's presidency, meetings between the Accused and the RUF/AFRC leadership were a necessary part of Taylor's attempts to reconcile the warring factions and further the peace effort.⁴³⁸ Counsel for the Accused further sought to demonstrate that the Sierra Leone border territory in Liberia was under the control of rebel Liberian forces. According to the Defense, this limited Taylor's ability to control the area, and made it impossible for him to send materials to or receive materials from Sierra Leone.⁴³⁹

Defense questioning also highlighted the general state of chaos in the region, and the involvement of many different regional players in the Sierra Leone civil war. For example, the Defense elicited testimony from witnesses confirming that the RUF had secured arms from the Liberian rebel group United Liberation Movement of Liberia for Democracy (ULIMO) and other demobilized groups that had previously hidden or buried weapons.⁴⁴⁰ In this regard, the Defense attacked the suggestion that Taylor was controlling the RUF's acquisition of weapons. Likewise, to directly refute the suggestion that Taylor controlled the Liberians that may have been fighting with the AFRC or RUF, the Defense elicited evidence about the Sierra Leonean government recruiting and hiring Liberian mercenaries from ULIMO to fight with the SLA.⁴⁴¹ This suggests that any Liberian English heard by witnesses may have come from Liberians who had traditionally fought against Taylor, and who had been incorporated into the SLA—the group from which the AFRC emerged. This type of evidence casts significant doubt on the allegation that Taylor controlled the Liberian soldiers fighting in Sierra Leone.

The Defense also elicited testimony about the tensions between the RUF and AFRC, attempting to distance the RUF, and thus Taylor, from the 1999 Freetown invasion.⁴⁴² Like the Prosecution, the Defense also asked witnesses about how individual perpetrators of various alleged crimes were dressed. However, the Defense highlighted the differences in the clothing worn by RUF and AFRC soldiers. If a witness responded that the individual was wearing military clothing, as opposed to civilian clothing, the Defense could use that testimony to bolster its position that the AFRC was responsible for that particular crime. The Defense also continued to focus on discord between the two groups, and whether it was the AFRC alone that led the invasion on Freetown in 1999. The evidence tended to show that the groups, although distinct, often worked side by side and that witnesses considered them one in the same. Testimony indicated that while an individual who committed a crime may have been dressed in military clothing, they were often accompanied by "rebels" in civilian clothes or in mixed clothing.⁴⁴³ Witnesses also testified that although it may have been the AFRC who arrived in Freetown first in 1999, they believed the RUF was involved in the attack from its inception.⁴⁴⁴

Overall, the Defense built a strong case during the Prosecution's evidence. Although Judges at the SCSL are generally forgiving when evaluating the credibility of Prosecution witnesses, the Defense thoroughly impeached a number of key Prosecution witnesses.⁴⁴⁵ What is more, the Defense has consistently and clearly indicated its theory of the case, adducing evidence in support of its case at every opportunity.

Only after the Defense has presented its entire case, however, and the Prosecution has an opportunity to cross-examine Defense witnesses, will the Judges finally be able to evaluate the evidence as a whole and make a determination of guilt or innocence.

V. CONCLUSION

The trial of Charles Taylor has probably been one of the most anticipated trials in international criminal law, and is certainly the most high profile case at the Special Court for Sierra Leone. In spite of several initial setbacks, the Prosecution was able to present its evidence and has finally rested its case against Taylor. To get to this point in the trial, the Court battled a lack of political will in the international community to hand Taylor over to the tribunal as he escaped prosecution while in exile in Nigeria. Through creative legal reasoning, it quashed Taylor's jurisdictional challenges by holding that it was a court of international character. The Tribunal evaded potential security challenges the trial posed by securing a space at the ICC to hold the trial and an agreement from the United Kingdom to incarcerate Taylor if he is convicted. Trial Chamber II encountered and eventually overcame another setback when Taylor dismissed his counsel on the day of the Prosecution's opening statement. Finally, after four and a half years of legal, political, and logistical challenges faced by the Court to bring a case against Taylor, the Prosecution began presenting its evidence in January 2008.

Those members of the Court not involved in the day-to-day proceedings have been challenged by the distance of the trial from Sierra Leone and Liberia. The decision to move the trial to The Hague was criticized by members of Sierra Leonean civil society and members of the international justice community, who complained that the move undermined the purpose of the tribunal to provide accessible justice in Sierra Leone for the people of Sierra Leone. The Registry has done a commendable job meeting this challenge, by engaging in robust and creative outreach activities that target a wide variety of Sierra Leoneans and Liberians. Although access to and engagement with the trial are not optimal, the Outreach and Public Affairs department has done its best within limited resources to ensure the widest possible audience to the trial, and they say they are seeing success as a result of their efforts.

Once the trial started, however, the trial continued to face novel legal, logistical, and political challenges. The trial of Charles Taylor has involved a number of interesting and important jurisprudential developments at the SCSL. The *Taylor* trial has seen the culmination of legal arguments over a difficult and contentious legal principle, joint criminal enterprise. Trial Chamber II has had to decide motions regarding the sufficiency of pleading JCE in both the *AFRC* and the *Taylor* trials. Although the arguments in both cases were distinct, the end result has been a widening of an already broad legal principle. In the *Taylor* trial, the Trial Chamber had to wade through multiple shifting arguments about the common purpose of the JCE Taylor allegedly participated in, in order to determine whether the Prosecution had sufficiently pleaded JCE. Through a creative reading of the Second Amended Indictment, the Court found that Taylor had been charged with participating in a JCE with the common purpose of terrorizing the civilian population of Sierra Leone. This common purpose was distinct from various common purposes the Prosecution had argued throughout the trial, and came after the Prosecution had already rested its case. This jurisprudential development will not only have an impact on the judgment in the *Taylor* trial and the legal arguments each party will now have to make under this new legal conceptualization of the case, but it could also have repercussions beyond the SCSL in the development of international criminal law.

The Trial Chamber has also made an effort to keep the trial as transparent and open as possible, and as such, has taken a hard line on witness protection issues. It denied closed sessions for several Prosecution witnesses, many of who did not end up testifying at trial. It also took a narrow view towards the application of a previous Trial Chamber I decision granting protective measures to fact-based witnesses, an approach the Appeals Chamber eventually overruled. Moreover, the Court had to decide on whether a journalist should be obliged to reveal confidential “facilitators” that helped him research a story. The Court ultimately held that the journalist had the right to protect his sources, and did not obligate him to divulge their identities in the trial.

The Prosecution has called an impressive number of witnesses to testify against Taylor, but according to observations from monitoring public trial sessions and reviewing public court documents, none of these witnesses has provided the “smoking gun” evidence many were expecting to hear in this trial. Moreover, the Prosecution, Defense, and the Judges should have taken measures to avoid the need to have so many crime-base witnesses travel to The Hague to testify. The Prosecution’s witnesses have been faced with rigorous cross-examination and attempts at impeaching their credibility by the Defense, including very serious allegations that the witnesses were paid to provide damaging testimony against Taylor. The Court has been challenged by an unprecedented volume of motions to decide—and has often lagged worryingly behind in rendering timely decisions, at times risking serious prejudice to the parties. The Trial Chamber has also been tasked with the difficult responsibility of gathering evidence from victims of horrible traumas, which it met at times with insensitivity.

In spite of Prosecutor Rapp’s comments at the conclusion of the Prosecution’s case-in-chief, the Prosecution’s phase of the trial of Charles Taylor was far from being the most fair and efficient as it could have been. By delaying nearly a year on its decision on joint criminal enterprise, a central tenet of the case, the Trial Chamber unfairly changed the legal framework of the case after the Prosecution had rested its case. Moreover, as discussed above, there is much room for improvement during the remainder of the trial. While the Court has met the minimum international fair trial standards as articulated in the ICCPR and other relevant texts,⁴⁴⁶ it fell short of best practices, especially with regards to indictment writing, the use of judicial notice, courtroom management and judicial efficiency, and the treatment of witnesses in the courtroom.

With the Defense phase of the trial, the Trial Chamber will likely face many more critical matters before rendering its final judgment. We can only hope that the problems discussed in this report improve during the remainder of the trial. As the Defense begins the presentation of its case, with the testimony of Taylor, things have started to look ever more complex and challenging for the SCSL. The second phase of the trial will surely provide many more obstacles—legal, logistical, and political—the Court will have to overcome in order to ensure that justice is served and Taylor receives a fair and transparent trial.

ANNEX A: JUDICIALLY NOTICED FACTS

UNDER 94(A)

- Fact A: The city of Freetown, the Western area and the following districts are located in the country of Sierra Leone: Port Loko, Bombali, Koinadugu, Kono, Kailahun, Kenema and Bo.
- Fact B: Sierra Leone declared itself to be a party to the Geneva Conventions with effect from 27 April 1961 and acceded to the Additional Protocol II to the Geneva Conventions on 21 October 1986.
- Fact C: There was an armed conflict in Sierra Leone from about March 1991 until about 18 January 2002.
- Fact D: The AFRC was founded by members of the Armed Forces of Sierra Leone. Soldiers of the Sierra Leone Army (SLA) comprised the majority of the AFRC membership.
- Fact E: President Kabbah's government returned to power in Sierra Leone in March 1998.
- Fact F: The *Lomé Peace Agreement* committed the parties to promoting full respect for human rights and humanitarian law.
- Fact G: Part Five of the *Lomé Peace Agreement* recognized the importance of upholding, promoting and protecting the human rights of every Sierra Leonean, as well as the enforcement of humanitarian law.
- Fact H: On 10 November 2000, the Government of Sierra Leone and the RUF signed a Ceasefire Agreement in Abuja, Nigeria, to declare and observe a ceasefire and halt hostilities, effective from 10 November 2000.
- Fact I: In 1975, 15 West Africa States signed the treaty creating an Economic Community of West Africa (ECOWAS).
- Fact J: On 10 December 1999, ECOWAS member states signed a protocol that subsumed the Protocol Relating to Mutual Assistance on Defence (PMAD) and established the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping, and Security.
- Fact K: The following counties are in the Republic of Liberia: Bomi, Bong, Gbarpolu, Grand Basa, Grand Cape Mount, Grand Gedeh, Grand Kru, Lofa, Margibi, Maryland, Montserrado, Nimba, Rivercess, River Gee and Sinoe.
- Fact L: There was an armed conflict in Liberia from about 24 December 1989 until about 17 August 1996.
- Fact M: Armed groups who participated in the armed conflict in Sierra Leone included:
- a) The Revolutionary United Front (RUF)

- b) The Armed Forces Revolutionary Council (AFRC); and
- c) The Civil Defence Forces (CDF).

- Fact N: The Revolutionary United Front (RUF) began armed operations in Sierra Leone in March 1991.
- Fact O: On 30 November 1996, Foday Saybana Sankoh and Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, signed a Peace Agreement in Abidjan, Ivory Coast.
- Fact P: The 30 November 1996 Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) required that the “two foes” ensure [that] a total cessation of hostilities is observed forthwith.
- Fact Q: The 20 [sic] November 1996 Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) stated that the Executive Outcomes shall be withdrawn five weeks after the deployment of the Neutral Monitoring Group (NMG).
- Fact R: The 30 November 1996 Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) stated that:
- “The parties agree that the basic civil and political liberties which are recognized by the Sierra Leone legal system and are contained in the Declarations and Principles on Human Rights adopted by the UN and the OAU, especially the Universal Declaration of Human Rights and the African Charter on Human and People’s Rights, shall be fully guaranteed and promoted within Sierra Leone society.
- These include the right to life, liberty, freedom from torture; the right to a fair trial, freedom of conscience [...]”
- Fact S: The 20 November 1996 Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) stated that:
- “The parties undertake to respect the principles and rules of international humanitarian law.”
- Fact T: Active hostilities recommenced in Sierra Leone following a temporary lull in fighting after the signing of the 30 November 1996 Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL).
- Fact U: In July 1998, Foday Sankoh was transferred from the custody of the Nigerian Government to the custody of the Sierra Leonean Government.
- Fact V: In October 1998, Foday Sankoh was found guilty of treason and sentenced to death in the High Court of Sierra Leone.

- Fact W: On 7 July 1999, the Government of Sierra Leone signed a peace agreement with the RUF in Lomé, Togo ("*Lomé Peace Agreement*").
- Fact X: The parties to the Lomé Peace Agreement recognized the imperative that the children of Sierra Leone were entitled to special care and protection of their inherent right to life, survival and development, in accordance with the provisions of the International Convention on the Rights of the Child." [sic]
- Fact Y: In 1981, ECOWAS member states signed a Protocol Relating to Mutual Assistance on Defence (PMAD).
- Fact Z: On 29 August 1997, ECOWAS extended the mandate of ECOMOG troops in Liberia to include Sierra Leone.
- Fact AA: The ECOWAS Cease-fire Monitoring Group is also known as ECOMOG.
- Fact AB: ECOWAS issued a final Comminuqué at the conclusion of its 28-29 August 1997 summit in Abuja, Nigeria.
- Fact AC: ECOWAS issued a final Comminuqué at the conclusion of its 28-29 August 1997 summit in which it mandated ECOMOG to specifically monitor the ceasefire, enforce sanctions and embargo and secure the peace in Sierra Leone.
- Fact AD: ECOMOG ousted the AFRC/RUF junta from power on or about 14 February 1998.
- Fact AE: In the press release, *Sierra Leone Rebels Forcefully Recruit Child Soldiers*, dated 31 May 2000, Human Rights Watch stated or noted:
- The executive director of the Africa Division of Human Rights Watch called on all parties to the conflict in Sierra Leone to immediately stop the use of child soldiers and to release all abducted children and people under the age of eighteen.
- Fact AF: In its press release, *New Testimony of Rape Committed by Sierra Leone Rebels – RUF fighters rape women and children in Makeni and other towns*, dated 5 June 2000, Human Rights Watch:
- called upon the members of the U.N. Security Council to provide UNAMSIL with the mandate and the means to protect civilians in Sierra Leone from atrocities.
- Fact AG: In *Taylor-made: The Pivotal Role of Liberia’s Forests and Flag of Convenience in Regional Conflict*, dated September 2001, Global Witness stated or noted that:
- The UN Security Council should immediately impose a total embargo on the exportation and transportation of Liberian timber, and its importation into other countries. Such an embargo should remain in place until it can be demonstrated that the trade does not contribute to the RUF in Sierra Leone and armed militias in Liberia, and that it is carried out in a transparent manner.

Fact AH: In its press release *IMC Plastic Surgeons Remove the Scars of War in Sierra Leone*, dated 4 September 2001, the International Medical Corps stated or noted:

For hundreds of children and child soldiers in Sierra Leone, the 10-year civil war left scars that could only be healed with the help of IMC's plastic surgery program.

Without plastic surgery, the child victims might never be able to return to their communities and reintegrate into society. The torment of the scars was so great that some children tried to burn them off with caustic soda, which only made them worse.

Fact AI: Sierra Leone's decade-long conflict was marked by an extraordinary level of brutal human rights abuses, including abductions, beatings, killings, sexual assault of women and men, being "captured" for less than 24 hours, torture, forced labour, serious injuries and amputations.

Fact AJ: Amnesty International Report 2001, which covered the period January to December 2000, set out that:

A UN panel of experts, established in August [2000] to investigate the link between the diamond trade and the conflict in Sierra Leone, published its report in December.

The panel made recommendations, including for an embargo on diamonds from Liberia and a travel ban on Liberian officials by UN member states.

UNDER 94(B)

Fact 1: AFRC Trial Judgment para 169: As the founders of the AFRC belonged to the Sierra Leone Army and therefore had been fighting the RUF since 1991, the coalition between the two factions following the 1997 coup was not based on longstanding common interests. Both factions officially declared that they were joining forces to bring peace and political stability to Sierra Leone. On 18 June 1997, the RUF issued an official apology to the nation for its crimes and went on to praise Johnny Paul Koroma's Government.

Fact 4: AFRC Trial Judgment para 1656: The Supreme Council did not have the collective ability to effectively control the military, as the military retained its own distinct chain of command and organizational structure.

Fact 5: AFRC Trial Judgment paras 175, 176: Soon after the Conakry Accord was signed, hostilities resumed. ECOMOG forces attacked Freetown on 13 and 14 February 1998. The AFRC forces were not able to hold their positions and escaped through the Freetown peninsula.

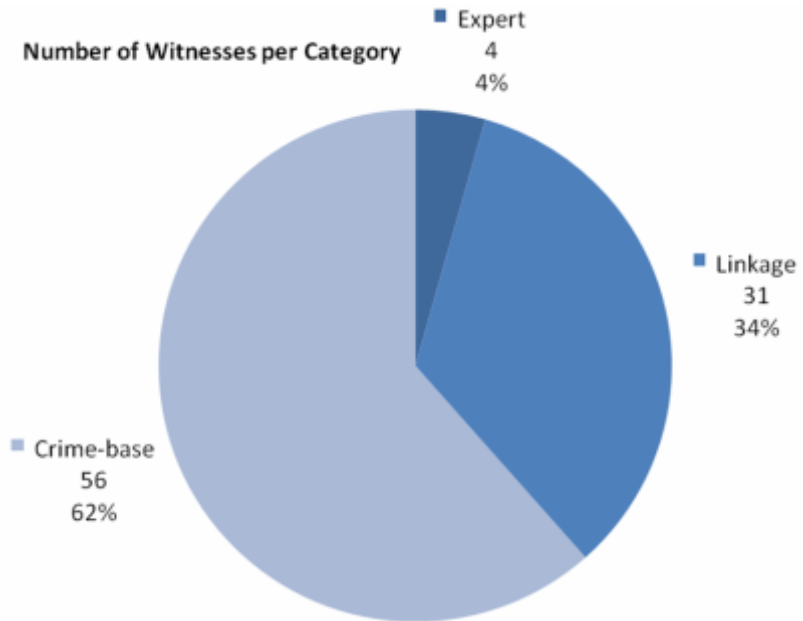
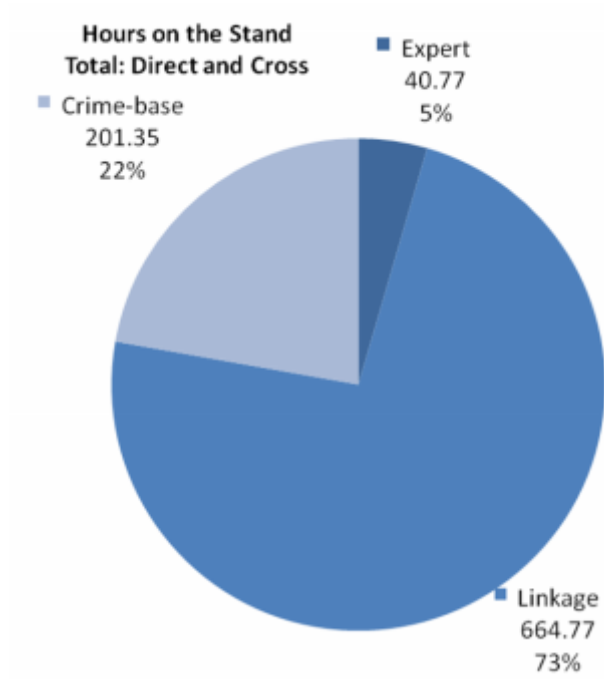
The retreat from Freetown was uncoordinated and without any semblance of military discipline. AFRC soldiers and RUF fighters fled with their families using either civilian cars or army vehicles. The fleeing troops passed through the villages of Lumley, Goodrich, York and Tumbo. From Tumbo they crossed Yawri Bay to Fo-gbo. They then proceeded to Newton and Masiaka (Port Loko District). It took three to four days for the troops to reach Masiaka. This period is often referred to as "the intervention."

