



The University of
Nottingham

UNITED KINGDOM • CHINA • MALAYSIA

*Human Rights
Law Centre*

**BRIDGING THE GAP:
ENSURING THE LASTING
LEGACY OF THE SIERRA LEONE
SPECIAL COURT AND THE
TRUTH AND RECONCILIATION
COMMISSION**



Foreign &
Commonwealth
Office

Green Scenery



Best Practice Guide

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1. INTRODUCTION TO THE '*BRIDGING THE GAP*' PROJECT

1.1. Background to the Project

Sierra Leone experienced a brutal civil war between 1991 and 2002, characterised by widespread and systematic attacks on civilians, including murder, rape, torture, mutilation, amputation, abduction, forced marriage and the conscription of child soldiers. Following the conclusion of the civil war, two internationalised justice and accountability mechanisms were established in order to address the atrocities committed during the conflict. A Truth and Reconciliation Commission (TRC) was established as part of the Lomé Peace Accord, which facilitated the conclusion of the civil war. The TRC aimed to create an impartial record of the atrocities whilst issuing a report with recommendations to the Government of Sierra Leone. Subsequently, an Internationalised Criminal Tribunal, the Special Court for Sierra Leone (SCSL) was set up by agreement between the government of Sierra Leone and the UN, mandated to prosecute those who bore the greatest responsibility for atrocities committed between 1996 and 2002.

The justice and accountability mechanisms adopted in Sierra Leone have been heavily shaped by the internationalised status of the mechanisms as well as the granting of amnesty to all but the most responsible perpetrators of violence. As a result of this amnesty, combined with the jurisdiction of the Special Court for Sierra Leone, the domestic criminal justice system of Sierra Leone has operated separately from the SCSL and the TRC. The impact of both mechanisms has therefore been reduced. The legal system of Sierra Leone maintains many characteristics of a post conflict State: limited human, physical and infrastructural resources constrain its ability to provide and maintain an effective, functioning legal system. At a time when the SCSL is nearing its completion and considering its legacy for the people and institutions of Sierra Leone, the gap between international and domestic criminal justice efforts is now firmly in the spotlight.

1.2. Aims and Objectives

The '*Bridging the Gap: Ensuring the Lasting Legacy of the Sierra Leone Special Court and the Truth and Reconciliation Commission*' project intends to facilitate an increased ability of the Sierra Leonean criminal justice stakeholders to operate according to its national and international human rights obligations, by locating the application of human rights standards at the SCSL and TRC within the national criminal justice system.

This project is therefore a collaborative exercise, between the project partners and criminal justice stakeholders such as judges, prosecutors, lawyers, legal educators and civil society organisations, in order to integrate the internationalised justice and accountability mechanisms within national practice in a way that is both appropriate and sensitive to the post conflict realities of the criminal justice system.

1.3. Outputs of the Project

The outputs of the project are:

- A *Needs Assessment* of the gaps and priorities of the national criminal justice system;
- A *Best Practice Guide* based on the SCSL-TRC findings on human rights standards in criminal justice;

- A *Knowledge Transfer Exercise* to integrate the *Best Practice Guide* into national practice by stakeholders;
- An *Evaluation Report*, to consider the project's impact and priority areas for future action.

1.4. Project Partners

Bridging the Gap is a project between the *University of Nottingham Human Rights Law Centre*, which implements the project and *Green Scenery*. The project team consists of Associate Professor Olympia Bekou (Director), Joseph Rahall (Project Partner), Emilie Hunter (Senior Researcher), Agnes Flues (Project Manager), Milena Castellnou and Nicola Gregory (Researchers). The Project Advisor is Professor Michael O'Flaherty, who established the UN Human Rights Programme in Sierra Leone in 1998 and was chief of the UNAMSIL human rights section until 2000. It is conducted with the strong support of the *Office of the Attorney General and Ministry of Justice* and the *National Human Rights Commission*. It is made possible through the Human Rights & Democracy Programme of the *UK Foreign and Commonwealth Office*.

Green Scenery: is a non-governmental organization in Sierra Leone without religious, political or governmental affiliation. Green Scenery is working towards a future where food is secured, human rights are respected, access to justice is guaranteed and biodiversity is protected. Its approach is community-based programming. Green Scenery is registered with the Registrar General and the Ministry of Development and Economic Planning.

University of Nottingham Human Rights Law Centre: is committed to the promotion and protection of human rights and the establishment and strengthening of the rule of law worldwide. It carries out its work by means of research, training, publications and capacity building. It collaborates with governments, intergovernmental organisations, academics, students and civil society, and has implemented programmes worldwide. Through its dedicated International Criminal Justice Unit, the Human Rights Law Centre conducts research and training on a range of international criminal justice matters and has considerable expertise in conducting research and training, knowledge transfer, capacity-building and technical support projects on national implementation of the International Criminal Court (ICC) Statute.

2. INTRODUCTION TO THE BEST PRACTICE GUIDE

2.1 Background

The Best Practice Guide constitutes the final outcome of '*Bridging the Gap: Ensuring the Lasting Legacy of the Sierra Leone Special Court and the Truth and Reconciliation Commission*'.

Prior to the drafting of the Best Practice Guide, the project team undertook a thorough assessment of the needs of the Sierra Leonean criminal justice system. A good understanding of the existing capacity, needs and priorities of the national criminal justice system was essential in order to realise this project's key objective to ensure the lasting legacy of the Special Court for Sierra Leone (SCSL) and the Truth and Reconciliation Commission (TRC).

As part of this exercise, the project team carried out desktop research in Nottingham, UK and the Project Director conducted consultations with stakeholders in Freetown, Sierra Leone from 5th to 10th of September 2011. As a result, a Report entitled 'Assessment of needs and gaps in the human rights standards of the Sierra Leonean Criminal Justice System' ('Needs Assessment Report') was completed. It includes a review of:

- a) The legal basis for human rights standards;
- b) The actors of the criminal justice system and their infrastructural framework;
- c) The causes of the criminal justice system needs; and
- d) The challenges faced by the criminal justice system.

As Sierra Leone is currently a post-conflict State and due to its challenging economic situation, the main difficulties faced by its criminal justice system are caused by infrastructural barriers. Taking this into account, the Needs Assessment Report identified the following obstacles:

- a) Budgetary constraints;
- b) Inadequate facilities;
- c) A shortage of legal actors;
- d) Poor conditions of service;
- e) Inadequate interpretation and implementation of policy, rules and procedure;
- f) A shortage of legal services;
- g) Extensive delays in criminal proceedings; and
- h) The need for legal reform.

This assessment of the situation of the Sierra Leonean criminal justice system was therefore used as a basis for this Best Practice Guide.

2.2 Purpose and Objectives of the Best Practice Guide

The objective of the Best Practice Guide is to ensure that human rights and fair trial standards are respected within the Sierra Leonean criminal justice system by

incorporating practices developed by the Special Court for Sierra Leone and findings of the Truth and Reconciliation Commission.

This Best Practice Guide aims to be an operational document and aspires to improve the day-to-day functioning of the criminal justice system. The Needs Assessment Report concluded that infrastructural constraints are the main obstacles to the full respect of human rights and fair trial standards in Sierra Leone. Therefore, this Best Practice Guide is taking a realistic approach by focusing on providing practical and workable recommendations that can be implemented by stakeholders within the current infrastructural context of Sierra Leone.

The final phase of the *Bridging the Gap* project will aim at integrating the Best Practice Guide into national practice in a way that is both appropriate and sensitive to the post conflict realities of the criminal justice system. This will involve a collaborative shadowing exercise between the Project Director, the Senior Researcher, and the criminal justice stakeholders. Therefore, this Best Practice Guide will serve as a basis for a constructive knowledge transfer from the project team to the actors of the Sierra Leonean criminal justice system.

2.3 Stakeholders

The main stakeholders of both the Best Practice Guide and the knowledge transfer exercise are the following:

- Judges: the judiciary will benefit from an increased awareness of the practices drawn from the experience of the Special Court for Sierra Leone and the Truth and Reconciliation Commission in upholding international human rights standards when adjudicating trials;
- State Counsel: the prosecution is encouraged to use this Best Practice Guide in developing prosecutorial strategies which integrate procedures respectful of the rights of all of the actors involved;
- Defence Counsel: this Best Practice Guide will be helpful to the defence in upholding the rights of the accused and in promoting procedures to implement them.

Moreover, this project is also particularly keen to promote the Best Practice Guide amongst secondary stakeholders such as legal educators, paralegals, and civil society organisations. For instance, legal educators are encouraged to integrate these best practices in the curriculum, teaching materials and seminars and to use this Guide as a teaching aid. This is particularly important as the Faculty of Law and the School of Law of Fourah Bay College are training the next generation of legal practitioners. Similarly, civil society organisations are expected to draw inspiration from the Best Practice Guide when engaging with actors of the criminal justice system and in their advocacy campaigns for a fair and effective delivery of justice. Civil society organisations will also find these best practices useful when working with accused persons, victims and witnesses of criminal offences. By taking these proactive measures, civil society will naturally promote the Best Practice Guide.

As a result, while this project has focused on developing practical recommendations for the main actors of the criminal justice system (Judges, State Counsel and Defence Counsel), the Best Practice Guide will also participate in increasing awareness of human rights standards amongst all those involved with the Sierra Leonean criminal justice system.

2.4 Methodology of the Best Practice Guide

As the purpose of the Bridging the Gap Project is to ensure the legacy of the Special Court for Sierra Leone and the Truth and Reconciliation Commission, this Best Practice Guide focuses on the findings and the practices developed by these two institutions, in particular where they address some of the challenges facing the criminal justice system in Sierra Leone.

The Truth and Reconciliation Commission included general recommendations on the rule of law and the protection of human rights within the criminal justice system in its Final Report.¹ Therefore, this Best Practice Guide aims at facilitating the practical implementation of the following TRC recommendations, which 'are designed to facilitate the building of a new Sierra Leone based on the values of human dignity, tolerance and respect for the rights of all persons':²

'The Commission seeks to promote the creation of a human rights culture in Sierra Leone. A rights culture is one in which there is knowledge and recognition of the basic rights to which all human beings are entitled. A rights culture demands that we respect each other's human rights, without exception';

'The Commission calls on the judiciary to take a pro-active approach to the protection of human rights';

'The Commission calls upon the Sierra Leone Bar Association to become the guardians of the protection of the Rule of Law and the human rights of Sierra Leoneans';

'The organised bar is in a good position to be a powerful watchdog and should add its voice in protest, when human rights are abused and the rule of law is threatened. The Commission calls upon lawyers to stand up to injustice';

'Civil society has a crucial role to play in monitoring and reporting on cases of misconduct and corruption in the public sector. In particular, independent monitors should be assessing the performance of anti-corruption bodies and the measures they have instituted. Non-governmental groups should be engaged in ongoing advocacy and research';

¹ 'Our ultimate goal of peace and reconciliation will be reached if all living within its borders sincerely respect the human rights of all, without exception'. Foreword of the Truth and Reconciliation Commission, Final Report, Volume 1, 2004 at 2 (<<http://www.sierra-leone.org/TRCDocuments.html>>, last accessed on 9 December 2011). Furthermore, 'the Commission identified a need for individual and national restoration of dignity and the establishment of a new rights culture in Sierra Leone; a rights culture in which all Sierra Leoneans respect each other's human rights, without exception'. Truth and Reconciliation Commission, Final Report, Volume 2, 2004 at 122, para 35 (<<http://www.sierra-leone.org/TRCDocuments.html>>, last accessed on 9 December 2011).

² Truth and Reconciliation Commission, Final Report, Volume 2, 2004 at 117, para 2; 125, para 45; 148, para 182; 147, para 174; 147, para 171; 164, para 290; 134, para 96 (<<http://www.sierra-leone.org/TRCDocuments.html>>, last accessed on 9 December 2011).

'The Commission recommends the development of a compulsory programme of human rights education into schools at the primary, secondary and higher levels of education. Human rights education should become part of the formal curriculum and be examinable. Appropriate human rights and peace programmes should be compulsory for the training of recruits into the army, police and judicial service. The Government should work towards the fulfilment of these recommendations'.

In addition, the Special Court for Sierra Leone developed a range of legal practices which constitute the basis for this Best Practice Guide. Although some of its procedures are typical of the functioning of international tribunals and cannot be implemented at the domestic level, the Sierra Leonean criminal justice system could greatly benefit from the SCSL's experience. Therefore, best practices were drawn from the SCSL Statute and Rules of Procedure and Evidence, case law and SCSL publications.

Furthermore, in drafting this Best Practice Guide, the project team consulted a broad range of sources including, amongst others, academic and UN publications, legal documents from the United Kingdom, as well as documents from other international criminal tribunals. All sources which have been relied upon are referenced in the bibliography in Annex 1. Moreover, in order to facilitate stakeholders' access to publicly available information, the footnotes include hyper-links to online sources.

In order to fulfil human rights standards within the criminal justice system in Sierra Leone, this Best Practice Guide consists of the following Sections:

- **Sections 3, 4 & 5** address each of the actors engaged in the criminal justice system. Section 3 will start by focusing on accused persons and will provide best practices in order to ensure that their fair trial rights are respected throughout criminal proceedings. Subsequently, Sections 4 & 5 will turn to witnesses and victims with the aim of guaranteeing that their needs and interests are taken into account by all stakeholders.
- **Sections 6 & 7** move from the actors of the criminal justice system to the evaluation of procedure in criminal cases in order to improve the smooth running of criminal proceedings. Firstly, Section 6 puts forward best practices for disclosure that can be implemented within the criminal justice system. Secondly, Section 7 identifies active case management as a tool for reducing delays and improving corresponding best practices.