- Fact 6: AFRC Trial Judgment paras 180, 181: When SAJ Musa learned about Koroma's decision – that the AFRC soldiers should be subordinate to RUF command as part of the plan to recapture Kono District – he was furious. He would not accept the notion that untrained RUF fighters could be in charge of former soldiers, and insisted that the purpose of his group was to reinstate the army and that the RUF could not lead such a mission.
- In addition, before the operation to recapture Kono took place, a dispute erupted over command and control issues resulting in hostilities between the two factions and the deaths of several fighters. As a result, SAJ Musa, and a significant number of AFRC troops loyal to him, opted not to participate in or support the operation.
- Fact 7: AFRC Trial Judgment para 188: When Johnny Paul Koroma departed for Kailahun District in 1998, he was given to believe that he would be welcome there by the RUF. However, when he arrived in Kailahun he encountered a hostile RUF leadership. He was arrested by Sam Bockarie, Issa Sesay and other RUF fighters. He was then strip searched for diamonds and his wife sexually assaulted. Bockarie placed Koroma under house arrest in Kagama village near Buedu where he remained until mid 1999.
- Fact 8: AFRC Trial Judgment paras 190, 379: At a meeting in Koinadugu District, various AFRC commanders met with SAJ Musa to discuss the future and develop a new military strategy. The commanders agreed that the troops who had arrived from Kono District should act as an advance troop which would establish a base in north western area Sierra Leone in preparation for an attack on Freetown. The purpose was to “restore the Sierra Leone Army.”
- Fact 9: AFRC Trial Judgment paras 193, 384: From Colonel Eddie Town, in or around September 1998, AFRC troops staged a number of attacks on ECOMOG positions to supplement their dwindling stock of arms and ammunition.
- Fact 10: AFRC Trial Judgment para 197: In October 1998, following an armed clash with Dennis Mingo, SAJ Musa left Koinadugu District to join the advance team and prepare for an attack on Freetown. SAJ Musa did not follow the same route taken by the advance teams in his journey to the west.
- Fact 11: AFRC Trial Judgment para 198: Upon his arrival in “Colonel Eddie Town” in November 1998, SAJ Musa assumed command. He emphasized his disenchantment with the RUF and stressed that it was vital that his troops arrive in Freetown before the RUF. SAJ Musa reorganized the troops and began the advance towards Freetown. The troops passed through the villages of Mange, Lunsar, Masiaka and Newtown before arriving in Benguema in the Western Area in December 1998. Throughout the advance, the troops withstood frequent attacks by ECOMOG.
- Fact 12: AFRC Trial Judgment para 200: On one occasion during the advance, SAJ Musa and the AFRC troops heard the British Broadcasting Corporation (BBC) interview with Sam Bockarie over the radio. Bockarie revealed the position of the AFRC fighting forces and explained that it was RUF troops who were approaching Freetown. Soon after, ECOMOG bombarded

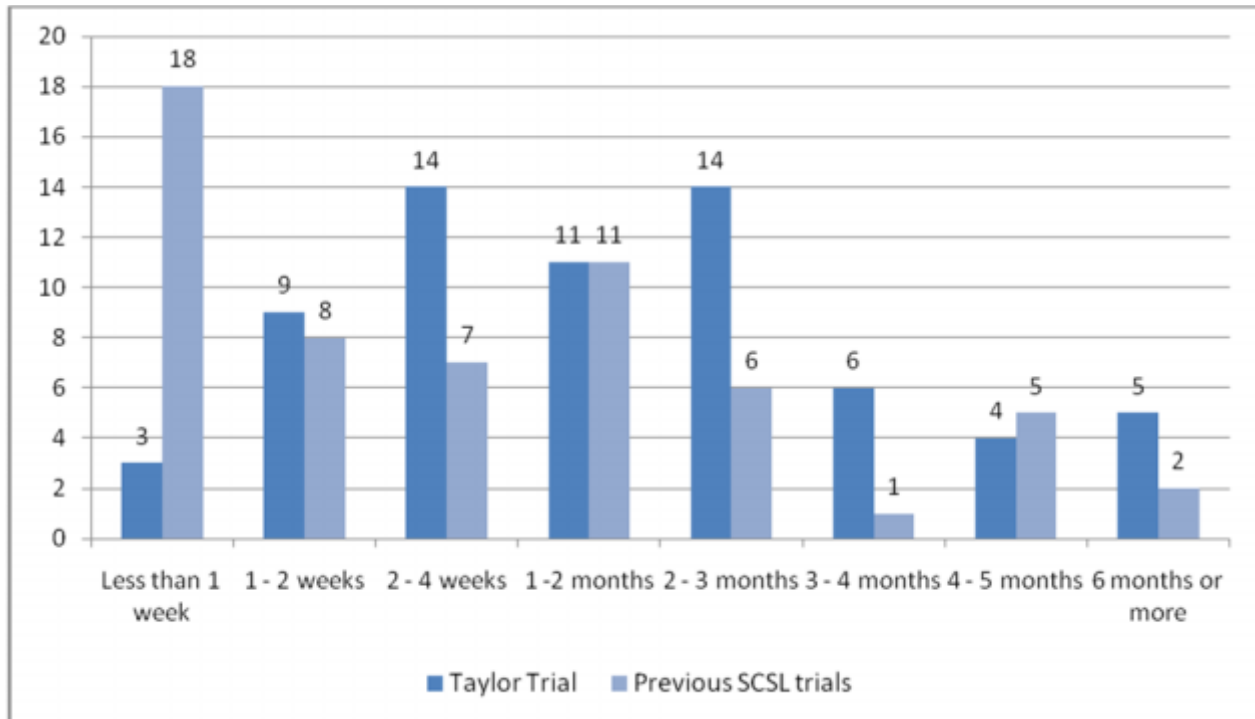
the area. Musa immediately contacted Sam Bockarie, insulted him and told him that he had no right to claim that the troops approaching Freetown were RUF troops.

- Fact 13: AFRC Trial Judgment para 201: On 23 December 1998, shortly after he arrived in Benguema, SAJ Musa was killed in an explosion during an attack on an ECOMOG weapons depot.
- Fact 14: AFRC Trial Judgment paras 202, 398: Following the death of SAJ Musa, the troops reorganized. On 5 January 1999, the Accused Brima gathered the troops in Allen Town and told them the time had come to attack Freetown. On 6 January, they invaded Freetown.
- Fact 15: AFRC Trial Judgment para 206: Following the heavy assaults from ECOMOG, the troops were forced to retreat from Freetown. This failure marked the end of the AFRC offensive as the troops were running out of ammunition. While the AFRC managed a controlled retreat, engaging ECOMOG and Kamajor troops who were blocking their way, RUF reinforcements arrived in Waterloo. However, the RUF troops were either unwilling or unable to provide the necessary support to the AFRC troops.

ANNEX B: BREAKDOWN OF THE PROSECUTION'S CASE⁴⁴⁷



ANNEX C: COMPARISON OF TIME TAKEN FOR TRIAL CHAMBER II DECISIONS



ANNEX D: LIST OF COURT DECISIONS AND TIME TAKEN TO RENDER A DECISION

Case No.	Decision	Date Filed	Days to decision
SCSL-03-01-T-311	Decision on Defence Office application to suspend all time limits pending the resolution of issues surrounding the termination of Mr. Karim Khan by Mr. Charles Ghankay Taylor before the Prosecution opening statement of 4 June 2007.	3-Jul-07	21 days
SCSL-03-01-T-312	Decision in respect of Prosecution's urgent public motion for admission of material pursuant to Rules 89 (C) and 92bis for use during opening statement.	3-Jul-07	1 month 18 days
SCSL-03-01-T-317	Decision on Defence application for leave to appeal the 29 May 2007 'Decision on urgent and public Defence motion requesting leave for Charles Ghankay Taylor to give an un-sworn statement from the dock'.	16-Jul-07	10 days
SCSL-03-01-T-318	Decision on the confidential Prosecution motion to rescind and augment protective measures for witnesses.	16-Jul-07	2 months 13 days
SCSL-03-01-T-319	Decision on Prosecution's motion for an order establishing guidelines for the conduct of the trial proceedings.	16-Jul-07	1 month 5 days
SCSL-03-01-T-341	Decision on Prosecution motion for an extension of time to file a reply to the Defence response to 'Prosecution's motion for admission of material pursuant to rules 89 (c) and 92bis'.	17-Sep-07	3 days
SCSL-03-01-T-348	Decision on Prosecution motion to rescind protective measures for witnesses.	3-Oct-07	2 months 8 days
SCSL-03-01-T-351	Decision on Defence motion seeking special measures with regard to Resolutions 1521 and 1532 of the United Nations Security Council.	31-Oct-07	3 months 26 days
SCSL-03-01-T-352	Decision on Defence motion to exclude, and in the alternative, to limit the admittance of Stephen Ellis' testimony and expert report.	31-Oct-07	3 months 26 days
SCSL-03-01-T-354	Public version of the confidential decision on Prosecution motion requesting special measures for disclosure of Rule 70 material.	2-Nov-07	2 months 3 days
SCSL-03-01-T-355	Decision on <i>ex parte</i> and confidential Prosecution motion for an order to provide to the Prosecution non-privileged documents recently obtained from the Accused's personal archive.	5-Nov-07	2 months 5 days
SCSL-03-01-T-364	Decision on Prosecution motion for leave to re-classify as "public" a motion previously filed on an <i>ex parte</i> & confidential basis.	3-Dec-07	19 days

Case No.	Decision	Date Filed	Days to decision
SCSL-03-01-T-368	Decision on confidential urgent Prosecution motion for immediate protective measures for witnesses and for non-public disclosure.	7-Dec-07	16 days
SCSL-03-01-T-369	Decision on Prosecution's motion for admission of material pursuant to Rules 89(C) and 92 <i>bis</i> .	7-Dec-07	2 months 13 days
SCSL-03-01-T-370	Decision on the Prosecution motion for judicial notice.	7-Dec-07	2 months 20 days
SCSL-03-01-T-399	Decision on Prosecution motion for admission of part of the prior evidence of TF1-362 & TF1-371 pursuant to Rule 92 <i>ter</i> .	25-Jan-08	7 days
SCSL-03-01-T-405	Decision on Prosecution motion to rescind protective measures for Witness TF1-275.	31-Jan-08	17 days
SCSL-03-01-T-408	Decision on public with confidential Annex D motion for leave to vary the witness list & to disclose statements of additional witnesses.	5-Feb-08	1 month 23 days
SCSL-03-01-T-427	Decision on confidential Prosecution motions SCSL-03-01-T-372 and SCSL-03-01-T-385 for the testimonies of witnesses to be held in closed session.	26-Feb-08	1 month 9 days
SCSL-03-01-T-437	Decision on confidential Prosecution motion for additional protective measures for the trial proceedings of Witnesses TF1-515, 516, 385, 539, 567, 388 and 390.	13-Mar-08	28 days
SCSL-03-01-T-439	Decision on Defence motion pursuant to Rule 75(G) to modify Sesay Defence protective measures decision of 30 November 2006 for access to closed session Defence witness testimony and limited disclosure of Defence witness names and related exculpatory material.	14-Mar-08	2 months
SCSL-03-01-T-472	Decision on confidential and urgent Defence motion to rescind or vary protective measures for Prosecution Witness TF1-334.	14-Apr-08	4 days
SCSL-03-01-T-475	Decision on confidential and urgent Prosecution motion for additional protective measures for the trial proceedings of TF1-561 and decision on confidential Prosecution request to withdraw motion for additional protective measures for the trial proceedings of Witness TF1-561.	16-Apr-08	12 days

Case No.	Decision	Date Filed	Days to decision
SCSL-03-01-T-476	Decision on confidential urgent motion to mark as "confidential" material introduced through any witness testifying in closed session, and in particular material introduced through TF1-371 and decision on confidential urgent Prosecution motion to mark as "confidential" material introduced through TF1-371.	16-Apr-08	1 month 12 days
SCSL-03-01-T-515	Decision on confidential urgent Prosecution motion for additional protective measures for Witnesses TF1-338 and TF1-579.	22-May-08	20 days
SCSL-03-01-T-516	Decision on confidential Defence motion for the disclosure of exculpatory material pursuant to Rule 68 of the Rules of Procedure and Evidence.	22-May-08	2 months 19 days
SCSL-03-01-T-543	Decision on Defence application to exclude the evidence of proposed Prosecution expert witness Corinne Dufka or, in the alternative, to limit its scope and on urgent Prosecution request for decision.	19-Jun-08	4 months 11 days
SCSL-03-01-T-551	Decision on Defence motion pursuant to Rule 75(G) to rescind closed session protective measures granted orally in other proceedings for Witness TF1-366.	2-Jul-08	1 month
SCSL-03-01-T-556	Decision on Prosecution notice under Rule 92 <i>bis</i> for the admission of evidence related to inter alia Kenema District and on Prosecution notice under Rule 92 <i>bis</i> for the admission of the prior testimony of TF1-036 into evidence.	15-Jul-08	3 months 1 day
SCSL-03-01-T-560	Decision on public Prosecution request to withdraw notice under Rule 92 <i>bis</i> for the admission of prior trial transcripts of testimony of TF1-141.	17-Jul-08	15 days
SCSL-03-01-T-575	Decision on public Prosecution motion for leave to call TF1-036 to give evidence-in-chief & cross-examination <i>viva voce</i> .	5-Sep-08	23 days
SCSL-03-01-T-576	Decision on public Prosecution motion notice of change in witness status or in the alternative motion for leave to change witness status.	5-Sep-08	9 days
SCSL-03-01-T-584	Decision on confidential Prosecution application for leave to vary the protective measures of TF1-168.	10-Sep-08	2 months 8 days
SCSL-03-01-T-607	Decision on Prosecution motion for leave to call TF1-060 to give evidence-in-chief & cross examination <i>viva voce</i> .	26-Sep-08	17 days
SCSL-03-01-T-615	Decision on confidential Prosecution motion for additional protective measures for witness TF1-395.	3-Oct-08	2 months 18 days

Case No.	Decision	Date Filed	Days to decision
SCSL-03-01-T-622	Decision on confidential urgent Prosecution application for leave to appeal order of service of documents SCSL-03-01-T-451, SCSL-03-01-T-452, SCSL-03-01-T-457.	7-Oct-08	5 months 24 days
SCSL-03-01-T-623	Decision on Prosecution notice under Rule 92 <i>bis</i> for the admission of evidence related to inter alia Kono District.	8-Oct-08	1 month 11 days
SCSL-03-01-T-633	Decision on Prosecution notice under Rule 92 <i>bis</i> for the admission of evidence related to inter alia Kono District - TF1-218 & TF1-304.	14-Oct-08	1 month 2 days
SCSL-03-01-T-634	Decision on public with confidential Annexes A to G Prosecution notice under Rule 92 <i>bis</i> for the admission of evidence related to inter alia Kono District - TF1-195, TF1-197, TF1-198, & TF1-206.	15-Oct-08	23 days
SCSL-03-01-T-635	Decision on public with confidential annexes A to C Prosecution notice under Rule 92 <i>bis</i> for the admission of evidence related to inter alia Freetown & Western Area - TF1-023 & TF1-029.	16-Oct-08	23 days
SCSL-03-01-T-642	Decision on public with confidential annexes B to G Prosecution notice under Rule 92 <i>bis</i> for the admission of evidence related to inter alia Freetown & Western Area -TF1-024, TF1-081 and TF1-084.	20-Oct-08	10 days
SCSL-03-01-T-644	Decision on public with confidential annexes A to D & F to G Prosecution notice under Rule 92 <i>bis</i> for the admission of evidence related to inter alia Freetown & Western Area - TF1-098, TF1-104 and TF1-227.	21-Oct-08	7 days
SCSL-03-01-T-645	Decision on confidential urgent Prosecution application for leave to appeal oral decision regarding protective measures for Witness TF1-062.	24-Oct-08	11 days
SCSL-03-01-T-649	Decision on Kallon motion pursuant to Rule 75(G) to modify Kallon and Gbao Defence protective measures decisions of 19 March 2007 and 1 March 2007 for access to closed session Defence witness testimony and limited disclosure of Defence witness names and related exculpatory material.	28-Oct-08	5 months 6 days
SCSL-03-01-T-653	Decision on confidential Defence application for leave to appeal an oral and majority decision of the Trial Chamber rescinding protective measures purportedly granted to Witness TF1-065.	31-Oct-08	23 days
SCSL-03-01-T-673	Decision on public Prosecution motion to allow Witness TF1-303 to give testimony by video-link.	18-Nov-08	12 days