Each of the Sections will begin by presenting an overview of the subject-matter addressed, followed by a general principle. This principle will be further developed by best practices targeted at the different stakeholders, namely Judges, State Counsel and Defence Counsel.

3. BEST PRACTICES REGARDING ACCUSED PERSONS

Overview

Accused persons are the first set of actors addressed in the Best Practice Guide.

The concept of a fair trial is pivotal to the rights of an accused person in a criminal case. The right to a fair trial is fundamental in enabling criminal justice proceedings to be conducted fairly and in ensuring that the rule of law and legal certainty are upheld. The Sierra Leonean Constitution, which 'is the Supreme law of the land',³ guarantees the right to a fair trial under its Chapter Three, which provides for the protection of human rights within Sierra Leone.⁴

Sierra Leone has also ratified the African Charter on Human and Peoples' Rights (ACHPR) and the International Covenant on Civil and Political Rights (ICCPR). These regional and international standards corroborate the importance of fair trial rights which should be incorporated at the national level in criminal proceedings in Sierra Leone.⁵

The SCSL can serve as a model to ensure that the rights of the accused are respected and upheld, as it applies international human rights standards. Article 17 of the SCSL Statute provides that an accused shall have fair trial rights⁶ and that all accused persons should be treated equally:⁷

'The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses'.

'All accused shall be equal before the Special Court'.

These rights have been followed at the SCSL and have been reiterated on several occasions in its case law as noted throughout this Section. These rights should be respected in the Sierra Leone criminal justice system, as they are crucial to ensuring the protection of human rights and are procedural methods of safeguarding the rule of law.⁸

Equality before the courts means firstly that every person who appears before a court should not be discriminated against, either during legal proceedings or in the way in which the law is applied to the individual in question. Secondly, equality before the

³ United Nations General Assembly 'Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 – Sierra Leone', A/HRC/WG.6/11/SLE/3, 2011 at 4, (<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/108/94/PDF/G1110894.pdf?OpenElement>>, last accessed on 9 December 2011).

⁴ University of Nottingham Human Rights Law Centre, 'Assessment of Needs and Gaps in the Sierra Leonean Criminal Justice System' at Section 4.4.

⁵ Idem at Section 4.4.

⁶ Article 17(2) of the Statute of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011).

⁷ Article 17(1) of the Statute of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011).

⁸ Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007 at 1, para 2 (<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>, last accessed on 9 December 2011); University of Nottingham Human Rights Law Centre, 'Assessment of Needs and Gaps in the Sierra Leonean Criminal Justice System' at Section 4.6.1.

courts means that all persons should have equal access to the courts.⁹

The following best practices will participate in ensuring that an accused benefits from a fair trial as guaranteed by the Sierra Leonean Constitution.

3.1. Right to Bail

Grounds for Bail

Principle

When an accused person appears in court for the first time in a case, the issue of whether or not he or she should be granted bail should be discussed.

The right to bail is important for an accused person as it determines whether or not his/her freedom is going to be restricted and consequently has an impact on his/her personal circumstances.

The ACHPR draws attention to an individual's right to liberty.¹⁰ In Sierra Leone, Section 17 of the Sierra Leonean Constitution protects individuals from arbitrary arrest or detention. Section 17(3) specifies that a person detained in custody and charged should be brought before a court within 10 days from the arrest date in capital cases and within 72 hours for all other offences.

In Sierra Leone, bail is provided for in Section 79 of the Criminal Procedure Act 1965. The police cannot grant bail for a person charged with murder or treason, in this case it can only be granted by a judge.¹¹ For all other felonies, the same discretion to grant bail rests with the court.¹² In circumstances where an accused is charged with other offences which are not felonies, the court shall grant bail unless there is a good reason not to.¹³ Bail can be granted at any time.¹⁴

⁹ Office of the United Nations High Commissioner for Human Rights & the International Bar Association, 'Professional Training Series No 9. Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers', 2003 at 218; University of Nottingham Human Rights Law Centre, 'Assessment of Needs and Gaps in the Sierra Leonean Criminal Justice System' at Section 4.6.1.

¹⁰ Section 6 of the African Charter on Human and Peoples' Rights: 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained'.

(<http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf>, last accessed on 9 December 2011).

¹¹ Section 79(1) of the Criminal Procedure Acts of Sierra Leone, 1965 (<<http://www.sierra-leone.org/Laws/1965-32.pdf>>, last accessed on 9 December 2011).

¹² Section 79(2) of the Criminal Procedure Acts of Sierra Leone, 1965 (<<http://www.sierra-leone.org/Laws/1965-32.pdf>>, last accessed on 9 December 2011).

¹³ Section 79(3) of the Criminal Procedure Acts of Sierra Leone, 1965 (<<http://www.sierra-leone.org/Laws/1965-32.pdf>>, last accessed on 9 December 2011).

¹⁴ Section 79 (4) of the Criminal Procedure Acts of Sierra Leone, 1965 (<<http://www.sierra-leone.org/Laws/1965-32.pdf>>, last accessed on 9 December 2011).

'The Court must consider the bail position of the Accused at all hearings' Justice Sector Development Programme, 'Criminal Case Management: Best Practice Handbook', 2006 (<http://www.britishcouncil.org/criminal_case_management_handbook.pdf>, last accessed on 9 December 2011) at 17.

At the SCSL bail has not been granted in any of the cases before it, however the right to bail is acknowledged in the SCSL Rules of Procedure and Evidence, according to which the accused has a right to apply for bail.¹⁵ The SCSL did however note in the *CDF* case that when considering whether or not to grant bail, the court should take into consideration:¹⁶

- (a) *whether the accused will appear for trial if granted bail; and*
 b) *whether the accused will pose a danger to any victim, witness or other persons.*

Furthermore, the court stated that the issue of bail should be decided upon on a 'case to case basis and to ensure a balance between the public interest and the presumption of innocence of the Accused'.¹⁷

Although these guidelines were set out to provide coherence throughout cases at the SCSL, they can be used in conjunction with Sierra Leonean national procedure which prescribes that bail is at the Judge's discretion.

The following are best practices for the stakeholders which should be taken in to consideration when an application for bail is made by an accused person.

Best Practices for Judges

- The Judge should consider the following reasons when deciding whether to grant or refuse bail:
 - a) the age of the accused;¹⁸
 - b) the employment status of the accused;¹⁹
 - c) the nature of the offence, how serious the offence is and any probable sentence the accused could receive;
 - d) the strength of State Counsel's case against the accused;
 - e) the character of the accused and any ties with his community;
 - f) if the accused has been granted bail previously either on the current or a previous offence, the extent to which he/she met his bail conditions.²⁰

¹⁵ Rule 65 of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

¹⁶ *Prosecutor v Fofana & Kondewa* (Fofana- Decision on Application for Bail Pursuant To Rule 65), SCSL-04-14-T-173, 5 August 2004 at 13 para 62, (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=wtGNN2jeYws%3d&tabid=153>>, last accessed on 9 December 2011).