Case No.	Decision	Date Filed	Days to decision
SCSL-03-01-T-691	Decision on public Prosecution application for leave to appeal decision regarding the tender of documents.	10-Dec-08	2 months 25 days
SCSL-03-01-T-717	Decision on Prosecution request to withdraw application for leave to appeal oral decisions regarding allowing questions concerning the location of the family of a witness and failing to order redaction of the locations.	2-Feb-09	8 months 22 days
SCSL-03-01-T-720	Decision on Public with confidential annexes C to E Prosecution Motion for Admission of the prior trial transcript of witnesses TF1-021 and TF1-083 pursuant to Rule 92 Quarter.	5-Feb-09	4 months 19 days
SCSL-03-01-T-722	Decision on Motion for disclosure of evidence underlying prejudicial statements made by the Chief Prosecutor, Mr. Stephen Rapp, to the Media.	6-Feb-09	8 months 12 days
SCSL-03-01-T-724	Decision on Prosecution Motion for admission of document pursuant to Rule 89(c).	9-Feb-09	8 months 7 days
SCSL-03-01-T-725	Decision on application for leave to file an amicus brief on confidential source issues raised during the cross-examination of witness TF1-355.	9-Feb-09	6 days
SCSL-03-01-T-735	Decision on confidential Defence application for disclosure of documents in the custody of the Prosecution pursuant to Rule 66 and Rule 68.	18-Feb-09	7 months 13 days
SCSL-03-01-T-736	Decision on Prosecution motion for admission of Liberia search documents.	18-Feb-09	2 months 7 days
SCSL-03-01-T-737	Decision on Prosecution motion for admission of extracts of the report of the Truth and Reconciliation Commission of Sierra Leone.	19-Feb-09	3 months 3 days
SCSL-03-01-T-739	Decision on Prosecution motion for admission of documents of the United Nations and United Nations bodies.	20-Feb-09	3 months 4 days
SCSL-03-01-T-742	Decision on Prosecution motion for admission of documents of certain non-governmental organisations and associated press releases.	23-Feb-09	1 month 12 days
SCSL-03-01-T-744	Decision on Prosecution motion for admission of document pursuant to Rules 89(C) and 92bis.	25-Feb-09	7 days
SCSL-03-01-T-745	Decision on Prosecution motion for admission of BBC Radio broadcasts.	25-Feb-09	1 month 16 days

Case No.	Decision	Date Filed	Days to decision
SCSL-03-01-T-747	Decision on Prosecution motion for admission of documents seized from Foday Sankoh's house.	26-Feb-09	3 months 3 days
SCSL-03-01-T-748	Decision on Prosecution motion for admission of documents of certain intergovernmental organisations & of certain governments.	26-Feb-09	1 month 22 days
SCSL-03-01-T-749	Decision on Prosecution motion for admission of documents seized from RUF Kono office, Kono District.	27-Feb-09	2 months 27 days
SCSL-03-01-T-750	Decision on Prosecution motion for admission of newspaper articles obtained from the Catholic Justice and Peace Commission archive in Monrovia, Liberia.	27-Feb-09	2 months 16 days
SCSL-03-01-T-751	Decision on public urgent Defence motion regarding a fatal defect in the Prosecution's second amended indictment relating to the pleading of JCE.	27-Feb-09	10 months 14 days

Methodology: These figures were compiled by calculating the number of days that passed between the final filing on a motion (usually a reply) and the date of the decision. To find the number of months that had passed, this number of days was divided by 30.43, the average number of days in a month. Finally, the number past the decimal point from the last calculation was multiplied again by 30.43 to determine the number of days.

ENDNOTES

¹ Special Court for Sierra Leone, Office of the Prosecutor Press Release, Feb. 2, 2009.

² Prosecutor v. Charles Taylor, SCSL-03-01-I-059, "Decision on immunity from jurisdiction" (Appeals Chamber), 31 May 2004, at ¶¶ 39-40.

³ United Nations Security Council, "The Situation in Sierra Leone," S/RES/1688 (2006), 16 June 2006, 1 [hereinafter "SC Res. 1688 (2006)"].

⁴ The new Defense team was in place about a month and a half after Khan resigned.

⁵ Because this report only covers the *Taylor* case through the close of Prosecution evidence, a second companion report will be published at the conclusion of trial, covering the Defense case and final Judgment

⁶ As enshrined in Article 14 of the International Covenant on Civil and Political Rights. UN General Assembly, International Covenant on Civil and Political Rights, 16 Dec. 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> [accessed 6 May 2010].

⁷ On June 12, 2000, Sierra Leone President Ahmad Tejan Kabbah wrote to the United Nations requesting its support in creating a court to try perpetrators of the conflict in Sierra Leone. WCSC Interim Report, "From Mandate to Legacy: The Special Court for Sierra Leone as a Model for 'Hybrid Justice'," April 2005. On Aug. 14, 2000, the UN Security Council passed Resolution 1315 requesting the Secretary-General to explore options for establishing the court, which was founded when the UN Security Council signed a bilateral agreement with the Sierra Leonean government on 16 Jan. 2002. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 Jan. 2002 [hereinafter "Special Court Agreement"]; Security Council resolution 1315 (2000) of 14 Aug. 2000.

⁸ Special Court for Sierra Leone Statute, Article 1 [hereinafter “SCSL Statute”]. Nov. 30, 1996 was the date the ultimately unsuccessful Abidjan Peace Accord was signed by the government of Sierra Leone and the leaders of the Revolutionary United Front.

⁹ *Taylor*, Case No. SCSL-03-01-1, Indictment, 7 March 2003 [hereinafter “Original Indictment”]. Taylor was charged with acts of terrorism (Count 1); collective punishments (Count 2); extermination (Count 3); murder (Count 4); violence to life, health, and physical or mental well-being, in particular murder (Count 5); rape (Count 6); sexual slavery (Count 7); outrages upon personal dignity (Count 8); violence to life, health, and physical or mental well-being, in particular cruel treatment (Count 9); inhumane acts (Count 10); use of child soldiers (Count 11); enslavement (Count 12); pillage (Count 13); intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission (Count 14); murder of UN peacekeepers (Count 15); violence to life, health, and physical or mental well-being of UN peacekeepers (Count 16); and taking hostages (Count 17). *Id.*

¹⁰ Leslie Lang, “The Special Court for Sierra Leone: Media Coverage of Charles Taylor,” War Crimes Studies Center, 3 (2005).

¹¹ *Id.* See also Peter Dennis, “A Brief History of Liberia,” International Center for Transitional Justice, 5 (May 2006), available at <http://www.ictj.org/static/Africa/Liberia/BriefHistory.pdf>.

¹² Peter Dennis, “A Brief History of Liberia,” International Center for Transitional Justice, 5 (May 2006) available at <http://www.ictj.org/static/Africa/Liberia/BriefHistory.pdf>.

¹³ For a discussion about the media coverage surrounding Taylor’s indictment and exile, see Lang, *supra* note 10.

¹⁴ The Court established Trial Chamber II on Jan. 17, 2005. Special Court for Sierra Leone, Press Release, “Judges of Second Trial Chamber Sworn In,” 17 Jan. 2005, available at <http://www.scs-l.org/LinkClick.aspx?fileticket=D%2bFa43XpkFs%3d&tabid=112>.

¹⁵ *Taylor*, Case No. SCSL-03-01-263, “Second amended indictment,” 29 May 2007 [hereinafter “Second Amended Indictment”]. The Prosecution dropped the charges of collective punishments (Count 2) and extermination (Count 3) related to killing Sierra Leonean civilians during the conflict, as well as the charges against Taylor for attacks on UN peacekeepers in 2000, Counts 14 – 17. *Taylor*, Original Indictment, ¶ 59.

¹⁶ *Taylor*, Second Amended Indictment.

¹⁷ *Taylor*, Second Amended Indictment. Taylor was also charged with planning, instigating, ordering, and aiding and abetting the commission of these crimes. *Id.* ¶ 33.

¹⁸ Johnson-Sirleaf felt that in order to rebuild Liberia and reduce Taylor’s influence over the country, Taylor needed to face trial at the SCSL. Hoge, Warren, “Liberian Seeks Extradition of Predecessor for Atrocities Trial,” New York Times, March 18, 2006, available at <http://www.nytimes.com/2006/03/18/international/africa/18liberia.html>.

¹⁹ In a bizarre final twist, Taylor reportedly “escaped” from his seaside villa before the Nigerian government formally revoked his asylum. However, he was subsequently apprehended at the Nigeria-Cameroon border and handed over to Liberia. Nigeria’s compliance was also contentious, as it sought regional approval of the extradition and refused to extradite Taylor directly to Sierra Leone, as Johnson-Sirleaf requested. See BBC News, “Dispute over Taylor extradition,” March 27, 2006, <http://news.bbc.co.uk/2/hi/africa/4850216.stm>.

²⁰ Michelle Staggs, “Second Interim Report on the Special Court for Sierra Leone ‘Bringing Justice and Securing Lasting Peace’: Some Reflections on the Trial Phase at the Special Court Michelle Staggs,” March 2006, 1 [hereinafter “Second Interim Report”].

²¹ *Taylor*, Case No. SCSL-03-01-I-15, “Motion to quash,” July 23, 2003, 3. Taylor was President of Liberia from 1997 until 2003; the jurisdiction of the SCSL spans Nov. 1996 – Jan. 2002.

²² *Taylor*, Case No. SCSL-03-01-I-38, “Submission of the amicus curiae on head of state immunity in the case of the Prosecutor v. Charles Ghankay Taylor,” 23 Oct. 2003 [hereinafter “Submission by Professor Orentlicher”]; *Taylor*, Case No. SCSL-03-01-I-39, “Submissions of the amicus curiae on head of state immunity in the case of Prosecutor v. Charles Ghankay Taylor,” 23 Oct. 2003 [hereinafter “Submission by Philippe Sands”]. Both amicae argued that the SCSL was a court of international character and that Taylor did not enjoy immunity. Submission by Professor Orentlicher, ¶ 26; Submission by Philippe Sands, ¶ 118.

²³ *Taylor*, Case No. SCSL-03-01-I-51, “Application to appear as an amicus curiae in the case of Prosecutor v. Charles Ghankay Taylor,” 28 Nov. 2003 [hereinafter “Submission by African Bar Association”]. The African Bar Association argued that Taylor did not enjoy immunity. *Id.*, ¶ 4.09.

²⁴ *Taylor*, SCSL-03-01-16-PT, “Prosecution’s response to defense motion to quash the indictment against Charles Ghankay Taylor,” ¶ 15 (arguing that “The Special Court for Sierra Leone was thus established, not under the municipal law of Sierra Leone, but under international law. It exists and functions in the sphere of international law,”); Submission by Professor Orentlicher ¶ 26; Submission by Philippe Sands, ¶ 118; Submission by African Bar Association, ¶ 4.09.

²⁵ *Taylor*, Case No. SCSL-03-01-I, “Appeals Chamber decision on immunity from jurisdiction,” 31 May 2004, ¶ 53 [hereinafter “Decision on Immunity from Jurisdiction”].

²⁶ SCSL Statute, Article 6(2); *Taylor*, Decision on Immunity from Jurisdiction, ¶¶ 34 – 42.

²⁷ SCSL Statute.

²⁸ *Taylor*, Case No. SCSL-03-01-I-15, “Motion to quash,” July 23, 2003, pgs 3 – 8.

²⁹ *Id.*

³⁰ *Taylor*, Decision on Immunity from Jurisdiction, ¶ 37.

³¹ *Id.* at ¶ 38.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at ¶ 41.

³⁷ *Id.* at ¶ 52.

³⁸ The decision and the Court’s reasoning were contentious and have been widely debated by scholars, although discussion of the merits of the decision is outside the scope of this report. See James L. Miglin, “From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone,” 16 *Dalhousie J. Legal Stud.* 21 (2007); Micaela Frulli, “The Question of Charles Taylor’s Immunity – Still In Search of a Balanced Application of Personal Immunities?,” 2.4 *ICJ* 1118 (2004); Gill Wigglesworth, “The end of Impunity? Lessons from Sierra Leone,” 84 *Int’l Aff.* 4, 813-814 (2008).

³⁹ This is allowed under Rule 45. Special Court for Sierra Leone Rules of Procedure and Evidence, Rule 45 [hereinafter “Rules”].

⁴⁰ Rule 61 stipulates that an Accused must be formally charged with regards to the indictment during the initial court appearance. Rules, Rule 61.

⁴¹ *Taylor*, Decision on Immunity from Jurisdiction.

⁴² *Taylor*, Trial Transcript, 3 April 2006, 15 (lines 4 – 6).

⁴³ Rule 45(B)(ii) of the Rules states that the Principal Defender must provide legal assistance to accused “if the accused does not have sufficient means to pay for it, as the interests of justice may so require.”

⁴⁴ Nmehielle also told the Court that Taylor feared for his life; given that Foday Sankoh, in custody of the SCSL, and Slobodan Milosević, in custody of the ICTY, had died in detention, Taylor was afraid he would not have access to adequate facilities to ensure his health and safety. In response, the Court directed the Registrar to attend to these concerns. *Taylor*, Trial Transcript, 3 April 2006, 18 (lines 6 – 19).

⁴⁵ *Taylor*, Case No. SCSL-03-01-I-88, “Principal Defender’s decision to provisionally assign counsel to Charles Ghankay Taylor,” 5 April 2006. In support of this decision, the Principal Defender cited his April 3, 2006 determination that Taylor was partially indigent, as well as Rule 45 of the Rules, which provide indigent defendants with the right to assigned counsel. *Id.*; Rules, Rule 45. This matter had been contentious throughout the trial, with barbs being thrown between the Prosecution and Defense about the location of Taylor’s alleged riches; the Prosecution contends that Taylor is hiding money and is not indigent, and the Defense claims that if Taylor had money hidden, the Prosecution would have certainly found it by now. See, e.g., BBC, “Taylor ‘had billions’ in US Bank,” May 2, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7379536.stm>.

⁴⁶ This provisional assignment expired on June 4, 2006, after which time the parties discussed permanent assignment of Taylor’s counsel, while the trial moved forward. Khan was reassigned to serve as Taylor’s counsel on July 13, 2006 for another ninety days. *Taylor*, Case No. SCSL-03-01-111, “Principle Defender’s decision to reassign counsel to Charles Ghankay Taylor,” 7 July 2006, ¶¶ 1-2. His assignment became permanent on Sept. 21, 2006. *Taylor*, Case No. SCSL-03-01-293, “Principle Defender’s decision accepting the withdrawal of Mr. Karim Khan as assigned counsel to Mr. Charles Ghankay Taylor,” 14 June 2007, 1.

⁴⁷ Although relevant documents and stories cite concerns about the “stability of West Africa,” there is no mention of specific security concerns. See e.g. Human Rights Watch, “Taylor Trial: A Third Country Must Step Forward,” April 27, 2006, available at <http://www.hrw.org/en/news/2006/04/27/taylor-trial-third-country-must-step-forward>; Human Rights Watch, “Taylor Trial: U.K. Removes a Key Obstacle,” June 15, 2006, available at <http://www.hrw.org/en/news/2006/06/15/taylor-trial-uk-removes-key-obstacle>; BBC, “UN to discuss Taylor trial move,” April 1, 2006, <http://news.bbc.co.uk/2/hi/africa/4867036.stm>; Craig Timberg, “Liberian President Backs Bid To Move Taylor Trial to Hague,” Washington Post, March 31, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/30/AR2006033001153.html>; Justice Initiative Communications, “Security Council Must Address Costs of Moving Taylor Trial to the Hague,” April 4, 2006, available at http://www.justiceinitiative.org/db/resource2?res_id=103165.

⁴⁸ Under Article 10 of the Special Court Statute, the Court can meet away from its seat (Freetown, Sierra Leone) if necessary for the efficient exercise of its functions. SCSL Statute, Article 10. Rule 4 of the Rules allows the President of the SCSL to authorize a Chamber or Judge to work outside the seat of the court and West Africa. Rules, Rule 4.

⁴⁹ SCSL Press Release, “Special Court President Requests Charles Taylor be Tried in The Hague,” 30 March 2006.

⁵⁰ *Taylor*, Trial Transcript, 3 April 2006, 19 (lines 7 – 17).

⁵¹ *Taylor*, SCSL-03-01-PT-91, “Urgent Defence motion for an order that no change of venue from the seat of the Court in Freetown be ordered without the Defence being heard on the issue and motion that the Trial Chamber request the President of the Special Court to withdraw the requests purportedly made to (1) the Government of the Kingdom of the Netherlands to permit that the trial of Charles Ghankay Taylor be conducted on its territory & (2) to the President of the ICC for use of the ICC building and facilities in the Netherlands during the proposed trial of Charles Ghankay Taylor,” 7 April 2006, ¶¶ 1 – 3 [hereinafter “Defence Motion for no Change of Venue”].

⁵² *Id.* at ¶ 11.

⁵³ *Id.* at ¶¶ 12-18.

⁵⁴ *Taylor*, SCSL-03-01-PT, “Prosecution response to Taylor urgent motion against change of venue,” 25 April 2006, ¶ 3.

⁵⁵ *Id.*

⁵⁶ *Taylor*, SCSL-03-01-R72, “Appeals Chamber decision on urgent Defence motion against change of venue,” 29 May 2006, ¶¶ 5 – 7.

⁵⁷ *Id.* at ¶ 4.

⁵⁸ *Id.* at ¶¶ 5 – 7.

⁵⁹ *Id.* at ¶¶ 7-8.

⁶⁰ Human Rights Watch, “Taylor Trial: A Third Country Must Step Forward,” April 27, 2006, available at <http://www.hrw.org/en/news/2006/04/27/taylor-trial-third-country-must-step-forward>

⁶¹ SC Res. 1688 (2006), 1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Taylor*, SCSL-03-01-PT-108, “Order Changing Venue of Proceedings,” 19 June 2006, ¶¶ 8, 10.

⁶⁵ Justice Initiative Communications, “Security Council Must Address Costs of Moving Taylor Trial to the Hague,” April 4, 2006, available at http://www.justiceinitiative.org/db/resource2?res_id=103165, see also Human Rights Watch, “Taylor Trial: U.K. Removes a Key Obstacle,” June 15, 2006, <http://www.hrw.org/en/news/2006/06/15/taylor-trial-uk-removes-key-obstacle>.

⁶⁶ *Taylor*, SCSL-01-03-PT-250, “Defence motion pursuant to rule 54 requesting order to court management to accept filings and serve hard copies of all filings on the parties in The Hague immediately,” 23 May 2007.

⁶⁷ *Taylor*, Case No. SCSL-03-01-PT-269, “Decision on Defence motion pursuant to Rule 54 requesting order to Court Management to accept filings and serve hard copies of all filings on the parties in The Hague immediately,” 31 May 2007, ¶ 2. For example, the Defense counsel was told to pick up in Freetown Prosecution filings that included multiple CDs of Annexes, although the Defense counsel and the trial were located in The Hague. *Id.* at ¶ 3.

⁶⁸ *Id.* at ¶ 13. Indeed, these problems and others were at the heart of the reasons Taylor gave for excusing his counsel on the first day of trial, ultimately leading to a six-month delay in proceedings. *Taylor*, Case No. SCSL-03-

01-PT, "Principal Defender's decision accepting the withdrawal of Mr. Karim Khan as assigned counsel to Mr. Charles Ghankay Taylor," 14 June 2007, 4.

⁶⁹ *Taylor*, Case No. SCSL-03-01-PT, "Decision on Defence Motion pursuant to Rule 54 requesting order to Court Management to accept filings and serve hard copies of all filings on the parties in The Hague immediately," 31 May 2007, ¶ 8.

⁷⁰ Taylor's current legal team has cited difficulties in communication, reporting, and cooperation that make their job more difficult than it needs to be. Interview with Defense Counsel, Dec. 2008.

⁷¹ Email from SCSL Registrar Herman von Hebel to author, June 30, 2009 [hereinafter "Email from Registrar"].

⁷² Email from Registrar, *supra* note 71.

⁷³ *Taylor*, Case No. SCSL-03-01-PT, "Registrar's submission pursuant to Rule 33 (B) relating to issues pertaining to the Prosecution motion to allow witnesses to give testimony by video-link filed on 9 Feb. 2007," 22 Feb. 2007. Over 190 witnesses would have to testify via video-link before the costs of installing the video-link technology would be worth the investment. *Id.* at ¶ 27.

⁷⁴ The motion was dismissed on the grounds that issuing a broad order for categorical video-link testimony was not in the interests of justice, given the jurisprudence on the matter and the preference for witnesses to give evidence directly in Court. *Taylor*, Case No. SCSL-03-01-PT, "Decision on Prosecution motion to allow witnesses to give testimony by video-link," 30 March 2007, ¶¶ 22-27.

⁷⁵ *Id.* at ¶ 28. To be fair to the Prosecution, it filed its motion on Feb. 9, approximately four months before its opening statement, eight months after the decision to move the trial. *Taylor*, Case No. SCSL-03-01-PT, "Prosecution motion to allow witnesses to give testimony by video-link," 9 Feb. 2007. The Defense and the Registrar responded on Feb. 22, 2007. *Taylor*, Case No. SCSL-03-01-PT, "Registrar's submission pursuant to Rule 33 (B) relating to issues pertaining to the Prosecution motion to allow witnesses to give testimony by video-link filed on 9 Feb. 2007," 22 Feb. 2007; *Taylor*, Case No. SCSL-03-01-PT, "Defence response to Prosecution motion to allow witnesses to give testimony by video-link," 22 Feb. 2007. The Trial Chamber took over a month to render its decision.

⁷⁶ Email from Herman von Hebel, Jan. 25, 2010.

⁷⁷ Registrar Herman von Hebel said "Of course it would have been preferable that the Taylor trial would have taken place in Freetown. That after all was the philosophy behind the SCSL as a hybrid court." Email from Registrar, *supra* note 71.

⁷⁸ Some suggest that the move was a pre-determined element of an agreement made to get Taylor to surrender and step down from his Presidency. See Cruvellier; *infra* note 96, at 23.

⁷⁹ *Taylor*, Case No. SCSL-03-01-PT-201, "Civil society amicus curiae brief regarding change of venue of Taylor trial back to Freetown," 9 March 2007, ¶¶ 4-5.

⁸⁰ *Id.*

⁸¹ *Id.* at ¶¶ 6-12.

⁸² *Id.* at ¶ 13-16.

⁸³ *Id.* at ¶ 14

⁸⁴ *Id.* at ¶ 15.

⁸⁵ Email from Registrar, *supra* note 71.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ This department was not funded under the "core-budget" of the Court, which covered only "core" Court activities and was funded by the contributions of major donors. On the contrary, the Registrar had to secure outside sources of funding to pay for outreach activities, and was successful in securing a large grant from the European Commission. Email from Herman von Hebel, Jan. 25, 2010.

⁸⁹ Email from Outreach Coordinator, May 5, 2009. Reports on file with author, provided by Outreach and Public Affairs department of the SCSL, May 2009.

⁹⁰ Reports on file with author, provided by Outreach and Public Affairs department of the SCSL, May 2009.

⁹¹ *Id.*

⁹² Unfortunately, the OPA had to suspend the program after a Liberian visitor absconded. Interview with Court official. Managing the risk of abscondment is a big challenge for both the OPA and the WVS, who have to arrange secure international travel, visas, lodging, and transport for those individuals traveling to The Hague.

⁹³ Who at the time was Binta Mansaray, who is now Registrar of the SCSL.

⁹⁴ Email from Herman von Hebel, Jan. 25, 2010.

⁹⁵ Jonathan Paye-Layleh, BBC News, "Liberians Wary as Taylor Testifies," <http://news.bbc.co.uk/2/hi/africa/8150245.stm>, July 14, 2009.

⁹⁶ Thierry Cruvellier, "From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test," International Center for Transitional Justice and Sierra Leone Court Monitoring Programme (2009), 15.

⁹⁷ Email from Outreach Coordinator, May 5, 2009.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ According to WCSC "Special Report, Initial Appearance of Charles Taylor," "the security camera was affixed by the ICC, and was monitoring images without sound. The Trial Chamber ordered its removal from the room. When the ICC did not comply with this request for 18 days, the Chamber extended the start date of the trial proceedings, with the exception of the Prosecution's opening statement, from the 4th of June to the 25th of June in order to compensate for lost time in defense preparation. The defense contends that its loss of preparation time far exceeds this eighteen-day period." Sara Kendall, "The Opening of the Trial of Charles Taylor: Early Developments and Delays," War Crimes Studies Center, 3 (July 3, 2007).

¹⁰¹ *Taylor*, Trial Transcript, 4 June 2007, 10 (lines 17 – 20).

¹⁰² *Taylor*, Trial Transcript, 4 June 2007, 11 (lines 12 – 14).

¹⁰³ *Taylor*, Trial Transcript, 4 June 2007, 12 (lines 1 – 3). A team of this size is normal for defense teams in international criminal trials. The team also usually has interns and a case manager.

¹⁰⁴ *Taylor*, Trial Transcript, 4 June 2007, 10 (lines 17 – 20).

¹⁰⁵ This equality of arms conflict is not unique to the Taylor case or to the SCSL. However, it may be exacerbated in this instance by the SCSL's tight budget and the timing of the Taylor case at the end of the SCSL.

¹⁰⁶ The Court based its decision on Rule 60(A)(i) and 60(B).

¹⁰⁷ See Code of Conduct, Rules 18 and 19. Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, 13 May 2006. Rule 18 provides that Defense Counsel can no longer represent their client after that client has terminated the representation, and that the termination is effective immediately if the client notifies the Registrar in writing of his intention to conduct his own defense. Code of Conduct, Rule 18 (A) and 18(D).

¹⁰⁸ Rule 45(D) provides that "Any request for replacement of an assigned counsel shall be made to the Principal Defender. Under exceptional circumstances, the request may be made to a Chamber upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings." Although the Court did not allow for submissions on or discussion of the application of the rule, its interpretation is arguably incorrect. Taylor was not asking for a replacement of his assigned counsel; he was terminating his representation and stating that he would represent himself moving forward; this is distinguishable from the issue of replacing one assigned counsel with another. Rules, Rule 45.

¹⁰⁹ See *Trial Taylor*, Trial Transcript, 4 June 2007, 21 – 26.

¹¹⁰ No contempt charges were ever brought against Khan.

¹¹¹ Three days after Khan's termination, the Prosecution filed a motion contesting this termination. The court never rendered a decision on the issue, noting that it had been "overtaken by events." Court Records website.

¹¹² Prosecutor v. Brima, Kamara and Kanu (*AFRC* case), Case No. SCSL-04-16-AR73-441, "Decision on Brima-Kamara Defence appeal motion against Trial Chamber II in majority decision on extremely urgent confidential joint motion for the re-appointment of Kevin Metzger and Wilber Harris as lead counsel for Alex Tamba Brima and Brima Bazzy Kamara," 8 Dec. 2005, ¶ 89; see also Kendall Taylor Report, 4.

¹¹³ *Taylor*, Trial Transcript, 25 June 2007, 39 (lines 8-9).

¹¹⁴ *Taylor*, Trial Transcript, 25 June 2007, 40 (line 25).

¹¹⁵ *Taylor*, Trial Transcript, 25 June 2007, 42 (line 18-28).

¹¹⁶ *Taylor*, Trial Transcript, 25 June 2007, 43 (line 9-14). In an email from Khan to the Principal Defender notifying him of Khan's withdrawal from the case, Khan blamed the Registrar for violating SCSL rules. He wrote:

An unfortunate feature of this case has, of late, been the personal and unnecessary imputations that have been made. Notwithstanding the Registrar's rule 33 filing received today (in which he

refers to my ‘behaviour’ in court on 4th June, but is completely reticent about his failure to comply with a judicial direction on 7th May). He also makes a number of inaccurate remarks regarding the funding of the Taylor team. My letters . . . speak for themselves. The LSC was breached by the Registrar quite knowingly. Despite that, I fear that the Trial Chamber may not have been fully or fairly briefed about the extent of our difficulties in the months June 2006 to March 2007 or the effect this, the visa issue or the camera surveillance had on the confidence of the accused. Instead “teething troubles” and “start up difficulties” have been pled to minimize the prejudice suffered by the Defense in general and Mr. Taylor in particular. This erosion of confidence led to Mr. Taylor’s action on 4th June.

Taylor, Case No. SCSL-03-01-293, “Principal Defender’s decision accepting the withdrawal of Mr. Karim Khan as assigned counsel to Mr. Charles Ghankay Taylor,” 14 June 2007, Annex A.

¹¹⁷ The SCSL is based purely on voluntary donations. In spite of its narrow mandate and early promises to be “lean” and efficient, the SCSL is facing severe financial problems as it nears its conclusion. Indeed, as the Taylor trial entered its second year, SCSL officials began to worry publically about the future of the tribunal due to budget shortfalls. “I could have the best evidence in the world, I could have the strongest advocacy, but if we ran out of funds, the court might have to let the accused go. You can’t hold them if you don’t have the resources to finish the trial. I don’t want that to happen,” Prosecutor Rapp recently told media outlets. “Special Court for Sierra Leone receives funding reprieve.” April 15, 2009, available at <http://www.humanrights-geneva.info/Special-Court-for-Sierra-Leone,4337>. The near bankruptcy of the SCSL was confirmed by a Court official in an interview on March 26, 2009. Interview with Gregory Townsend, March 26, 2009. Justice Winter, then-President of the SCSL, told the UN Security Council in July 2009 that the budget shortfall “[. . .] poses the real possibility of disrupting our work, which would have disastrous consequences for the Council’s extensive peace building efforts in Sierra Leone and Liberia. A disruption in the proceedings would send the wrong message to the international community, jeopardizing the fight against impunity and potentially calling into question our collective commitment to international justice.” Prosecutor Rapp echoed this sentiment, telling the Security Council the Court was facing an “impending crisis.” “Even if all pledged donations from donors for this year come in early, our funds will run dry before next year’s round of donations, and the Special Court will not have the resources necessary to complete its work,” Rapp said. Registry Press Release, “Special Court Officials Brief U.N. Security Council on Progress, Challenges,” July 16, 2009, available at <http://www.sc-sl.org/PRESSROOM/RegistryPressReleases/2009/tabid/214/Default.aspx>.

¹¹⁸ The trial had originally been scheduled to recommence on Aug. 20, giving the new Defense team less than a month from the start of their contracts (which came into effect on Aug. 1) to prepare their case. The Defense requested that the Court postpone the proceedings until Jan. 7, 2008. *Taylor*, Case No. SCSL-03-01-323, “Defence Motion for adjournment to allow the Defence adequate time and facilities to prepare and other ancillary matters,” 31 July 2007. The Prosecution did not oppose the motion, and the Court set the final trial date for Jan. 7, 2008. *Taylor*, Trial Transcript, 20 Aug. 2007, 34 – 35 (lines 29, 1 – 6); 35 (lines 26-27).

¹¹⁹ Prosecutor v. Tadić, Case No. IT-94-1-A (Appeals Chamber), “Judgment,” 15 July 1999, ¶¶ 189-229 [hereinafter “*Tadić* Appeal Judgment”]. The fact that JCE is a form of committing was recently emphasized by Justice Shahabuddeen at the ICTY. Prosecutor v. Krajišnik, Case No. IT-00-39-A (Appeals Chamber), “Judgment,” ¶ 11-17 March 2008, (Shahabuddeen, J., separate opinion).

¹²⁰ “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.” Statute, Article 6.1.

¹²¹ *Tadić* Appeal Judgment, ¶ 190. For further discussion of the three categories, see Prosecutor v. Kvočka et al. Case No. IT-98-30/1-A (Appeals Chamber), “Judgment,” 28 Feb. 2005, ¶¶ 86 (JCE III), 182 (JCE II); Prosecutor v. Karemera et al., Case Nos. ICTR-98-44-AR72.5, & ICTR-98-44-AR72.6, “Decision on jurisdictional appeals,” 12 April 2006, ¶ 17 (JCE III); Prosecutor v. Martić, Case No. IT-95-11 (Appeals Chamber) “Judgment,” 8 Oct. 2008, ¶¶ 83-84 (JCE III); Prosecutor v. Karadžić, Case No. IT-95-5/18-AR72.4, “Decision on Prosecution’s motion appealing Trial Chamber’s decision on JCE III foreseeability,” 25 June 2009.

¹²² *Tadić* Appeal Judgment, ¶ 227; Prosecutor v. Krajišnik, Case No. IT-00-39-T, “Judgment,” 27 Sept. 2006, ¶ 884

¹²³ *Tadić* Appeal Judgment, ¶ 227.

¹²⁴ *Id.*; Prosecutor v. Brđanin ICTY-IT-99-36-A (Appeals Chamber), “Judgment,” ¶ 430 [hereinafter “*Brđanin Appeals Judgment*”], citing Prosecutor v. Kvočka et al., Case No. IT-98-30/1 (Appeals Chamber), “Judgment,” [hereinafter “*Kvočka Appeals Judgment*”] ¶¶ 97-98.

¹²⁵ *Brđanin Appeals Judgment*, ¶ 365, 430-431. See also Prosecutor v. Vasiljević, Case No. IT-98-32-A (Appeals Chamber), “Judgment,” 25 Feb. 2004, ¶ 101.

¹²⁶ The *Tadić* appeal judgment explains JCE I as involving cases “where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design . . . they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proved to have, effected the killing are as follows: (i) The accused must voluntarily participate in one aspect of the common design (for instance . . . providing material assistance to or facilitate the activities of his co-perpetration), and (ii) The accused, even if not personally effecting the killing, must nevertheless intend the result.” *Tadić Appeal Judgment*, ¶ 196.

¹²⁷ See *Brđanin Appeals Judgment* ¶ 410-413.

¹²⁸ According to the *Tadić Appeal Judgment*, JCE III arises in cases “involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.” *Tadić Appeal Judgment*, ¶ 204.

¹²⁹ *Taylor*, Case No. SCSL-01-03-327, “Prosecution notification of filing of amended case summary,” 3 Aug. 2007, ¶ 43.1-43.2.

¹³⁰ A pleading cannot assume the existence of one of these elements, although in certain narrow circumstances a court may find that it is sufficient if an element is pleaded by “necessary implication.” See *AFRC Trial Judgment*, ¶ 65, citing Prosecutor v. Hadžihasanović et al., “Decision on form of the indictment,” 18 Nov. 2003, ¶ 10; Prosecutor v. Brđanin and Talić, Case No. IT-99-36-PT, “Decisions on objections by Momir Talić to the form of the amended indictment,” 20 Feb. 2001, ¶ 48; Prosecutor v. Brđanin and Talić, Case No. IT-99-36-PT, “Decisions on form of fourth amended indictment,” 23 Nov. 2001, ¶ 12.

¹³¹ See *Kvočka Appeals Judgment*, ¶ 28; Prosecutor v. Krnojelac, Case No. IT-97-25-A (Appeals Chamber), “Judgment,” 13 Sept. 2003, ¶ 138.

¹³² See *Kvočka Appeals Judgment*, ¶ 28.

¹³³ See Prosecutor v. Martić, Case No. IT-95-11 (Appeals Chamber) “Judgment,” 8 Oct. 2008, ¶ 163 (“[T]he Appeals Chamber reiterates that a vague indictment not cured by timely, clear and consistent notice causes prejudice to the accused. The defect may only be deemed harmless through demonstrating that the accused’s ability to prepare his defence was not materially impaired”).

¹³⁴ *AFRC*, Case Nos. SCSL-04-16-PT-070 and SCSL-04-16-PT-070, “Decision on Prosecution request for leave to amend the indictment,” 6 May 2004; *AFRC*, Case No. SCSL-04-16-PT-046-I and II, “Decision and order on Defense preliminary motion on defects and order on Defense preliminary motion on defects in the form of the indictment,” 1 April 2004; *AFRC*, Case No. SCSL-03-13-PT-036, “Decision and order on the Defense preliminary motion for defects in the form of the indictment,” 19 Nov. 2003; *AFRC*, Case No. SCSL 03-13-I-002, “Decision approving the indictment, the warrant of arrest, and order for transfer and detention and order for non-public disclosure,” 16 September 2003; *AFRC*, Case No. SCSL 03-0-I-003, “Decision approving indictment and order for non-disclosures,” 7 March 2003; see also Prosecutor v. Alieu Kondewa, Case No. SCSL-03-PT-050, “Decision and order on Defence preliminary motion for defects in the form of the indictment, with Annexure,” 27 Nov. 2003.

¹³⁵ Indictments for the *RUF*, *AFRC*, and *Taylor* trials all alleged that the accused participated in a common plan to “take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas.” *Taylor*, Original Indictment, ¶ 23; *AFRC*, Case No. SCSL-2004-16-PT, “Indictment,” 5 Feb. 2004, ¶ 33 (common purpose to “take any actions to gain and exercise political power and control over the territory of Sierra Leone,”); *RUF*, Case No. SCSL-04-15-PT, “Corrected amended consolidated indictment,” 2 Aug. 2006, ¶ 36 (common purpose to “take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas”).