¹⁷ *Idem* at 14 para 63.

¹⁸ Justice Sector Development Programme, 'Criminal Case Management: Best Practice Handbook', 2006 at 19 (<http://www.britishcouncil.org/criminal_case_management_handbook.pdf>, last accessed on 9 December 2011).

¹⁹ *Idem* at 19.

- When deciding whether or not to grant bail, the Judge should take into consideration whether if released on bail, the accused would commit an offence that would be likely to cause physical or mental injury to another person.²¹
- The Judge must consider whether the accused is fit to be granted bail in his own recognisance.²²
- The Judge can, if he/she thinks fit, admit any person to bail although the court before whom the charge is pending has not thought fit to do so.²³
- The Judge should remind an unrepresented accused person of his/her right to apply for bail at any time throughout proceedings.²⁴
- The Judge should inform the accused that once bail has been granted, he/she does not have to pay any money to either a court clerk or a police officer to be released from custody.²⁵
- Whether or not bail is granted, a record of the decision must be kept.²⁶
- If bail is granted subject to certain conditions, the court should give its reasons for its decision.²⁷ The conditions must be recorded so that the court can monitor the accused's adherence to bail.
- The Judge should also explain to the defendant the consequences for breaching bail.²⁸
- Furthermore, the Judge should ensure that an accused person is given a copy of the bail record if he/she requests one.²⁹

²⁰ Schedule 1 of the Bail Act, 1976 (UK)

(<<http://www.legislation.gov.uk/ukpga/1976/63/contents>>, last accessed on 9 December 2011).

²¹ Section 114(2) of the Coroners & Justice Act, 2009 (UK)

(<<http://www.legislation.gov.uk/ukpga/2009/25/contents>>, last accessed on 9 December 2011).

²² 'The court must consider whether the Accused is fit to be admitted to bail in his own recognisance'. Justice Sector Development Programme, 'Criminal Case Management: Best Practice Handbook', 2006 at 19 (<http://www.britishcouncil.org/criminal_case_management_handbook.pdf>, last accessed on 9 December 2011).

²³ Section 79(5) of the Criminal Procedure Acts of Sierra Leone, 1965

(<<http://www.sierra-leone.org/Laws/1965-32.pdf>>, last accessed on 9 December 2011).

²⁴ 'In the case of an unrepresented accused, the Court must explain to the Accused that he can make a bail application and he can ask the court to consider remanding him on bail'. Justice Sector Development Programme, 'Criminal Case Management: Best Practice Handbook', 2006 at 17

(<http://www.britishcouncil.org/criminal_case_management_handbook.pdf>, last accessed on 9 December 2011).

²⁵ 'The Accused must be told that bail is free and that he does not have to pay money to any court official or police officer to secure his release on bail'. Justice Sector Development Programme, 'Criminal Case Management: Best Practice Handbook', 2006 at 19

(<http://www.britishcouncil.org/criminal_case_management_handbook.pdf>, last accessed on 9 December 2011).

²⁶ Section 5(1) of the Bail Act, 1976 (UK) (<<http://www.legislation.gov.uk/ukpga/1976/63/contents>>, last accessed on 9 December 2011).

²⁷ Section 5(3) of the Bail Act, 1976 (UK) (<<http://www.legislation.gov.uk/ukpga/1976/63/contents>>, last accessed on 9 December 2011).

²⁸ 'When the Accused is granted bail the consequences of failure to attend court or indeed to adhere to any conditions imposed by the court must be fully explained'. Justice Sector Development Programme, 'Criminal Case Management: Best Practice Handbook', 2006 at 18

(<http://www.britishcouncil.org/criminal_case_management_handbook.pdf>, last accessed on 9 December 2011).

²⁹ Section 5 of the Bail Act, 1976 (UK) (<<http://www.legislation.gov.uk/ukpga/1976/63/contents>>, last accessed on 9 December 2011).

Best Practices for State Counsel

- State Counsel should consider recommendations by the police on bail if applicable.³⁰
- It is State Counsel's duty to make specific recommendations to the Judge on whether or not the court should grant bail.³¹
- When State Counsel makes a recommendation on bail, he/she should present the recommendation in a logical and well-structured format setting out the arguments clearly.³²
- As bail applications can be made at any stage of a case, State Counsel should review an accused's bail position throughout the criminal proceedings.³³
- For offences which are imprisonable, State Counsel should consider the following when making a recommendation on bail:
 - a) whether the accused has offended, run away or interfered with witnesses when the accused has been granted bail either in the current or a previous case;
 - b) whether the accused shows any express or implied intention to continue to offend, run away or interfere with witnesses and whether the accused has any motive to do so. An example of a motive would be the accused obtaining money to buy drugs and/or alcohol;
 - c) whether the accused has previously breached bail conditions either in the current or a previous case;
 - d) whether the accused in a current or a previous case has failed to surrender to custody;
 - e) any evidence of the accused being violent or threatening towards victims or witnesses in the current/previous case;
 - f) any factors which could affect an accused adhering to bail conditions such as drugs or alcohol addiction;
 - g) the seriousness of the case and the likelihood of conviction. This means the more serious the offence, the more likely it is that the accused will be convicted and therefore there will be a stronger need to prevent the risks of an accused person not complying with bail.³⁴

³⁰ 'In all cases you will consider recommendations made by the Police relating to bail. Where practicable, if you disagree with the Police view on bail, you will consult with the Police regarding the course of action you propose'. UK Crown Prosecution Services, 'Legal Guidance on Bail', 2011, (<http://www.cps.gov.uk/legal/a_to_c/bail/index.html>, last accessed on 9 December 2011).

³¹ 'Having considered the views of the Police, it is the Prosecutor's duty to make a specific recommendation to the Court regarding its decision whether or not to grant bail and, if appropriate, upon which conditions'. Idem.

³² 'You should be in a position to present a logical, structured application setting out the arguments supporting whatever course you propose'. Idem.

³³ 'Bail applications can occur at any stage of the progress of a case. You should keep the bail position of a defendant under review throughout the life of the case'. Idem.

³⁴ 'Important considerations will include:

- Any history of offending, absconding or witness interference whilst on bail in the current or in previous proceedings;
- Any express or implied intention to continue to offend, abscond or interfere and any apparent motive for the risk (for example, to obtain money for the purpose of drug purchases);

Best Practices for Defence Counsel

- Defence Counsel should consider the following when deciding whether to make a bail application:
 - a) the strength of the prosecution evidence;
 - b) the nature and extent of the charge(s);
 - c) the gravity of any alleged injury;
 - d) whether the evidence is circumstantial; and
 - e) whether the accused is alleged to have confessed.
- Defence Counsel should take full instructions from his/her client on the circumstances of the offence and what he would like to plea.
- Defence Counsel should have an up-to-date copy of his/her client's previous convictions if he/she has any.
- Defence Counsel should request this from State Counsel if he/she does not have one.
- Defence Counsel should go through his/her client's previous record in detail if he/she has one, looking at:
 - a) the circumstances of any serious or similar offences;
 - b) whether he/she pleaded guilty to any previous offences;
 - c) whether he/she failed to appear at court and the reasons for failing to appear;
 - d) whether he/she has ever been convicted of an offence whilst on bail.
- Defence Counsel should speak to his/her client about the following details which can be presented to the court when making a bail application:
 - a) current job;
 - b) home situation;
 - c) any responsibilities he/she has;

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- The extent to which the defendant has continued to offend whilst subject to other Orders of the Court, such as suspended or deferred sentences and conditional discharge, and to any relevant breach proceedings in respect of other sentences; the presence of one or more of the features may demonstrate an unwillingness or inability to comply with Orders of the Court;
 - Any previous breaches of bail conditions in earlier or concurrent proceedings or, in the case of absconding, failures to surrender to custody;
 - Any evidence of violence or threats towards, or undue influence over, the victim of the crime or other vulnerable witnesses;
 - The degree of temptation to abscond;
 - Any factors which might affect the defendant's ability to comply with bail conditions, such as drug or alcohol dependency. Care must be taken, however, with mentally disordered offenders to ensure that the risks of the future events are reduced in a way most compatible with their proper care and treatment (for example by diversion to a recognised medical treatment scheme or by a remand on bail to an appropriate probation or medical facility); and
 - The effect that the seriousness of the proceedings and the likely penalty of conviction may have upon the defendant; generally speaking, the more serious the offence and the higher the likely penalty, the stronger will be the need to guard against one of the future risks'. Idem.

- d) any potential/probable effect a continued loss of liberty would have on him/her;
 - e) whether his/her client's circumstances have changed since the offence eg whether he/she has moved from the area, whether he/she has changed his/her crowd of friends etc.
- Defence Counsel can make an application for bail on his/her client's behalf at any time during the case.³⁵
 - Defence Counsel should consider speaking to State Counsel before the case to find out whether he/she has any objections to bail. If there are objections to bail being granted, Defence Counsel should ask State Counsel what they are and think about what bail conditions may overcome these objections.
 - Defence Counsel should keep the bail application as brief as possible and to the point, avoiding repetition and addressing each of the points in a logical manner. Defence Counsel should remember to make the strongest points at the beginning and at the end of the bail application.
 - Defence Counsel should approach any objections to bail by:
 - a) undermining the validity of any objections and or by casting doubt on them;
 - b) proposing solutions to how any objections can be met.
 - When making a bail application, Defence Counsel should present evidence of the accused's good character.
 - Defence Counsel should ask an accused whether he/she would like a copy of the bail record.

If a court decides to grant bail, it can impose bail conditions or require the defendant to provide a surety, to ensure that an accused person surrenders to custody. This is detailed in the following principle.

Bail Conditions

Principle

The court can, if it believes it is necessary, require the defendant to provide a surety. The court however can also attach extra conditions to bail if it thinks they are necessary.

An accused person may be required to provide a surety to the court to guarantee that he/she will adhere to bail.³⁶ A surety is a person (normally the friend, relative or employer of the accused), who agrees to ensure that the accused will attend court on his/her next timetabled appearance. The surety accepts that if the accused fails to

³⁵ Section 79(4) of the Criminal Procedure Acts of Sierra Leone, 1965.

(<<http://www.sierra-leone.org/Laws/1965-32.pdf>>, last accessed on 9 December 2011).

³⁶ Section 3 of the Bail Act, 1976 (UK) (<<http://www.legislation.gov.uk/ukpga/1976/63/contents>>, last accessed on 9 December 2011).

surrender to custody, the surety him/herself will have to pay a specified sum of money to the court as a result.

The court can also attach conditions to an accused's bail if it thinks it is necessary to ensure that he/she surrenders to custody.

These conditions can include:

- a) reporting to a police station;
- b) keeping curfew;
- c) staying out of a certain area;
- d) staying in a certain area;
- e) providing the court with a fixed address;
- f) surrendering a passport.

If bail conditions are breached, any money which has been provided as a surety will be forfeited.

Bail conditions can be changed and Defence Counsel can apply to the court to alter or remove them. These bail conditions are not currently provided for in Sierra Leone.

Best Practices for Judges

- It is likely that in many situations the accused will not have access to someone who can afford to pay his/her bail.³⁷ When deciding whether or not a surety is required, the Judge should therefore examine the accused's:
 - a) financial resources;
 - b) character;
 - c) criminal record if he/she has one; and
 - d) relationship to the defendant.³⁸

Best Practices for Defence Counsel

- Defence Counsel should speak to his/her client before making a bail application, taking into account the above considerations about possible bail conditions and whether he/she is prepared to stick to them. Defence Counsel should speak with

³⁷ 'Court should bear in mind that some accused persons may not be au fait with the procedures of the court. Courts should make increased use of section 79 (7) and at least try to depart from the use of sureties depositing title deeds as a condition of bail. The majority of people before the criminal courts are poor and may not have access to people who are wealthy enough or indeed willing to bail them'. Justice Sector Development Programme, 'Criminal Case Management: Best Practice Handbook', 2006 at 17 (<http://www.britishcouncil.org/criminal_case_management_handbook.pdf>, last accessed on 9 December 2011).

³⁸ Section 79(7) of the Constitution of Sierra Leone, Act No. 6 of 1991 (<<http://www.sierra-leone.org/Laws/constitution1991.pdf>>, last accessed on 9 December 2011).

him/her about practical solutions to objections by State Counsel on him/her obtaining bail.

- Defence Counsel should consider whether any surety is or is likely to be available and the amount he/she would be prepared to offer.
- Defence Counsel should explain the obligation of acting as a surety to ensure that the defendant surrenders to bail and the fact that the surety can lose money if this happens.
- Defence Counsel should ask the surety once the obligation has been explained whether he/she is still willing to be a surety.
- If the surety agrees, Defence Counsel should ask the surety how much money he is prepared to pay and how he will pay if the court requires it.
- Before Defence Counsel begins his/her final submissions in a case, he/she should call the person who is proposing to act as a surety in to the witness box where the surety should take an oath.
- When Defence Counsel calls the prospective surety he/she should ask questions which:
 - a) establish the relationship between the surety and the accused;
 - b) establish that the surety understands the meaning of what being a surety is and the consequences if the accused does not appear at court;
 - c) establish the amount of money that the surety is proposing;
 - d) establish how the surety will raise the money if the accused fails to appear at court;
 - e) confirm that the person is still willing to be a surety.
- If the court grants bail, Defence Counsel should speak with his/her client and ensure that he/she understands what it means. If any conditions have been attached to bail, Defence Counsel should ensure that his/her client understands what they are and any potential consequences if he/she breaches them.
- If bail is refused, Defence Counsel should ask his/her client whether he/she would like a new bail application to be made at the accused's next appearance.