¹³⁶ *AFRC Trial Judgment*, ¶ 85.

¹³⁷ *Id.* at ¶ 81.

¹³⁸ *AFRC*, Case No. SCSL-04-16-PT, “Decision and order on Defence preliminary motion on defects in the form of the indictment,” 1 April 2004, ¶¶ 51-52.

¹³⁹ *AFRC* Trial Judgment, ¶ 67.

¹⁴⁰ *Id.*, citing *Prosecutor v. Kallon and Kamara*, Case No. SCSL-2004-15-AR72(E)/ SCSL-2004-16-AR72(E), “Decisions on challenge to jurisdiction: Lomé Accord Amnesty,” ¶ 20.

¹⁴¹ *AFRC* Trial Judgment, ¶ 71.

¹⁴² *Id.* at ¶ 74.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at ¶ 76.

¹⁴⁵ *Id.* at ¶ 79.

¹⁴⁶ *Id.* at ¶¶ 79 - 80.

¹⁴⁷ *Id.* at ¶ 76.

¹⁴⁸ *Id.*

¹⁴⁹ See e.g. *Taylor*, Case No. SCSL-03-01-378, “Urgent Defence motion regarding a fatal defect in the Prosecution’s second amended indictment relating to the pleading of JCE,” 14 Dec. 2007; *Taylor*, Case No. SCSL-03-01-446, “Consequential submission in support of urgent Defence motion regarding a fatal defect in the Prosecution’s second amended indictment relating to the pleading of JCE,” 31 March 2008.

¹⁵⁰ *Taylor*, Case No. SCSL-03-1-378, “Public urgent Defence motion regarding a fatal defect in the Prosecution’s second amended indictment related to the pleading of JCE,” 14 Dec. 2007.

¹⁵¹ *Taylor*, Case No. SCSL-03-1-446, “Consequential submission in support of urgent Defence motion regarding a fatal defect in the Prosecution’s second amended indictment related to the pleading of JCE,” 31 March 2008.

¹⁵² *Taylor*, Case No. SCSL-03-1-463, “Prosecution response to the Defence’s consequential submission regarding the pleading of JCE,” 10 April 2008.

¹⁵³ *Taylor*, Case No. SCSL-03-1-473, “Defence reply to Prosecution response to the Defence’s consequential submission regarding the pleading of JCE,” 15 April 2008, 5.

¹⁵⁴ *Taylor*, Case No. SCSL-03-01-752, “Decision on urgent Defence motion regarding a fatal defect in the Prosecution’s second amended indictment relating to the pleading of JCE,” 27 Feb. 2009 (Lussick, J., dissenting) [hereinafter “Trial Chamber JCE Decision”]; *Taylor*, Case No. SCSL-03-01-775, “Decision on ‘Defence notice of appeal and submissions regarding the majority decision concerning the pleading of JCE in the second amended indictment,’” 1 May 2009 [hereinafter “Appeals Chamber JCE Decision”].

¹⁵⁵ *Taylor*, Appeals Chamber JCE Decision, ¶ 15, citing *AFRC* Appeal Judgment, ¶ 76 (holding that the ultimate objective of the JCE and the means to achieve that objective constitute the common plan, design or purpose of the JCE).

¹⁵⁶ *AFRC* Appeals Judgment, ¶ 76.

¹⁵⁷ *Taylor*, Case No. SCSL-03-1-473, “Defence reply to Prosecution response to the Defence’s consequential submission regarding the pleading of JCE,” 15 April 2008, 5.

¹⁵⁸ *Taylor*, Trial Chamber JCE Decision; *Taylor*, Appeals Chamber JCE Decision.

¹⁵⁹ *Taylor*, Trial Chamber JCE Decision.

¹⁶⁰ *Taylor*, Second Amended Indictment, ¶ 33. Although similar language is used to plead JCE in other tribunals, this is a step back from the language of the original indictment, when the Prosecutor did plead specifically that Taylor was involved in a “joint criminal enterprise.” *Taylor*, Original Indictment.

¹⁶¹ *Taylor*, Original Indictment, c.f. *RUF*, Case No. SCSL-04-15-PT, “Corrected amended consolidated indictment,” 2 Aug. 2006; *AFRC*, Case No. SCSL-04-16-PT, “Further amended consolidated indictment,” 1 Feb. 2005

¹⁶² *Taylor*, Original Indictment, ¶ 23.

¹⁶³ *Id.* at ¶ 20; see *RUF* Indictment ¶¶ 36-37; *AFRC* Indictment ¶¶ 33-34.

¹⁶⁴ *Taylor*, Original Indictment, ¶¶ 25-26.

¹⁶⁵ *Taylor*, Case No. SCSL-01-03-74, “Amended indictment and case summary accompanying the amended indictment,” 16 March 2006, ¶ 5; Second Amended Indictment, ¶ 5. The absence of the words “joint criminal enterprise” does not mean the indictment is defective. ICTY and ICTR jurisprudence provides that “joint criminal enterprise,” “common purpose,” and “criminal enterprise” can be used interchangeably, and that other phrases could also be used. *Gacumbitsi v. the Prosecutor*, Case No. ICTR-2001-64-A (Appeals Chamber), “Judgment,” 7 July

2006, ¶ 165. “The question is not whether particular words have been used, but whether an accused has been meaningfully ‘informed of the nature of the charges’ so as to be able to prepare an effective defence.” *Id.*

¹⁶⁶ *Taylor*, SCSL-03-01-PT-75, “Amended indictment and case summary accompanying amended indictment,” 16 March 2006, Case Summary, ¶ 42.

¹⁶⁷ *Id.*

¹⁶⁸ *Taylor*, Pre-Trial Brief, ¶ 6.

¹⁶⁹ *Taylor*, Original Indictment, ¶ 30. The indictment alleges that attacks against the Sierra Leonean civilians “were carried out primarily to terrorize the civilian population [and] were used to punish the population for failing to provide sufficient support to the AFRC/RUF, or for allegedly providing support to the Kabbah government or government forces.” *Id.*

¹⁷⁰ *Taylor*, Trial Transcript, 4 June 2007, 32 (lines 12 – 32).

¹⁷¹ *Taylor*, Trial Transcript, 4 June 2007, 32 (lines 17-21). The common plan took on a few different forms in the opening statement: of taking control of Sierra Leone by a campaign of terror, at 34 (lines 10-11); a plan formulated in Libya in 1988 – 1989 to “take over political and physical control of Sierra Leone in order to exploit its abundant natural resources and to establish a friendly or subordinate government there to permit—to facilitate this exploitation,” at 41 (lines 13-16); “the common plan to take over the political control of Sierra Leone,” at 70 (lines 6-7).

¹⁷² *Taylor*, SCSL-03-01-PT-75, “Amended indictment and case summary accompanying amended indictment,” 16 March 2006, Case Summary, ¶ 42.

¹⁷³ *Taylor*, Case No. SCSL-03-1-463, “Prosecution response to the Defence’s consequential submission regarding the pleading of JCE,” 10 April 2008, ¶ 19.

¹⁷⁴ *Taylor*, Trial Chamber JCE Decision.

¹⁷⁵ *Id.* at ¶ 71.

¹⁷⁶ *Id.*

¹⁷⁷ *Taylor*, Case No. SCSL-03-01-751, “Decision on public urgent Defence motion regarding a fatal defect in the Prosecution’s second amended indictment relating to the Pleading of JCE—Dissenting opinion of Justice Richard Lussick,” 27 Feb. 2009, ¶ 11 [hereinafter “Justice Lussick’s Dissent on JCE”].]

¹⁷⁸ *Id.* at ¶ 12.

¹⁷⁹ *Id.* at ¶ 15.

¹⁸⁰ *Id.* at ¶ 24.

¹⁸¹ *Taylor*, Case No. SCSL-03-01-767, “Defence notice of appeal and submissions regarding the majority decision concerning the pleading of JCE in the second amended indictment,” 26 March 2009.

¹⁸² *Taylor*, Trial Transcript, 9 April 2009, 14 (lines 22-25).

¹⁸³ *Taylor*, Appeals Chamber JCE Decision, ¶ 25.

¹⁸⁴ *Id.* at ¶ 21.

¹⁸⁵ *Taylor*, Trial Transcript, 4 May 2009, 15-6 (lines 25-9, 1).

¹⁸⁶ *RUF* Judgment, ¶ 372.

¹⁸⁷ *Id.* at ¶ 373.

¹⁸⁸ *Id.* at ¶¶ 374, 376.

¹⁸⁹ Sesay appealed this decision on the grounds that he was prejudiced by waiting until the Judgment to inform the parties that the Court would not rely on the Notice Concerning Joint Criminal Enterprise because he had prepared his case as though the Court would rely on the Notice. The Appeals Chamber dismissed this ground of appeal, holding that Sesay had failed to show any prejudice that could have resulted from the Trial Chamber’s reliance on the Indictment rather than the Notice. *RUF* Appeals Judgment, ¶¶ 105 – 110.

¹⁹⁰ *Taylor*, Justice Lussick’s Dissent on JCE, ¶ 12.

¹⁹¹ See *Galić* Appeals Judgment, ¶¶ 102-104.

¹⁹² *AFRC* Trial Judgment, ¶ 667.

¹⁹³ *Id.* at ¶ 668 (citing *Galić* Appeals Judgment, ¶ 102).

¹⁹⁴ *AFRC* Trial Judgment, ¶ 669.

¹⁹⁵ *Id.* (citing *Galić* Appeals Judgment, ¶ 104).

¹⁹⁶ For example, someone may have had the intent to kill a civilian while committing murder, but this murder could also be considered an act of terrorizing the civilian population if it was done with the primary goal of spreading fear. This will be harder to establish with crimes such as enslavement, sex-based crimes, or the use of child soldiers, which may not have been committed with the primary purpose of spreading fear. See discussion *infra*, at notes 199 to 201 and surrounding text.

¹⁹⁷ *Taylor*, Case No. SCSL-03-01-327, “Prosecution notification of filing of amended case summary,” 3 Aug. 2007, ¶ 43.1-43.2.

¹⁹⁸ *Id.* This argument in the alternative relegates the majority of the counts to the “extended form” of JCE liability, the most far-reaching form of the doctrine. It is not clear whether the Prosecution will follow this breakdown of crimes under JCE I and JCE III in its final arguments, given the change in the common purpose it must now prove. A close examination of the charges against Taylor is necessary to demonstrate how they may fit into the common purpose of terrorizing the civilian population.

¹⁹⁹ *RUF Trial Judgment*, ¶ 1981-1982. The Court explained, “The means to terrorise the civilian population included unlawful killings (Counts 3 to 5), sexual violence (Counts 6 to 9), and physical violence (Counts 10 to 11). Additional criminal means to achieve the common purpose included the enlistment, conscription and use of Child Soldiers (Count 12) as a mean to enforce the military components of the AFRC/RUF forces in order to assist in specific military operations; forced labor of civilians (Count 13) to perform farming, logistical chores or diamond mining which was necessary for the furtherance of the common purpose. In addition, the practice of pillage (Count 14) was endorsed and ordered or tolerated by senior RUF Commanders in order to serve as compensation to satisfy their fighters, and thereby furthered the common purpose, as it ensured the willingness of the troops to fight. The punishment of the civilian population for their alleged support of opposing forces was also a means to further the joint criminal enterprise. The Chamber, therefore, finds that the crimes charged under Counts 1 to 14 were within the joint criminal enterprise and intended by the participants to further the common purpose to take power and control over Sierra Leone.” *Id.* at ¶ 1982.

²⁰⁰ *AFRC Trial Judgment*, ¶¶ 1450, 1454, and 1459.

²⁰¹ *RUF Trial Judgment*, ¶¶ 1346-1352. The Trial Chamber held that “because of the consistent pattern of conduct demonstrated in the exercise of the sexual violence the above findings of sexual slavery and ‘forced marriage’ were committed with the requisite and specific intent to terrorise the civilian population,” *Id.* at ¶ 1356. Regarding rape, it found that the “public nature of the crimes was a deliberate tactic on the part of the perpetrators to instill fear into the civilians.” *Id.* at ¶ 1355. This was upheld on *RUF Appeal Judgment*, *id.* at ¶ 1105. *C.f.* *AFRC Trial Judgment*, ¶ 1459 (holding that “the primary purpose behind commission of sexual slavery was not to spread terror among the civilian population, but rather was committed by the AFRC troops to take advantage of the spoils of war, by treating women as property and using them to satisfy their sexual desires and other conjugal needs”). On appeal of this holding, the Appeals Chamber held that “The Appeals Chamber is of the opinion that the Prosecution’s attempt to search for further acts of terrorism by adding the three enslavement crimes to this list is an unnecessary exercise since the Appellants have already been convicted of acts of terrorism and an adequate sentence has been imposed.” *AFRC Appeals Judgment*, ¶ 172.

²⁰² See *e.g.* Rules, Rule 75.

²⁰³ The Prosecution had applied for and been granted a rescission of protective measures for Alex Tamba Teh, TF1-015; Varmuyan Sherif, TF1-406; and Abu Keita, TF1-276. TF1-371 was the ninth Prosecution witness, called on Jan. 24, 2008. TF1-371’s testimony also highlighted difficulties with using the courtrooms at the ICC. As was normal for trials in Freetown, Presiding Justice Doherty ordered that the public gallery remain open for the testimony, with the witness shielded from view and no sound or audio feed in the public gallery. This procedure in Freetown allowed the public to watch the proceedings silently, mitigating some of the loss of transparency caused by the closed sessions. The ICC was unable to comply with this order, and instead barred anyone from entering the public gallery during closed testimony. This has remained the practice for the duration of the trial, making it more difficult to monitor the proceedings during closed sessions.

²⁰⁴ Rules, Rule 75(F) of the Rules of Procedure and Evidence.

²⁰⁵ *Taylor*, Trial Transcript, 24 Jan. 2008, 81 (lines 21 – 29); 82 (lines 1 – 10).

²⁰⁶ Taylor’s public trial rights are provided for in Article 17(2) of the Statute and Rules 26*bis* and 78 of the Rules of Procedure and Evidence. The Court’s obligations to witness protection are found in Rules 75(A) and 79(A)(ii).

²⁰⁷ *Taylor*, Case No. SCSL-03-01-427, “Decision on confidential Prosecution motions SCSL-03-01-372 and SCSL-03-01-385 for the testimonies of witnesses to be held in closed session,” 26 Feb. 2008, 6.

²⁰⁸ *Id.*

²⁰⁹ *Taylor*, Case No. SCSL-03-01-437, “Decision on confidential Prosecution motion for additional protective measures for the trial proceedings of witnesses TF1-515, 516, 385, 539, 567, 388, and 390,” 13 March 2008, 4. The Court ordered that the two witnesses testify behind a screen, with image and voice distortion, and with limited closed sessions when necessary to prevent the witnesses’ identities from becoming known. The Prosecution cited the witnesses’ subjective and objective safety concerns and that as “insider” witnesses with unique roles and responsibilities during the conflict, they would be more likely to be recognized by other RUF, AFRC or others closely associated with Taylor. *Taylor*, Case No. SCSL-03-01-413, “Defence response to the public Prosecution motion for additional protective measures for the trial proceedings of witnesses TF1-515, 516, 385, 539, 567, and 390,” 8 Feb. 2008, ¶ 21. Due to the confidential nature of the Prosecution’s original motion, the author could not review the particular considerations of the Prosecution. Witness TF1-390 ultimately did not testify in the *Taylor* trial.

²¹⁰ *Taylor*, Case No. SCSL-03-01-427, “Decision on confidential Prosecution motions SCSL-03-01-372 and SCSL-03-01-385 for the testimonies of witnesses to be held in closed session,” 26 Feb. 2008; *Taylor*, Case No. SCSL-01-437, “Decision on confidential Prosecution motion for additional protective measures for the trial proceedings of witnesses TF1-515, 516, 385, 539, 567, 388, and 390,” 13 March 2008, 4.

²¹¹ Eric Witte, “Trial Report, February-March 2008,” Open Society Justice Initiative, charlestaylortrial.org, 4. Notably, the Court also struck down a Prosecution request to keep exhibits entered into evidence during testimony confidential. The Prosecution argued that certain exhibits contain identifying information that could put witnesses at risk. The Defense objected, arguing that the trial must remain public and that ruling in favor of the Prosecution on this issue would infringe on Taylor’s fair trial rights. The Court denied the Prosecution’s request, noting that the particular exhibits in question did not specifically identify witnesses, and therefore posed no security risk to the witnesses. As such, the exhibits remained public. *Id.* at 4-5.

²¹² *Taylor*, Case No. SCSL-03-1-T, “Decision on confidential Prosecution motions SCSL-03-01-372 and SCSL-03-01-385 for the testimonies of witnesses to be held in closed session,” 26 Feb. 2008. The Court based its decision on the fact that the Prosecution had failed to detail protections other than closed sessions that could adequately protect the witness, but did not specify why those other techniques would be adequate. *Id.* at 6. *See Taylor*, Case No. SCSL-03-01-318, “Decision on the confidential Prosecution motion to rescind and augment protective measures for witnesses,” 16 July 2007, 3. The Court, applying the same rationale, denied closed sessions for TF1-406, TF1-546, TF1-548; *Taylor*, Case No. SCSL-03-01-551, “Decision on Defence motion pursuant to Rule 75 (G) to rescind closed session protective measures granted orally in other proceedings for witness TF1-366,” 2 July 2008. The Court granted the Defense motion to rescind an oral decision in the *RUF* trial to grant witness TF1-366 closed session testimony; the Prosecution did not oppose the motion. *Id.* at 3. *See also Taylor*, SCSL-03-01-615, “Decision on confidential Prosecution motion for additional protective measures for witness TF1-395,” 3 Oct. 2008 (denying additional protective measures including potential closed sessions because the Prosecution did not provide evidence demonstrating the witness needed additional protective measures).

²¹³ Witnesses TF1-338, TF1-366, TF1-390, TF1-395, TF1-542, TF1-546, TF1-555.

²¹⁴ *Taylor*, Trial Transcript, 24 Jan. 2008, 4 (lines 8-10).

²¹⁵ *RUF*, Case No. SCSL-04-15-PT-180, “Decision on prosecution motion for modifications of protective measures for witnesses,” 5 July 2004.