3.2. Presumption of Innocence³⁹

Principle

All persons are presumed innocent until proven guilty.

Therefore if an accused has been refused bail, this does not mean that he/she is guilty and this should not be used in criminal cases to influence the view of either the Judge or State Counsel. Similarly, if an accused has been kept in custody for a long time, this should not be used as an indicator of how guilty he/she may be.⁴⁰

In Sierra Leone, Section 23(4) of the Constitution acknowledges that every person who is charged with a criminal offence is entitled to the right to be presumed innocent until he/she is proven or has pleaded guilty.

The ACHPR also provides for every individual to be presumed innocent until proven guilty by a competent court or tribunal under Article 7(1)(b).⁴¹

At the SCSL, the presumption of innocence is also protected:⁴²

‘The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute’.

This is a right which has been acknowledged in the *AFRC*,⁴³ *CDF*⁴⁴ and *RUF*⁴⁵ cases at the SCSL. The following are the key principles on the presumption of innocence which were outlined by the SCSL in these cases:

³⁹ Article 14(2) of the International Covenant on Civil and Political Rights: ‘Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law’. (<<http://www2.ohchr.org/english/law/ccpr.htm>>, last accessed on 9 December 2011).

⁴⁰ Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, at 9 para 30, (<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>, last accessed on 9 December 2011).

⁴¹ Article 7(1)(b) of the African Charter on Human and Peoples’ Rights (<http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf>, last accessed on 9 December 2011)

⁴² Section 17(3) of the Statute of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011)

⁴³ *Prosecutor v Brima, Kamara & Kanu* (Judgement), SCSL-2004-16-T, 20 June 2007 (<<http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/TrialChamberJudgment/tabid/173/Default.aspx>>, last accessed on 9 December 2011).

⁴⁴ *Prosecutor v Fofana & Kondewa* (Judgement), SCSL-04-14-T, 2 August 2007 (<<http://www.sc-sl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/TrialChamberJudgment/tabid/175/Default.aspx>>, last accessed on 9 December 2011).

⁴⁵ *Prosecutor v Sesay, Kallon & Gbao* (Judgement), SCSL-04-15-T, 2 March 2009 (<<http://www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/TrialChamberJudgment/tabid/215/Default.aspx>>, last accessed on 9 December 2011).

i. The *AFRC* case. In this case, the court in its judgment stated that:⁴⁶

- a) *the presumption of innocence is enshrined within the SCSL Statute and therefore that an accused person shall be presumed innocent until proven guilty;*
- b) *this presumption places a burden on the prosecution to establish the guilt of each accused person;*
- c) *this burden remains on the prosecution until the end of the trial;*
- d) *there is no burden on an accused person to prove his innocence;*
- e) *one of the accused (Brima) gave evidence and called witnesses. This did not mean that he accepted the burden to prove his own evidence.*

ii. The *CDF* case. The court acknowledged the presumption of innocence as it is enshrined within the SCSL Statute and stated that:⁴⁷

- a) *it is the prosecution alone who bears the responsibility of proving that a defendant is guilty;*
- b) *the high standard which must be met to secure a defendant's conviction is proving his/her guilt beyond reasonable doubt;*
- c) *each fact that the accused's case is based on must be proven beyond reasonable doubt;*
- d) *this standard of proof in (b) and (c) does not need to be applied to every piece of evidence.*

⁴⁶ *Prosecutor v Brima, Kamara & Kanu* (Judgement), SCSL-2004-16-T, 20 June 2007 (<<http://www.scsl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/TrialChamberJudgment/tabid/173/Default.aspx>>, last accessed on 9 December 2011).

⁴⁷ *Prosecutor v Fofana & Kondewa* (Judgement), SCSL-04-14-T, 2 August 2007 (<<http://www.scsl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/TrialChamberJudgment/tabid/175/Default.aspx>>, last accessed on 9 December 2011).

iii. The *RUF* case. This right was acknowledged by the court in the RUF judgment, in which it stated that:⁴⁸

- a) it is the prosecution's duty to establish the guilt of an accused person; and*
b) each fact that a conviction is based on must be proven beyond reasonable doubt.

These considerations from the SCSL are consistent with international standards⁴⁹ that the presumption of innocence is fundamental in protecting human rights.⁵⁰ Therefore, it is recommended that stakeholders take them into account during criminal proceedings, as outlined in the following best practices.

Best Practices for Judges

- The Judge should not pre-judge a case before it has started and should not decide whether an accused person is innocent or guilty before a trial begins.⁵¹
- If Defence Counsel applies for his/her client's shackles or handcuffs to be removed, the Judge should take into consideration whether there is any danger of the accused being violent or attempting to escape.⁵²
- The Judge should inform an accused person who is shackled or wearing handcuffs and does not have a lawyer, that he/she can make an application to the court to have them removed.
- If an accused is shackled or wearing handcuffs during a jury trial, the Judge should inform the jury that this does not mean that the accused is guilty and should remind the jurors that he/she is presumed innocent until proven guilty.
- If a defendant has been kept in custody prior to the trial, the degree of time spent in custody should not be used to prejudge him/her.
- The Judge should not make any public statements about an accused person's innocence or guilt.
- In cases requiring a jury, the Judge should not tell the jury if the accused has any previous convictions.

⁴⁸ *Prosecutor v Sesay, Kallon & Gbao* (Judgement), SCSL-04-15-T, 2 March 2009 (<<http://www.scs-l.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/TrialChamberJudgment/tabid/215/Default.aspx>>, last accessed on 9 December 2011).

⁴⁹ Article 14 (2) of the International Covenant on Civil and Political Rights: 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'. (<<http://www2.ohchr.org/english/law/ccpr.htm>>, last accessed on 9 December 2011).

⁵⁰ Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, at 9 para 30 (<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>, last accessed on 9 December 2011).

⁵¹ *Idem* at 9 para 30.

⁵² 'Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals'. *Idem* at 9 para 30.

Best Practices for State Counsel

- State Counsel should not make statements in court during a trial speculating on the innocence or guilt of an accused person.
- State Counsel should not make any public statements to the media speculating on the innocence or guilt of an accused person either during or after the trial.
- It is State Counsel's duty to prove the guilt of an accused person.
- If Defence Counsel makes an application to the court to remove the handcuffs or shackles of a defendant, State Counsel can oppose this application to remove them if there are reasonable grounds for the defendant to remain under restraint.⁵³

Best Practices for Defence Counsel

- If the accused is shackled or handcuffed, Defence Counsel can ask the Judge to remove them. Defence Counsel should take into consideration whether there is any danger of his/her client being violent or attempting to escape when making the application.⁵⁴

⁵³ 'There is a presumption that a defendant should be unfettered in court unless there are reasonable grounds for restraint. The onus is on the prosecution to show reasonable grounds for the use of handcuffs'. UK Crown Prosecution Services, 'Legal Guidance on Handcuffing of Defendants', 2011 (<http://www.cps.gov.uk/legal/h_to_k/handcuffing_of_defendants/index.html>, last accessed on 9 December 2011).