²¹⁶ *Id.* at 15 – 16 (referring to measures (a), (b), and (e)).

²¹⁷ *Id.* at 16 (referring to measures G, H, and I).

²¹⁸ *Taylor*, Case No. SCSL-03-01-AR73-666, “Appeal Chamber decision on Prosecution appeal regarding the decision convening protective measures of witness TF1-062,” 13 Nov. 2008, ¶ 8.

²¹⁹ *Id.* The Prosecution relied on the 25 April 2004 Prosecution Disclosure Materials in which it listed 266 witnesses of fact; the Prosecution argued that this list was incorporated by reference into the July 2004 decision, and that therefore the July 2004 decision applied to all 266 witnesses of fact, not just the eighty-seven specified in that decision as Category A, B or C. *Id.*

²²⁰ The Court said “After careful consideration of that decision and the submissions of counsel we find nothing in the decision which would entitle witness TF1-215 to any protective measures. In our view the decision relates solely to those witnesses listed in Annexes A and B of the renewed Prosecution motion for protective measure. Witness TF1-215 is not among those witnesses listed in the Annexes. Accordingly, the witness will testify in open court.” *Taylor*, Trial Transcript, 6 May 2008, 9122-9123 (lines 23-2).

²²¹ *Taylor*, SCSL-03-01-605, “Public with confidential authorities Prosecution notice of appeal and submissions regarding the decision concerning protective measures for witness TF1-215,” 23 Sept. 2008.

²²² Rules, Rule 75(F)(i). This rule states that “Once protective measures have been ordered in respect of a witness or victim in any proceedings before the Special Court (the “first proceedings”), such protective measures: (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Special Court (the “second proceedings”) unless and until they are rescinded, varied or augmented [. . .].” *Id.*

²²³ Given the Court’s position on protective measures, a potential motivation for these rescissions could have been to speed up the trial and avoid potential delays from legal arguments over witness protection. However, when asked why the witnesses began requesting rescission of protective measures, the Court maintained that it was completely at the discretion of the witness to testify openly. Registrar Herman von Hebel said WVS and the Prosecution hold discussions with each witness just prior to their testimony, in which threat and security assessments are made. He said “these discussions are not to put any pressure on witnesses; it is just to assess the situation. It remains with the witness to take a final decision in full freedom whether or not to testify in public.” While he could not give details about specific threats received by witnesses, von Hebel suggested that linkage witnesses who were close to Taylor may face more serious threats to their safety, or the safety of their family, or to the opportunity to fully function in society after the testimony. Email from Registrar, *supra* note 71.

²²⁴ *Taylor*, Case No. SCSL-03-01-721, “Decision on Prosecution notice of appeal and submissions concerning the decision regarding the tender of documents,” 6 Feb. 2009.

²²⁵ *Taylor*, Case No. SCSL-03-01-AR73-666, “Decision on Prosecution appeal regarding the decision concerning protective measures of witness TF1-062,” (Appeals Chamber) 13 Nov. 2008, ¶ 30.

²²⁶ *Id.* at ¶ 31.

²²⁷ *Id.* (“Although the consultation provided by Rule 75(H) is in fact precatory, use of the procedure would certainly have been prudent, and perhaps expected [. . .]. As a consequence of not consulting with Trial Chamber I, the Trial Chamber’s erroneous construction of the RUF Protective Measures Decision [. . .] may have adversely affected the protective measures ordered for as many as 20 witnesses”).

²²⁸ *Taylor*, Case No. SCSL-03-1-T, “Decision on confidential urgent motion to mark as ‘confidential’ material introduced through any witness testifying in closed session, and in particular material introduced through TF1-371, and decision on confidential urgent Prosecution motion to mark as ‘confidential’ material introduced through TF1-371,” 16 April 2008. See WCSC Taylor Trial Report for April for more information. This motion came after a February oral decision holding the same.

²²⁹ April Trial Report, *infra* note 359, 4.

²³⁰ Trial Transcripts for this day are not publically available. For a discussion of the issue, see *id.* See also charlestaylortrial.org, “Prosecution Witness Describes Threats against Him and his Family in Sierra Leone; Cross-examination Continues,” April 28, 2008; available at <http://www.charlestaylortrial.org/2008/04/28/after-announcing-threats-to-him-and-his-family-in-sierra-leone-cross-examination-of-former-afrc-commander-continues/>.

²³¹ Kendall, *supra* note 229, 4.

²³² BBC, “‘Death Threats’ over Taylor trial,” Jan. 25, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7208497.stm>.

²³³ For example, the June Taylor trial report noted: “Concerns arose regarding potential exposure of the identity of Witness TF1-590, who claimed to have been tortured by Taylor’s son Chucky and who may testify in a case in the United States. Under cross-examination defense counsel pointed out the witness’s lawyer in the public gallery and noted the country where the lawyer is from and where the witness is currently residing. Counsel also noted that he had received an email during the course of cross-examination indicating that others outside the court may be aware of the witness’s identity. The court went briefly into closed session to discuss the contents of the email.” June Trial Report, *infra* note 364, 3.

²³⁴ *Taylor*, SCSL-03-01-714, “Defence motion for the disclosure of the identity of a confidential ‘source’ raised during cross-examination of TF1-355,” 23 Jan. 2009, ¶¶ 11 – 15.

²³⁵ *Id.* at ¶¶ 16 – 18.

²³⁶ *Id.* at ¶¶ 19 – 24.

²³⁷ *Id.* at ¶¶ 25 – 26.

²³⁸ *Id.* at ¶¶ 27 – 30. Rule 66 provides the rules for the Prosecution’s disclosure of materials to the Defense. Rules, Rule 66.

²³⁹ *Taylor*, SCSL-03-01-719, “Prosecution response to defence motion for disclosure of the identity of a confidential source raised during cross-examination of TF1-355,” 5 Feb. 2009, ¶¶ 4 – 7.

²⁴⁰ *Id.* at ¶¶ 9 – 18.

²⁴¹ *Id.* at ¶¶ 21 – 27.

²⁴² *Taylor*, Case No. SCSL-03-01-759, “Decision on Defence motion for the disclosure of the identity of a confidential ‘source’ raised during cross-examination of TF1-355,” 6 March 2009. After the Defense filed its motion, a group of three international organizations filed for leave to submit an amicus brief. *Taylor*, SCSL-03-01-718, “Application for leave to file an amicus brief on confidential source issues raised during the cross-examination of witness TF1-355,” 3 Feb. 2009 [hereinafter “Application for Amicus Brief”]. The application, filed by Article 19, Privacy International, and the Media Legal Defence Initiative, sought to provide legal background in response to Defense arguments. *Taylor*, Application for Amicus Brief, ¶ 10. The application was made pursuant to Prosecution enquiries about whether any non-governmental organizations would be interested in filing such an application. The Court denied the application, stating it was “neither necessary nor desirable for the Trial Chamber to hear from the Applications in order to properly determine the Defence Motion.” *Taylor*, SCSL-03-1-725, “Decision on application for leave to file an amicus brief on confidential source issues raised during the cross-examination of witness TF1-355,” 9 Feb. 2009, 2.

²⁴³ *Taylor*, Case No. SCSL-03-01-759, “Decision on Defence motion for the disclosure of the identity of a confidential ‘source’ raised during cross-examination of TF1-355,” 6 March 2009, ¶¶ 28-33.

²⁴⁴ *Id.* at ¶¶ 24-25.

²⁴⁵ *Id.* at ¶ 25.

²⁴⁶ *Id.* at ¶ 29, citing Prosecutor v. Brima et al, SCSL-04-16-AR73 (Appeals Chamber), “Decision on Prosecution appeal against decision on oral application for witness TF1-150 to testify without being compelled to answer questions on grounds of confidentiality,” 26 May 2006, Separate and Concurring Opinion of Hon. Justice Geoffrey Robertson, QC, ¶ 33.

²⁴⁷ *Taylor*, Case No. SCSL-03-01-759, “Decision on Defence motion for the disclosure of the identity of a confidential ‘source’ raised during cross-examination of TF1-355,” 6 March 2009, ¶ 32, citing Prosecutor v. Brđanin ICTY-IT-99-36-AR73.9 (Appeals Chamber), “Decision on interlocutory appeal,” 11 Dec. 2003, ¶¶ 39-40.

²⁴⁸ Rules, Rule 85(D). *Taylor*, SCSL-03-1-PT, “Decision on Prosecution motion to allow witnesses to give testimony by video-link,” SCSL-03-1-PT, 30 March 2007.

²⁴⁹ Rules, Rule 92bis.

²⁵⁰ See, e.g., *Taylor*, SCSL-03-01-598, “Defence objection to ‘Prosecution notice under Rule 92bis for the admission of evidence related to inter alia Kono District – TF1-195, TF1-197, TF1-198 & TF1-206 and other ancillary relief,’” 17 Sept. 2008.

²⁵¹ The specific portions of testimony the Defense objected to were included in a confidential Annex to the motion, and therefore it was not possible to determine the extent of the testimony the Defense claimed went to the acts and conduct of Taylor. See *id.*

²⁵² *Taylor*, SCSL-03-01-601, “Prosecution reply to ‘Public with confidential Annex X Defense objection to ‘Prosecution notice under Rule 92bis for the admission of evidence related to inter alia Kono District,’” 22 Sept. 2008, ¶ 6.

²⁵³ *Id.*

²⁵⁴ *Taylor*, SCSL-03-1-556, “Decision on Prosecution notice under Rule 92bis for the admission of evidence related to *inter alia* Kenema District and on Prosecution notice under Rule 92bis for the admission of the prior testimony of TF1-036 into evidence,” 15 July 2008, 4 (internal citations omitted).

²⁵⁵ *Id.*

²⁵⁶ *Id.* Rules, Rules 26*bis* and 54. Rule 26*bis* provides that “The Trial Chamber and Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with [. . .] full respect for the rights of the accused and due regard for the protection of victims and witnesses.” Rule 54 provides that “[. . .] of its own motion, a Judge or Trial Chamber may issue such orders [. . .] as may be necessary for the [. . .] conduct of the trial.”

²⁵⁷ *Taylor*, SCSL-03-1-556, “Decision on Prosecution notice under Rule 92*bis* for the admission of evidence related to *inter alia* Kenema District and on Prosecution notice under Rule 92*bis* for the admission of the prior testimony of TF1-036 into evidence,” 15 July 2008, 4 (internal citations omitted).

²⁵⁸ See, e.g., *id.*; *Taylor*, SCSL-03-01-644, “Decision on public with confidential Annexes A to D & F to G Prosecution notice under Rule 92*bis* for the admission of evidence related to *inter alia* Freetown & Western Area – TF1-098, TF1-104 and TF1-227,” 21 Oct. 2008.

²⁵⁹ Patricia M. Wald, “Tyrants on Trial: Keeping Order in the Courtroom,” Open Society Justice Initiative, 10 (2009).

²⁶⁰ Wald, *supra* note 259, 24.

²⁶¹ Wald, *supra* note 259, 24.

²⁶² This is the administrative plan that deals with the closing of the Court and winding down of core and non-core activities. The latest report on the SCSL completion strategy can be found at <http://www.scs-l.org/LinkClick.aspx?fileticket=yiUyKldB3OY%3d&tabid=176> (last accessed Feb. 5, 2010).

²⁶³ Email from Herman von Hebel, Jan. 25, 2010.

²⁶⁴ Michelle Staggs and Sarah Kendall, “Interim Report on the Special Court for Sierra Leone,” War Crimes Studies Center (2005), 26 – 27; see also Antonio Cassese, “Independent Expert Report on the Special Court for Sierra Leone,” 12 Dec. 2006, Section IV.

²⁶⁵ Michelle Staggs and Sarah Kendall, “Interim Report on the Special Court for Sierra Leone,” War Crimes Studies Center (2005), 26 – 27; see also Antonio Cassese, “Independent Expert Report on the Special Court for Sierra Leone,” 12 Dec. 2006, Section IV. Thierry Cruvellier, *From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test* (2009), International Center for Transitional Justice and Sierra Leone Court Monitoring Programme, 21-22; Human Rights Watch “Bringing Justice: The Special Court for Sierra Leone,” 7 Sept. 2004, Section III.

²⁶⁶ See, e.g. WCSC report from January regarding the problem with closed sessions and audio/visual, *infra* note 354. Then-Registrar Robin Vincent also noted that there were some initial problems working with the ICC court staff, but that these were remedied early on. It is notable that in the Trial Chamber in the ICC’s first case has also experienced technical and logistical problems with courtroom operation. See Jennifer Easterday, “Witness Protection: Successes and Challenges in the Lubanga Trial,” June 26, 2009, available at <http://www.lubangatrial.org/2009/06/26/witness-protection-successes-and-challenges-in-the-lubanga-trial/>.

²⁶⁷ Normally there is no afternoon session on Fridays.

²⁶⁸ See Jennifer Easterday, “Special Report on Rule 98 Pleadings in the Prosecutor v. Charles Taylor: Defense Motion for Acquittal on Basis of Insufficient Evidence,” War Crimes Studies Center, July 3, 2009. That report concludes that the Trial Chamber missed a valuable opportunity to focus the Defense case by limiting its decision to just the issue of joint criminal enterprise.

²⁶⁹ This period approximately captures the timeframe of motions submitted during the Prosecution’s case-in-chief.

²⁷⁰ Fourteen decisions took 2 – 3 months; 6 took 3 – 4 months, 4 took 4 – 5 months, and 5 decisions took 6 – 12 months.

²⁷¹ *Taylor*, SCSL-03-01-717, “Decision on Prosecution request to withdraw application for leave to appeal oral decisions regarding allowing questions concerning the location of the family of a witness and failing to order redaction of the locations,” 2 Feb. 2009 (noting that the motion was withdrawn and the issue moot; decision took eight months and twenty-two days); *Taylor*, SCSL-03-01-722, “Decision on motion for disclosure of evidence underlying prejudicial statements made by the Chief Prosecutor, Mr. Stephen Rapp, to the Media,” 6 Feb. 2009 (decision took eight months and twelve days); *Taylor*, SCSL-03-01-724, “Decision on Prosecution motion for admission of documents pursuant to rule 89(c),” 9 Feb. 2009 (decision took eight months and seven days); *Taylor*, SCSL-03-01-735, “Decision on confidential Defence application for disclosure of documents in the custody of the Prosecution pursuant to Rule 66 and Rule 68,” 18 Feb. 2009 (decision took seven months and thirteen days).

²⁷² *Taylor*, Case No. SCSL-03-01-751, “Decision on Defence application to exclude the evidence of proposed Prosecution witness Corinne Dufka, or, in the alternative, to limit its scope and on urgent Prosecution request for decision,” 19 June 2008, 3. The motion to exclude was actually filed in late January. *Taylor*, Case No. SCSL-01-03-402, “Defense application to exclude the evidence of proposed Prosecution expert witness Corinne Dufka or, in the alternative, to limit its scope,” 28 Jan. 2008.

²⁷³ *Taylor*, Case No. SCSL-03-01-751, “Decision on Defence application to exclude the evidence of proposed Prosecution witness Corinne Dufka, or, in the alternative, to limit its scope and on urgent Prosecution request for decision,” 19 June 2008, 12.

²⁷⁴ *Taylor*, SCSL-03-01-751, “Decision on public urgent Defence motion regarding a fatal defect in the Prosecution’s second amended indictment relating to the pleading of JCE,” 27 Feb. 2009.

²⁷⁵ See *supra* Section IV.B.1 for a thorough discussion of this issue.

²⁷⁶ Antonio Cassese, “Report on the Special Court for Sierra Leone: Submitted by the Independent Expert Antonio Cassese,” Dec. 12, 2006, 17 [hereinafter “Cassese Report”]. He noted that delays in decisions from Trial Chamber I were understandable while they were hearing two cases simultaneously. *Id.* This underscores the slowness of Trial Chamber II in the *Taylor* case, given that Trial Chamber II is currently only hearing one case, with only one defendant. See also Human Rights Watch, “Bringing Justice: the Special Court for Sierra Leone,” Sept. 7, 2004, Section III.B.

²⁷⁷ Cassese report, *supra* note 276, 17.

²⁷⁸ Notably, although the motion practice in these cases was significantly better than in the *Taylor* trial, it was bad enough to prompt criticism from Cassese. Cassese report, *supra* note 276, 17.

²⁷⁹ *RUF*, SCSL-04-15-665, “Decision on Defence application for review of the Registrar’s decision on the Sesay Defence ‘exceptional circumstances’ motion,” 15 Nov. 2006, (six months and twelve days); *RUF*, SCSL-04-15-610, “Decision on Sesay Defence motion to direct the Prosecution to investigate the matter of false testimony by Witness TF1-366,” 25 July 2006 (six months).

²⁸⁰ Cassese report, *supra* note 276, Annex, for *RUF*, *CDF* and *AFRC* cases for 3 June 2004 – 27 Oct. 2006, compared to *Taylor* trial data from court records, from July 3, 2007 until March 23, 2009 (with the exception of the *Taylor*, Case No. SCSL-03-01-764, “Decision on Defence application for leave to appeal the decision on urgent Defence motion regarding a fatal defect in the Prosecution’s second amended indictment relating to the pleading of JCE,” 18 March 2009, that dealt with a motion filed after the Prosecution rested its case).

²⁸¹ See Human Rights Watch, “Bringing Justice: the Special Court for Sierra Leone,” *supra* note 276, Section III.C.

²⁸² *Id.*

²⁸³ *Taylor*, Trial Transcript, 30 Sept. 2008, 97-98 (lines 4 -29, 1-15).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ See Jennifer Easterday, Charles Taylor Trial Report, Oct. 2008, 8; Human Rights Watch, “Bringing Justice: the Special Court for Sierra Leone,” *supra* note 276, Section III.C.

²⁸⁷ *Taylor*, SCSL-03-01-T, Trial *Taylor*, Trial Transcript, 30 Sept. 2008, 97-98 (lines 4 -29, 1-15).

²⁸⁸ Human Rights Watch, “Bringing Justice: the Special Court for Sierra Leone,” *supra* note 276, ¶¶ 122 – 123.

²⁸⁹ Human Rights Watch noted that “While the bench and the prosecution do not ask to see injuries in every instance when an amputee or scarred witness testifies, it has become a fairly common practice at the court.” *Id.* at ¶ 123. In the *Taylor* trial, the bench asked to see injuries in nearly every instance.