⁵⁴ 'Defendants appearing before courts should not be handcuffed or otherwise restrained in the dock, unless there is a danger of violence or escape', *idem*.

3.3. Right to Be Informed of the Charge in a Language One Understands⁵⁵

Principle

An accused has the right to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.

This right is distinct from the right to an interpreter which applies solely during the trial process.

In Sierra Leone, according to Section 23(5)(a) of the Constitution, every accused has the right to be informed of what he is charged with in a language he/she can understand which is important due to the official language of the Courts in Sierra Leone being English while the lingua franca is Krio.

This right has been recognised at the SCSL in its Statute:⁵⁶

'In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her'.

This is in line with international standards.⁵⁷

These best practices should be considered by Judges and Defence Counsel to protect the accused's right to be informed of the charges in a language he/she understands.

⁵⁵ Article 14(3)(a) of the International Covenant on Civil and Political Rights: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him'. (<<http://www2.ohchr.org/english/law/ccpr.htm>>, last accessed on 9 December 2011).

⁵⁶ Article 17(4)(a) of the Statute of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011).

⁵⁷ Article 14 (3)(a) of the International Covenant on Civil and Political Rights: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him'. (<<http://www2.ohchr.org/english/law/ccpr.htm>>, last accessed on 9 December 2011).

Best Practices for Judges

- Before the trial begins, if the accused does not have a lawyer, the Judge should ask if he/she understands the charges against him. If he/she does not understand, the Judge should:
 - a) provide him/her with a court interpreter where available;
 - b) if an interpreter is not available, consider allowing him/her more time to prepare his case;
 - c) if an accused person needs an interpreter and an interpreter is unavailable, proceedings should be adjourned until an interpreter can be located.
- The Judge should consider hearing cases in Krio.
- In cases involving interpreters, no plea should be entered if the defendant does not understand the nature of the charges brought against him or her.⁵⁸
- The Judge should advise police prosecutors that they should not be acting as interpreters.

Best Practices for Defence Counsel

- If an interpreter is required, Defence Counsel should consider asking the court for an adjournment whilst one is located.
- If an interpreter cannot be located, Defence Counsel should consider asking the court if it is possible for him/her to act as his/her client's interpreter throughout the trial instead of police prosecutors or court clerks.
- Defence Counsel should consider asking the court that his/her client be heard in Krio throughout the trial.

⁵⁸ 'A plea is uninformed if the defendant has not fully understood the nature of the case to which he is pleading because of his inadequate understanding of the language and because of the inadequate explanation given by his legal representative'. UK Crown Prosecution Services, 'Legal Guidance on Interpreters, 2011 (<http://www.cps.gov.uk/legal/h_to_k/interpreters/index.htm>, last accessed on 9 December 2011).

3.4. Right to Adequate Time and Facilities for the Preparation of the Defence & Right to Communicate with Counsel of One's Choosing⁵⁹

Principle

An accused has the right to adequate time and facilities for the preparation of his or her defence.

The definition of 'adequate time' will inevitably vary from case to case. It is essential that State Counsel follow their disclosure obligations efficiently to allow a defendant to have enough time to prepare his/her case. 'Facilities' include access to documents and evidence which an accused needs to prepare his/her case, in addition to having the opportunity to speak with his/her lawyer. When communicating with Defence Counsel, the accused should be able to do so promptly. Furthermore, this right is fundamental to ensuring that a lawyer can speak with his/her client in conditions which fully respect the confidential nature of their conversations. Defence lawyers should not be restricted, influenced, pressured or be subject to any undue interference in representing their clients.⁶⁰

Section 23(5)(b) of the Sierra Leonean Constitution protects the right of an accused person to have adequate time and facilities for the preparation of his/her defence. This is consistent with international standards.⁶¹ In Sierra Leone, this right will be subject to different infrastructural limitations such as the fact that law reports are not up to date and that the judiciary faces a shortage of computer facilities.⁶²

The right to adequate time and facilities is enshrined in the SCSL Statute:⁶³

'In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing'.

⁵⁹ Article 14(3)(b) of the International Covenant on Civil and Political Rights: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing'. (<<http://www2.ohchr.org/english/law/ccpr.htm>>, last accessed on 9 December 2011).

⁶⁰ Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007 at 10, para 34 (<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>, last accessed on 9 December 2011).

⁶¹ Article 14(3)(b) of the International Covenant on Civil and Political Rights: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing'. (<<http://www2.ohchr.org/english/law/ccpr.htm>>, last accessed on 9 December 2011).

⁶² University of Nottingham Human Rights Law Centre, 'Assessment of Needs and Gaps in the Sierra Leonean Criminal Justice System' at Section 7.1.

⁶³ Section 17(4)(b) of the Statute of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011).

In the *Taylor* case at the SCSL, the issue of adequate time and facilities was raised:⁶⁴

The Chamber stated that:

- a) 'adequate facilities' has a broad meaning;*
- b) it is the trial chamber's duty to balance the accused's right to adequate time to prepare his or her case and the right to be tried without undue delay according to the SCSL Statute.*

This jurisprudence from the SCSL has provided guidance on the concept of adequate time and facilities. It should be taken in to consideration by stakeholders when applying the following best practices, to ensure that the accused in Sierra Leonean criminal cases is sufficiently equipped to prepare his/her defence.

Best Practices for Judges

- If a defendant is unable to speak to his/her lawyer confidentially within the court room, the Judge should advise Defence Counsel to move closer to his/her client and/or move away from the public, jury, State Counsel or the Bench to maintain lawyer-client privilege.

Best Practices for Defence Counsel

- If Defence Counsel is unable to speak with his/her client confidentially, Defence Counsel should ask the judge if he/she can move closer to the accused and/or move away from the public, jury, State Counsel or the Bench to maintain lawyer-client privilege.
- If Defence Counsel does not believe that he/she has had enough time to prepare the defence, he/she should ask the court for an adjournment.
- Defence Counsel should ensure that the defence has access to resources including basic equipment such as stationery.

⁶⁴ *Prosecutor v Taylor* (Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr Taylor's Defence), SCSL-03-1-PT-164, 23 January 2007 (<<http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/TrialChamberDecisions/tabid/159/Default.aspx>>, last accessed on 9 December 2011).

3.5. Right to a Trial Without Undue Delay⁶⁵

Principle

All persons have the right to a trial without undue delay.

It is important that every accused person in Sierra Leone is brought to trial without any unnecessary delay so that:

- a) the accused person is not left in a state of uncertainty for too long; and/or
- b) if the accused person is in custody prior to the trial, he/she is not detained for longer than is necessary; and
- c) to serve the interests of justice; and
- d) to ensure that the criminal justice system runs as smoothly as possible.⁶⁶

This is a right recognised by the ACHPR⁶⁷ and internationally.⁶⁸

In Sierra Leone, although there is no similarly worded provision in the Constitution, Section 23(1) provides that when someone is charged with a criminal offence, he/she shall be given a fair hearing within a reasonable time.