²⁹⁰ See Testimony of TF1-097, *Taylor*, Trial Transcript, 17 Oct. 2008, 34-35.

²⁹¹ Schauer, Elisabeth, Ph.D. “The Psychological Impact of Child Soldiering,” 24 Feb. 2009, 34-38.

²⁹² Wald, *supra* note 259, 22, 25.

²⁹³ *Id.* at 25-26.

²⁹⁴ *Taylor* is accused of individual criminal responsibility under Article 6.1 for planning, instigating, ordering, committing, aiding and abetting, or through his participation in a JCE. Second Amended Indictment, ¶ 33. Under Article 6.3, *Taylor* is accused of responsibility for the crimes based on command responsibility. *Id.* at ¶ 34.

²⁹⁵ See Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao (*RUF* case), Case No. 04-15-A, “Judgment,” (Appeals Chamber) 26 Oct. 2009 [hereinafter “*RUF* Appeals Judgment”]; Prosecutor v. Brima, Kamara and Kanu, SCSL-2004-16-A, “Judgment,” (Appeals Chamber) 22 Feb. 2008 [hereinafter “*AFRC* Appeals Judgment”].

²⁹⁶ Two crime-base witnesses, TF1-081 and TF1-169 were admitted under Rule 92*bis*. TF1-021 and TF1-083, also crime-base witnesses, were admitted under Rule 92*quarter*. Two expert reports were admitted without the need to call thee expert to the stand, meaning the Court received evidence from a total 97 witnesses. Furthermore, four of the crime-base witnesses, Corinne Dufka, Hassan Bility, Stephen Smith, and Tariq Malik, were originally categorized as “factual witnesses” until upon requesting clarification on the status of these witnesses, the OTP indicated that they should be counted as crime-base witnesses.

²⁹⁷ TF1-081 and 169 had testimony introduced under Rule 92*bis*. Witnesses TF1-021 and TF1-083 had testimony introduced under Rule 92*quarter*. All were crime-base witnesses. Email from OTP, Aug. 13, 2009.

²⁹⁸ The Prosecution spent 382 hours and 30 minutes with linkage witnesses, and 116 hours and 41 minutes with crime-base witnesses. Calculations based on data from SCSL Registry, included as Annex B.

²⁹⁹ Thirty-four percent. *Id.*

³⁰⁰ Seventy percent of the Prosecution’s case, 76 percent of the time the Defense’s cross-examination, and 73 percent of the total. *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ Staggs, Second Interim Report, *supra* note 20 at 6.

³⁰⁷ From 7 March 2005 to 7 Nov. 2005.

³⁰⁸ The Defense case for all three Accused combined took 4 months and 3 weeks (5 June 2006 – 24 Oct. 2006), included 87 witnesses, and 270 hours and 56 minutes of testimony. Data from the SCSL Registrar.

³⁰⁹ From 5 July 2004 until 2 Aug. 2006. The length of this trial is due in part to Trial Chamber I’s schedule of hearing *RUF* and *CDF* sessions in alternating periods for the first year of the *RUF* trial.

³¹⁰ Data from the SCSL website. There was no data on the hours of testimony available for the *RUF* or *CDF* trials.

³¹¹ Direct examination of linkage witnesses took only 2.79 times longer than of crime-base witnesses. *See supra* note 298 and surrounding text.

³¹² See a full discussion of this issue below in Section IV.D.2.

³¹³ TF1-206, Alhaji Tejan Cole, spent seven minutes on direct examination, and six minutes on cross-examination.

³¹⁴ Calculations based on data from SCSL Registry.

³¹⁵ *Taylor*, SCSL-03-01-PT-227, “Joint filing by the Prosecution and Defence, admitted facts & law,” 26 April 2007.

³¹⁶ However, the only officially uncontested facts the parties could agree on were almost exclusively geographic and political in nature. *See id.*

³¹⁷ Indeed, the Prosecution told the Court “In terms of the crime-base evidence, the crime-base evidence of course is relevant because we’re required to prove the crime-base beyond a reasonable doubt, both the contextual elements and the underlying offences. We do not believe that we are obliged to call all crime-base witnesses live. And, indeed, if you look at our disclosure and you look at the materials you received as part of our pre-trial conference materials, you will note that we had approximately seventy-six witnesses we considered crime-base witnesses and we intended to call only ten witnesses live.” *Taylor*, Trial Transcript, 20 Aug. 2007, 30 (lines 17 – 29). The Prosecution went on to note that “we are of course, very happy to speak with the Defence to see if they will stipulate as to the crime-base and then to readjust our presentation accordingly. However, even when a crime-base is stipulated to, the Prosecution may provide the facts and circumstances surrounding the crimes that have been stipulated to. Otherwise, the Court has no basis to determine if the stipulation should be granted by this Court and they have no basis for understanding the environment and the circumstances in which these crimes were committed. So we do believe we would have a right to present at least some witnesses live, but we would also have the right, if there were stipulations, to present written statements or prior testimony so that your Honours would have the benefit of the facts and circumstances surrounding the commission of the crimes which bring us all here into court today.” *Taylor*, Trial Transcript, 20 Aug. 2007, 31 (lines 1 – 15).

³¹⁸ For a detailed description of this issue, see the discussion above on Rule 92*bis* in the Legal Developments Section.

³¹⁹ “Interview: Lead Defense Counsel Courtenay Griffiths Confirms Taylor Himself will Testify” Oct. 17, 2008, available at www.charlestaylortrial.org, posted Oct. 20, 2008.

³²⁰ Press Release by the Office of the Prosecutor, “Prosecutor Accuses Taylor Defence of Causing Hardship for Victim Witnesses,” Oct. 20, 2008, available at <http://www.sc-sl.org/Press/prosecutor-102008.pdf>.

³²¹ The Prosecution has a high burden of proof—it must prove beyond a reasonable doubt that the crimes alleged were committed and that these crimes were war crimes and crimes against humanity. For crimes against humanity, this means the Prosecution must prove that the crimes were committed against the civilian population and were widespread and systematic. Article 2, SCSL Statute.

³²² The Prosecution claimed that the Defense’s position on this issue “did not determine the number of witnesses we presented.” Email from OTP staff, Aug. 12, 2009.

³²³ Press Release by the Office of the Prosecutor, Prosecutor Accuses Taylor Defence of Causing Hardship for Victim Witnesses, Oct. 20, 2008, (“After the Defence demanded to question each of the crime base witnesses, the Prosecution has reduced the number of both ‘linkage’ and ‘crimes base’ witnesses in order to ensure that the trial is concluded within the available time and resources”); available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=EAwvJLPq0E%3d&tabid=196> (last accessed Feb. 5, 2010).

³²⁴ For a further discussion of the Prosecution’s decision to call a high number of crime-base witnesses, see *supra* Section IV.D.2.

³²⁵ Rules, Rule 94(A).

³²⁶ Rules, Rule 94(B) (“At the request of a party or of its own motion, a Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Special Court relating to the matter at issue in the current proceedings”).

³²⁷ *Id.*

³²⁸ *Taylor*, SCSL-03-01-PT-247, “Prosecution’s motion for judicial notice, 14 May 2007” 14 May 2007. The motion and its Annexes amounted to 2,129 pages, a size that the Trial Chamber considered “inordinate.” *Taylor*, SCSL-03-01-PT-254, “Decision on Defence motion pursuant to Rule 7bis seeking extension of time to respond to Prosecution’s motion for judicial notice,” 25 May 2007, 2.

³²⁹ *Taylor*, SCSL-03-01-PT-342, “Defence response to Prosecution’s motion for judicial notice,” 10 Sept. 2007, ¶ 15.

³³⁰ *Taylor*, SCSL-03-01-370 “Decision on the Prosecution motion for judicial notice, 7 Dec. 2007, ¶ 12, [hereinafter “Decision on Judicial Notice under 94(A)”] (citing Prosecutor v. Semanza, Case No. ICTR-97-20-T, “Decision on the Prosecutor’s motion for judicial notice and presumption of facts pursuant to Rules 94 and 54,” 3 Nov. 2000, ¶ 23). The Court also noted that this definition was applied in the *CDF* trial. *Taylor*, Decision on Judicial Notice under 94(A), ¶ 12.

³³¹ *Taylor*, Decision on Judicial Notice under 94(A), ¶ 13 (citing Prosecutor v. Norman et al, Case No. SCSL-04-14-AR73-398, “Fofana – decision on appeal against ‘Decision on Prosecution’s motion for judicial notice and admission of evidence,’” 16 May 2005, ¶ 28; Prosecutor v. Brima et al, Case No. SCSL-04-10-T, “Decision on the Prosecution motion for judicial notice and admission of evidence,” 25 Oct. 2005.)

³³² *Taylor*, Decision on Judicial Notice under 94(A), ¶ 14.

³³³ *Id.* at ¶¶ 17-21. Those facts judicially noticed are included below in Annex A.

³³⁴ *Id.* at Annex A.

³³⁵ *Id.*

³³⁶ The Prosecution submitted its motion on May 14, 2007. *Taylor*, Case No. SCSL-03-01-236, “Prosecution’s motion for judicial notice,” 14 May 2007. The *CDF* trial Chamber Judgment was rendered on Aug. 2, 2007 and the Appeals Judgment on May 28, 2008. The *AFRC* Trial Chamber Judgment was not rendered until June 20, 2007, and the Appeals Judgment on Feb. 22, 2008. The *RUF* Trial Chamber Judgment was rendered on Feb. 25, 2009, and the Appeals Judgment on 26 Oct. 2009. Data accessible on the SCSL website.

³³⁷ *Taylor*, SCSL-03-01-765, “Decision on Defence application for judicial notice of adjudicated facts from the *AFRC* Trial Judgment pursuant to Rule 94(B),” (Doherty, J., dissenting) 23 March 2009, ¶ 32 [hereinafter “Decision on Judicial Notice under 94(B)”].

³³⁸ *Taylor*, SCSL-03-01-723, “Defence application for judicial notice of adjudicated facts from the *AFRC* Trial Judgment pursuant to Rule 94(B),” 9 Feb. 2009.

³³⁹ Decision on Judicial Notice under 94(B), ¶ 2.

³⁴⁰ *Id.* at ¶ 8.

³⁴¹ *Id.* at ¶ 26 (citing Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-1184, “Decision on Sesay Defence application for judicial notice to be taken of adjudicated facts under Rule 94(B),” 23 June 2008, ¶ 19).

³⁴² *Taylor*, Decision on Judicial Notice under 94(B), ¶ 27.

³⁴³ *Id.* at ¶ 28.

³⁴⁴ *Id.* at Annex A.

³⁴⁵ *Taylor*, Case No. SCSL-03-01-738, “Prosecution response to Defence application for judicial notice of adjudicated facts from the ARFC Trial Judgment pursuant to Rule 94(B),” 19 Feb. 2009, ¶ 9.

³⁴⁶ Rules, Rule 94(B).

³⁴⁷ See Rules, Rule 73bis(C)-(G), Rule 73ter(C)-(E), Rule 90(F).

³⁴⁸ Prosecutor v. Fofana et al., SCSL-2004-14-A (Appeals Chamber), “Judgment,” 28 May 2008; AFRC Appeals Judgment (22 Feb. 2008); RUF Trial Chamber Judgment (25 Feb. 2009).

³⁴⁹ RUF Appeals Judgment (Oct. 26, 2009).

³⁵⁰ See *supra*, note 348.

³⁵¹ The Prosecution must prove that there was a “widespread or systematic attack against any civilian population,” Article 2, SCSL Statute.

³⁵² See e.g. Prosecutor v. Karemera et al., Case no. ICTR-98-44-AR73(c), “Decision on Prosecutor’s interlocutory appeal of decision on judicial notice,” 16 June 2006, ¶¶ 28-29; Prosecutor v. Semanza, Case No. ICTR-97-20-A (Appeals Chamber), “Judgement,” 20 May 2005, ¶ 192; Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-AR.73.1 (Appeals Chamber), “Decision on interlocutory appeals against Trial Chamber’s decision on Prosecution’s motion for judicial notice of adjudicated facts and Prosecution’s catalogue of agreed facts,” 26 June 2007. In the ICTY case, the Appeals Chamber noted “when an accused is charged with crimes committed by others, while it is possible to take judicial notice of adjudicated facts regarding the existence of such crimes, the actus reus and the mens rea supporting the responsibility of the accused for the crimes in question must be proven by other means than judicial notice. Thus, the Appeals Chamber sees no reason why judicial notice could not be taken of adjudicated facts providing evidence as to the existence of crimes committed by others and which the accused is not even charged with, as in the instant case, as long as the burden remains on the Prosecution to establish, by means other than judicial notice, that the accused had knowledge of their existence. The Appeals Chamber recalls, in this respect, that judicial notice of adjudicated facts “does not shift the ultimate burden of persuasion, which remains with the Prosecution” and that the facts “established under Rule 94(B) are merely presumptions that may be rebutted by the defence with evidence at trial,” *Milosević*, “Decision on interlocutory appeals against Trial Chamber’s decision on Prosecution’s motion for judicial notice of adjudicated facts and Prosecution’s catalogue of agreed facts,” 26 June 2007, ¶ 16 (internal citations omitted).

³⁵³ Rules, Rule 90(F)(ii).

³⁵⁴ Sara Kendall, “Charles Taylor Trial Report: January 7 – February 1, 2008,” War Crimes Studies Center, 2 (2008) [hereinafter “Jan. Trial Report”].

³⁵⁵ Jan. Trial Report, *supra* note 354, 4-5.

³⁵⁶ Early on in the trial, the parties argued over the admission of Dufka’s status as an expert. The Prosecution argued that Dufka’s specialized knowledge, training, and skill should be determinative of her status as an expert witness, and that the standard for admission of experts’ evidence is no higher than the general threshold for evidence—namely, relevance. The Defense countered by arguing that under ICTR jurisprudence, expert testimony should be allowed only if it assists the trier of fact. If it is redundant, or similar to other evidence led during trial, the Defense maintained, it should be excluded as unnecessary. In its decision, filed in June 2008, the Trial Chamber held that “it does not require expert opinion in order to appreciate the contents of publicly distributed human rights reports or statements made by victims or factual witnesses.” Seemingly siding with the Defense argument that expert evidence should assist the trier of fact, the Trial Chamber’s exclusion of Dufka’s report turned on the report’s helpfulness, not on its relevance. Thus, Dufka was not classified as an expert, according to the Court, and her testimony would be heard as that of a witness of fact. This decision rendered her expert report and its accompanying documents inadmissible under Rule 94bis. *Taylor*, Case No. SCSL-03-01-543, “Decision on Defence application to exclude the evidence of proposed Prosecution expert witness Corinne Dufka or, in the alternative, to limit its scope and on urgent Prosecution request for decision,” 19 June 2008.

³⁵⁷ See Corinne Dufka, “Youth, Poverty and Blood: The Lethal Legacy of West Africa’s Regional Warriors,” Human Rights Watch, April 13, 2005; see generally Human Rights Watch “Arms Embargo on Sierra Leone Rebels Neglected,” May 15, 2000; Human Rights Watch, “Letter to UN Secretary Council Members on Justice, the UN Mandate, and Arms in Sierra Leone,” May 19 2000.

³⁵⁸ Jan. Trial Report, *supra* note 354, 5-6.

³⁵⁹ Jan. Trial Report, *supra* note 354, 3-4; “Charles Taylor Trial Report: February 4 – March 14, 2008,” [hereinafter “Feb. Trial Report”], 2-3, 5-6 (testimony of Perry Kamara), 11-12 (testimony of Isaac Mongor), 12 (testimony of Joseph Marzah); Sara Kendall, “Charles Taylor Trial Report: March 31 – April 30,” [hereinafter “April Trial Report”], 9-11 (testimony of Alimamy Bobson Sesay).

³⁶⁰ “Charles Taylor Trial Report: September 2008,” available at <http://www.charlestaylortrial.org/2008/10/01/monthly-overview-Sept.-2008/>, [hereinafter “Sept. Trial Report”], testimony of TF1-585, testimony of Mohamed Bereteh Kabba.

³⁶¹ Jan. Trial Report, *supra* note 354, 3-4 (testimony of Varmuyan Sherif); April Trial Report, *supra* note 359, 9-11 (testimony of Alimamy Bobson Sesay).

³⁶² See Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao, “Judgment,” Case No. 04-15-T, 25 Feb. 2009, ¶¶ 893, 2187-2190 [hereinafter “RUF Trial Judgment”]; see also RUF Appeals Judgment, ¶¶ 1111-1112.

³⁶³ Taylor, Case No. SCSL-03-01-PT-218, “Public Rule 73bis Prosecution pre-trial conference materials, pre-trial brief,” 4 April 2007, ¶ 37 [hereinafter “Prosecution’s Pre-Trial Brief”].

³⁶⁴ Jan. Trial Report, *supra* note 354, 3 (testimony of Varmuyan Sherif); “Charles Taylor Trial Report: June 3 – June 30, 2008,” [hereinafter “June Trial Report”], 6 (testimony of TF1-539).

³⁶⁵ Feb. Trial Report, *supra* note 359, 5-6 (testimony of Kamara). “Charles Taylor Trial Report: July 2008,” (testimony of TF1-567), available at <http://www.charlestaylortrial.org/2008/08/01/monthly-overview-july-2008/>, [hereinafter “July Trial Report”]; Sept. Trial Report, *supra* note 360, (testimony of TF1-567).

³⁶⁶ Jennifer Easterday, “Charles Taylor Trial Report: August 18 – August 29, 2008,” 7-8 (testimony of TF1-367) [hereinafter “Aug. Trial Report”]; Jennifer Easterday “Charles Taylor Trial Report: October 1 – 31, 2008,” 11-18, [hereinafter “Oct. Trial Report”].

³⁶⁷ July Trial Report, *supra* note 365 (testimony of TF1-567); Aug. Trial Report, *supra* note 366, 7-8 (testimony of TF1-367); Sept. Trial Report, *supra* note 360 (testimony of TF1-338).

³⁶⁸ Taylor, Trial Transcript, 5 March 2008 (testimony of Mustapha Marvin Mansaray); Sept. Trial Report, *supra* note 360 (testimony of Emmanuel Bull, TF1-338, TF1-568).

³⁶⁹ Jan. Trial Report, *supra* note 354, 7 (testimony of Abu Keita), April Trial Report, *supra* note 359, 5-6 (testimony of Isaac Mongor); Jennifer Easterday, “Charles Taylor Trial Report: December 1, 2008 – February 28, 2009,” [hereinafter “Dec. Trial Report,”], 7 (testimony of Dauda Fornie); Taylor, Trial Transcript, 12 Dec. 2008 (testimony of Dauda Fornie).

³⁷⁰ Jan. Trial Report, *supra* note 354, 3 (testimony of Varmuyan Sherif); Feb. Trial Report, *supra* note 359, 2-3; April Trial Report, *supra* note 359, 5-11 (testimony of Isaac Mongor, TF1-516, and Alimamy Bobson Sesay); May Trial Report, *infra* note 371, 8-9 (testimony of Karmoh Kenneh); Dec. Trial Report, *supra* note 369, 7-10 (testimony of Dauda Aruna Fornie).

³⁷¹ “Charles Taylor Trial Report: May 1 – June 2, 2008,” 10 (testimony of Moses Blah) [hereinafter “May Trial Report,”].

³⁷² April Trial Report, *supra* note 359, 5-6 (testimony of Isaac Mongor); June Trial Report, *supra* note 364, 3-5 (testimony of Albert Hindowa Saidu); Aug. Trial Report, *supra* note 366, 5-6 (testimony of TF1-367).

³⁷³ April Trial Report *supra* note 359, 5-6 (testimony of Isaac Mongor); May Trial Report, *supra* note 371, 14 (testimony of Samuel Kargbo).

³⁷⁴ April Trial Report, *supra* note 359, 2; Oct. Trial Report, *supra* note 366, 3.

³⁷⁵ Jan. Trial Report, *supra* note 354, 3 (testimony of Varmuyan Sherif); Feb. Trial Report, *supra* note 359, 5 (testimony of Perry Kamara); April Trial Report, *supra* note 359, 6, 8 (testimony of Isaac Mongor and TF1-516); May Trial Report, *supra* note 371, 14 (testimony of Samuel Kargbo); Dec. Trial Report, *supra* note 369, 7-10 (testimony of Dauda Aruna Fornie).

³⁷⁶ Jan. Trial Report, *supra* note 354, 3 (testimony of Varmuyan Sherif); Dec. Trial Report, *supra* note 369, 9 (testimony of Dauda Aruna Fornie).

³⁷⁷ Feb. Trial Report, *supra* note 359, 3; April Trial Report, *supra* note 359, 5-6 (testimony of Isaac Mongor).

³⁷⁸ Oct. Trial Report, *supra* note 366, 3.

³⁷⁹ *Id.*

³⁸⁰ The SCSL has jurisdiction over events occurring from Nov. 30, 1996 until Jan. 18, 2002. *See* April Trial Report, *supra* note 359, 1; May Trial Report, *supra* note 371, 2; Aug. Trial Report, *supra* note 366, 2; Sept. Trial Report, *supra* note 360.

³⁸¹ *Taylor*, "Prosecution's Pre-Trial Brief," ¶ 8.

³⁸² Jan. Trial Report, *supra* note 354, 10.

³⁸³ Rules, Rule 89.

³⁸⁴ For example, the Court limited Dufka's evidence about cross-border attacks on Guinea to those that occurred before 2002. Jan. Trial Report, *supra* note 354, 10.

³⁸⁵ Sept. Trial Report, *supra* note 360.

³⁸⁶ Oct. Trial Report, *supra* note 366.

³⁸⁷ *Taylor*, Prosecution's Pre-Trial Brief, ¶ 42.

³⁸⁸ Oct. Trial Report, *supra* note 366.

³⁸⁹ Sept. Trial Report, *supra* note 360; Oct. Trial Report, *supra* note 366.

³⁹⁰ *Prosecutor v. Galić*, Case No. IT-98-29-A (Appeals Chamber), "Judgment," 30 Nov. 2006, ¶ 102 [hereinafter "*Galić* Appeals Judgment"]. The Court held that "extensive trauma and psychological damage form part of the acts or threats of violence" that is criminal under a count of terrorizing the civilian population. *Id.*

³⁹¹ Dec. Trial Report, *supra* note 369.

³⁹² *Id.*

³⁹³ Special Court for Sierra Leone, Office of the Prosecutor Press Release, Feb. 2, 2009.

³⁹⁴ *Id.*

³⁹⁵ Special Court for Sierra Leone, Office of the Prosecutor Press Release, "Testimony for the Prosecution Concluded in Taylor Trial," Feb. 2, 2009, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=9UCsv93B70k%3d&tabid=196>.

³⁹⁶ Defense Counsel argue that the excuse of mis-transcription did not appear to be well received by the Judges, and that this excuse was often discredited when a witness had been given the opportunity to correct errors in their statements but had failed to do so. Only the Judges can make qualitative determinations of witness credibility. However, notwithstanding the Judges' determinations of credibility of these witnesses, the frequent claim of errors in transcriptions during witness interviews brings into question the interview process and begs the question whether the interviews were video or voice recorded to provide an accurate record of the interviews. From the testimony monitors heard in Court, it seems that the interviews were only recorded by hand-written transcription and notes.

³⁹⁷ May Trial Report, *supra* note 371, 13 (testimony of Moses Blah); *see also* Feb. Trial Report, *supra* note 359, 6, 10 (testimony of Suwandi Camara and Foday Lansana).

³⁹⁸ May Trial Report, *supra* note 371, 13 (testimony of Moses Blah).

³⁹⁹ Oct. Trial Report, *supra* note 366, 4-6.

⁴⁰⁰ *See, e.g.*, Alpha Sesay, Daily Summary, "Afternoon Session: Defense Counsel Concludes Cross-Examination of Expert Witness TF1-358 and the Court Recalls 82nd Prosecution Witness TF1-579 for Cross-Examination," 24 Nov. 2008, available at <http://www.charlestaylortrial.org/2008/11/24/afternoon-session-defence-counsel-concludes-cross-examination-of-expert-witness-tf1-358-and-the-court-recalls-82nd-prosecution-witness-tf1-579-for-cross-examination/>.

⁴⁰¹ Feb. Trial Report, *supra* note 359, 4; May Trial Report, *supra* note 371, 3; June Trial Report, *supra* note 364, 2; Sept. Trial Report, *supra* note 360.

⁴⁰² Feb. Trial Report, *supra* note 359, 10; April Trial Report, *supra* note 359.

⁴⁰³ Feb. Trial Report, *supra* note 359, 8.

⁴⁰⁴ Sept. Trial Report, *supra* note 360; Oct. Trial Report, *supra* note 366.

⁴⁰⁵ *See* testimony of Varmuyan Sherif on Jan. 14, 2008, in which the Defense alleged that he was paid \$70 USD for transportation to Monrovia, despite the fact that he was already in Monrovia; testimony of Dauda Aruna Fornie on Dec. 11, 2008, in which the Defense alleged that he inappropriately received 30,000 Leones (approximately \$8.64)

for a Top Up Card; 480,000 Leones (approximately \$138 USD) for Relocation; 1,548,850 Leones (approximately \$445 USD) for Miscellaneous Accommodations and 2,154,000 Leones (approximately \$620) for Witness Allowance. The Defense insinuated through cross-examination questions that the amount given to Fornie was excessive and used to buy his testimony.

⁴⁰⁶ For example, the Defense contends that it has been asked during SCSL outreach events why the Defense does not pay its witnesses more than the OTP to ensure witness participation. A senior member of the Defense team noted that this question is “indicative of one . . . poisonous legacy of this Court’s example to the people of the region.” Email from Defense Counsel, Jan. 25, 2010.

⁴⁰⁷ Interview with Stephen Rapp, Feb. 9, 2009.

⁴⁰⁸ See, e.g., *RUF*, Case No. SCSL-04-15-1161, “Motion to request Trial Chamber to hear evidence concerning the Prosecution witness management unit and its payment to witnesses,” 30 May 2008 [hereinafter “*RUF* Motion regarding Witness Payments”], Annex E (Letter from Mr. Jordash to Mr. Harrison, dated 1st Dec. 2007 and reply from Mr. Rapp, dated 18th Dec. 2007). The OTP gave this same type of reply to the author in response to questions about the WMU and WVS.

⁴⁰⁹ Rules, Rule 39.

⁴¹⁰ See, e.g., *RUF* Motion regarding Witness Payments, Annex E (Letter from Mr. Jordash to Mr. Harrison, dated 1st Dec. 2007 and reply from Mr. Rapp, dated 18th Dec. 2007); *RUF*, Case No. SCSL-04-15-1169, “Prosecution response to Sesay request to hear evidence concerning the Prosecution’s Witness Management Unit,” 5 June 2008.

⁴¹¹ See *RUF* Motion regarding Witness Payments. The Prosecution contends that “time wasted” is a Sierra Leonean term that refers to lost earnings. *RUF*, Case No. SCSL-04-15-1169, “Prosecution response to Sesay request to hear evidence concerning the Prosecution’s Witness Management Unit,” 5 June 2008, ¶ 27.

⁴¹² See *RUF* Motion regarding Witness Payments Annex B (noting payments for 50,000 leones (TF1-141)).

⁴¹³ See *id.* (Noting payments for 100,000 leones (TF1-141)).

⁴¹⁴ See *id.* (Noting payments for 150,000 leones (TF1-141)).

⁴¹⁵ See *id.* (Noting payments of \$3000 (TF1-371)).

⁴¹⁶ See *id.* at Annex C (Noting payments for \$250 (TF1-046)).

⁴¹⁷ *Taylor* Witness TF1-375.

⁴¹⁸ *Taylor*, Trial Transcript, 27 Aug. 2008, 37-39.

⁴¹⁹ The Defense also noted that the witness was given money for transportation on days that he had no meetings with OTP, for cell phone communication on the same day in two amounts, and that both OTP and WVS gave the witness money for medical bills. *Taylor*, Trial Transcript, 11 Dec. 2008, 121-124.

⁴²⁰ See *RUF* Motion regarding Witness Payments (noting payments for US \$50 (350,000 leones)).

⁴²¹ *RUF*, Case No. SCSL-04-15-1169, “Prosecution response to Sesay request to hear evidence concerning the Prosecution’s Witness Management Unit,” 5 June 2008; Interview with Stephen Rapp, Feb. 9, 2009.

⁴²² Other *Taylor* trial witness payments that were questioned by the Defense include payments to Moses Blah, “who noted that he was given money by the Prosecution as ‘a good will measure,’” *RUF* Motion regarding Witness Payments, ¶ 30.x, citing *Taylor* Trial Transcript, 19 May 2008, 29; *Taylor* Prosecution Witness TF1-337, who admitted he received payments for lost wages in excess of what he normally earned or would spend on daily expenses for his family; and also received funds for his children’s school fees because of “problems” in his family; *RUF* Motion regarding Witness Payments, ¶¶ 30.xi-30.xii, citing *Taylor* Trial Transcript, 7 March 2008, 37-42, 63; *Taylor* Prosecution witness TF1-532, Isaac Mongor, who received money for lost wages even though he admitted he did not tell the Prosecution the amount he would normally earn or the days he was not working; *RUF* Motion regarding Witness Payments, ¶ 30.xiii, citing *Taylor* Trial Transcript, 1 April 2008, 95, 102. The *RUF* Motion regarding Witness Payments also noted that *Taylor* Prosecution Witness TF1-532 had been given money for lost wages on a Sunday even though he did not work on Sundays, and TF1-548 said that he had been given money “as a reward for coming to be interviewed,” and as “compensation for the efforts” he made to see the Prosecution, *RUF* Motion regarding Witness Payments, ¶¶ 30.xiv-30.xv, citing *Taylor* Transcript, 7 April 2008, 6705 and 13 Feb. 2008, 65.

⁴²³ See testimony of James Kpungbo, Oct. 13, 2008, Samuel Komba, Oct. 13, 2008, Sahr Bindi, Oct. 16, 2008, Edna Bangura, Oct. 20, 2008, TF1-023, Oct. 22, 2008, Mohammed Bah, Oct. 22 – 23, 2008, Alpha Jalloh, Oct. 23, 2008, and Gibril Sesay, Oct. 29, 2008.

⁴²⁴ See, e.g., *id.*

⁴²⁵ *Taylor* Trial Transcript, 16 Oct. 2008, 95-100.

⁴²⁶ See Rules, Rule 39(ii); *c.f.* ITCY Rules of Procedure and Evidence, Rule 34(a) and ICTR Rules of Procedure and Evidence, Rule 39(ii). The ICTR appears to be the only other Tribunal that has dealt with this issue of witness payments in Court, but these issues seemed to center on witness security and relocation, rather than “cash for convictions.” *Prosecutor v. Protais Zigranyirazo*, Case No. ICTR 2001-73-T, “Scheduling order of the Court for an *in camera* hearing on the Prosecutor’s motion to permit limited disclosure of information regarding payments and benefits provided to witness Ade and his family,” 19 Jan. 2005. Indeed, it is telling that Stephen Rapp has often used the ICTR and its reimbursement to witnesses for expenses, relocation, safety, and welfare when discussing the payments made by the WMU at the SCSL. See “Witnesses ‘Bribed’ in War Crimes Trial,” *The National*, Nov. 19, 2009. Mr. Rapp pointed out that the International Criminal Tribunal for Rwanda has paid upwards of \$200,000 to relocate witnesses and their families after testimonies that could endanger them. See generally “Money Troubles Endanger at Trial of First African Leader to Face a War Crimes Court,” *The Times*, April 22, 2008. Mr. Rapp has stated the principle is that nobody should be worse off as a result of testifying.

⁴²⁷ Interview with court personnel, Oct. 2009.

⁴²⁸ *Id.*

⁴²⁹ RUF, Case No. SCSL-04-15-1173, “Decision on Sesay motion to request the Trial Chamber to hear evidence concerning the Prosecution’s Witness Management Unit and Its Payments to Witnesses,” 25 June 2008, 2.

⁴³⁰ AFRC Trial Judgment, ¶ 108.

⁴³¹ See Kendall, *supra* note 359

⁴³² AFRC Trial Judgment, ¶ 125.

⁴³³ *Id.* at ¶¶ 110 – 111.

⁴³⁴ *Id.* at ¶ 112.

⁴³⁵ *Id.* at ¶ 113.

⁴³⁶ *Id.* at ¶ 128.

⁴³⁷ *Id.* at ¶ 130. This sentiment and position was echoed by Trial Chamber I in the RUF case, in which it held that “there is no evidence to justify the conclusion that witnesses came to testify due to the financial incentives paid by the Court nor does this, in any way, negate their credibility. The Chamber therefore draws no adverse inferences from the fact that witnesses received compensation, and does not consider such compensation relevant in assessing the credibility of any particular witness.” RUF Trial Judgment, ¶ 525.

⁴³⁸ Jan. Trial Report, *supra* note 354, 9; May Trial Report, *supra* note 371, 3; Dec. Trial Report, *supra* note 369, 4.

⁴³⁹ Jan. Trial Report, *supra* note 354, 8; Oct. Trial Report, *supra* note 366, 4-6.

⁴⁴⁰ Feb. Trial Report, *supra* note 359, 11 (testimony of Mustapha Mansaray); Aug. Trial Report, *supra* note 366, 9 (testimony of TF1-367).

⁴⁴¹ In October, the Defense read aloud certain excerpts from President Kabbah’s testimony on the subject before the Sierra Leone Truth and Reconciliation Commission:

Another group which I came to know about much later, as part of the security units utilised by the military, was the Special Task Force. I was never briefed about this when I assumed office as President in 1996. I knew about the existence of this unit only on the day of the AFRC coup d’état, yet the army, without regard for the origin and true motive of the members of this group, had used them regularly and depended on them considerably. [. . .] The NPRC inherited from the APC regime the problem of ULIMO, but it too never settled or attempted to settle it. All it did was to insist on the dropping of the ‘J’ and the ‘K’ from the names of the two factions and to collectively rename them Special Task Force. The Special Task Force was then almost incorporated into the Sierra Leone Army and they received salaries, allowances and their supplies were regularly replenished.

Taylor, Trial Transcript, 23 Oct. 2008, 76 (lines 1 – 5), 77 (lines 1 – 5, 22 – 29). Counsel for the Defense concluded “President Kabbah is saying to the Truth and Reconciliation Commission that what was known as ULIMO was turned into the Special Task Force.” *Taylor*, Trial Transcript, 23 Oct. 2008, 78 (lines 11 – 13).

⁴⁴² May Trial Report, *supra* note 371, 2-3; Aug. Trial Report, *supra* note 366, 2; Dec. Trial Report, *supra* note 369, 4.

⁴⁴³ Dec. Trial Report, *supra* note 369, 4.

⁴⁴⁴ Dec. Trial Report, *supra* note 369, 4. This will likely be an important element of the Defense's case-in-chief, given the recent *RUF Appeals* judgment that upheld the Trial Chamber's finding that the RUF and AFRC were no longer part of a JCE at the time of the Freetown attack. Trial Chamber I had found the three RUF accused not guilty, under any theory of liability, for crimes committed in connection with the 1999 Freetown invasion. *RUF Trial Judgment*, ¶ 2184. The Chamber found that the evidence that the RUF sent reinforcement troops to the AFRC to be "inconclusive and conflicting," and noted the tensions and lack of trust between the RUF and AFRC leaders. *RUF Trial Judgment*, ¶ 2192. For the same reason, the Chamber also held that the three RUF Accused not guilty of crimes committed in Port Loko district from Feb. 1999 to April 1999. These findings were upheld by a majority of the Appeals Chamber. *RUF Appeals Judgment*, ¶¶ 1143-1149.

⁴⁴⁵ Jennifer Easterday, "Charles Taylor Trial Report Dec 2009 – Feb. 2009," War Crimes Studies Center, 3 March 2009.

⁴⁴⁶ International Covenant on Civil and Political Rights, Article 14. *See also* European Convention on Human Rights, Article 6; American Convention on Human Rights, Article 8; Arab Charter on Human Rights, Article 7; Universal Declaration of Human Rights, Article 10.

⁴⁴⁷ Four of the crime-base witnesses, Corinne Dufka, Hassan Bility, Stephen Smith, and Tariq Malik, were originally categorized as "factual witnesses" until upon requesting clarification on the status of these witnesses, the OTP indicated that they should be counted as crime-base witnesses.