At the SCSL, this is enshrined in Article 17(4)(c) of the Statute:⁶⁹

*'In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
To be tried without undue delay'.*

In the *Taylor* case,⁷⁰ the SCSL Trial Chamber commented on the right to a trial without undue delay:

⁶⁵ Article 14(3)(c) of the International Covenant on Civil and Political Rights: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To be tried without undue delay'. (<<http://www2.ohchr.org/english/law/ccpr.htm>>, last accessed on 9 December 2011).

⁶⁶ Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007 at 11, para 35, (<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>, last accessed on 9 December 2011).

⁶⁷ Article 7(1)(d) of the African Charter on Human and Peoples' Rights: 'Every individual shall have the right to have his cause heard. This comprises: the right to be tried within a reasonable time by an impartial court or tribunal'. (<http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf>, last accessed on 9 December 2011).

⁶⁸ Article 14(3)(c) of the International Covenant on Civil and Political Rights: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To be tried without undue delay'. (<<http://www2.ohchr.org/english/law/ccpr.htm>>, last accessed on 9 December 2011).

⁶⁹ Article 17(4)(c) of the Statute of the Special Court for Sierra Leone, (<<http://www.scs-l.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011).

a) *It is the Trial Chamber's discretion to fix a trial date, the trial chamber should consider the parties' views on trial dates but is not bound by them:*

'The discretion to fix a trial date rests with the Trial Chamber as part of its case management function, and while it should consider the views of the parties in this regard, it is not bound by them'.

b) *The SCSL Rules of Procedure and Evidence which refer to the fact that a trial should be fair and expeditious taking into account the rights of the accused.*

This SCSL jurisprudence can assist at the national level by corroborating the importance of active judicial case management to ensure that cases are dealt with as swiftly as possible in order that an accused receives a trial without undue delay. This is consistent with the TRC which recommended that an efficient case management system is implemented to ensure the smooth running of cases:⁷¹

'The creation of an efficient case flow management system, the proper scheduling of cases and an increase in judicial sitting hours will enable the judiciary to work at greater capacity'.

This is further addressed below in Section 7, however it should be pointed out that the incorporation of this TRC recommendation will inevitably assist with an accused receiving a trial without undue delay. Therefore, the following are best practices which can be useful to all stakeholders in the court to enable an accused to be tried as swiftly as possible after he/she is charged.

Best Practices for Judges

- The Judge should be mindful of the time period within which an accused is brought to trial when deciding on a timetable with both parties to protect his/her right to trial without undue delay. In respect of what constitutes a reasonable

⁷⁰ *Prosecutor v Taylor* (Decision on Defence application for leave to appeal "joint decision on Defence motions on adequate facilities and adequate time for the preparation of Mr. Taylor's Defence" dated 23 January 2007), SCSL-03-01-PT-182, 15 February 2007, (<<http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/TrialChamberDecisions/tabid/159/Default.aspx>>, last accessed on 9 December 2011).

⁷¹ 'The creation of an efficient case flow management system, the proper scheduling of cases and an increase in judicial sitting hours will enable the judiciary to work at greater capacity'. Truth and Reconciliation Commission, Final Report, Volume 2, 2004 at 148, para 183, (<<http://www.sierra-leone.org/TRCDocuments.html>>, last accessed on 9 December 2011).

time period, this will vary according to the circumstances of each case.⁷² There are however several factors which have to be taken into consideration including:

- a) the length of each stage of proceedings;
 - b) the detrimental effects of the delay of the proceedings;
 - c) availability of other remedies;
 - d) the complexity of the case; and
 - e) the result of any appeal proceedings.⁷³
- If the defendant has been denied bail, the Judge should bear in mind that it is essential that he/she is tried as swiftly as possible.⁷⁴
 - The Judge should not adjourn cases unless absolutely necessary taking into account a defendant's right to time for the preparation of his defence.
 - The Judge should ensure that all parties are complying with their disclosure obligations in a timely manner.
 - The Judge should liaise with court staff to ensure that indictments are drafted as quickly as possible.⁷⁵

Best Practices for State Counsel

- State Counsel should comply with all disclosure obligations in a timely manner.
- State Counsel should incorporate an efficient case management system in to the day-to-day running of cases.

Best Practices for Defence Counsel

- When bail is denied, it is of particular importance that Defence Counsel reminds the court of the accused's right to a trial without undue delay so that he/she is tried as swiftly as possible.⁷⁶

⁷² Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007 at 11, para 35,

(<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>, last accessed on 9 December 2011);

In *Eustace Henry and Everal Douglas v. Jamaica*, it was held that a delay lasting twenty two months between two murder suspects being rearrested and the date of their second trial were incompatible with Article 14 (3) of the ICCPR. Communication No. 571/1994, UN Doc. CCPR/C/57/D/571/1994, 25 July 1996

(<<http://www1.umn.edu/humanrts/undocs/html/VIEW571.htm>>, last accessed on 9 December 2011).

⁷³ *Franz and Maria Deisl v Austria*, Communication No. 1060/2002, UN Doc. CPR/C/81/D/1060/2002, 27 July 2004

(<<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/8a3224f62ec39c0fc1256efc0049c2be?Opendocument>>, last accessed on 9 December 2011).

⁷⁴ Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007 at 11, para 35,

(<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>, last accessed on 9 December 2011).

⁷⁵ In the case of *State v Chukuma Obeelodochina*, which involved a single count and only three witnesses, the preparation of the indictment lasted up to three years. The defendant therefore had to wait three years before his trial. *State v Chukuma Obeelodochina* [2007] SLHC 18 (13 March 2007) at para 8-14, (<<http://www.sierraleoneli.org/sl/judgment/high-court/2007/18-0>>, last accessed on 9 December 2011).

- Defence Counsel should comply with all disclosure obligations in a timely manner.
- Defence Counsel should incorporate an efficient case management system in to the day-to-day running of cases.

3.6. Right to Legal Counsel⁷⁷

Principle

Every accused person has the right to legal counsel and has the right to defend himself or herself in person.

In Sierra Leone, the right to legal counsel is part of the Constitution.⁷⁸ This is consistent with the ACHPR⁷⁹ and international standards.⁸⁰

The importance of this right is acknowledged at the SCSL:⁸¹

*'In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.'*

⁷⁶ Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007 at 11, para 35, (<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>, last accessed on 9 December 2011).

⁷⁷ Article 14(3)(d) of the International Covenant on Civil and Political Rights: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it', (<<http://www2.ohchr.org/english/law/ccpr.htm>>, last accessed on 9 December 2011).

⁷⁸ Section 17(2)(b) of the Constitution of Sierra Leone, Act No. 6 of 1991, (<<http://www.sierra-leone.org/Laws/constitution1991.pdf>>, last accessed on 9 December 2011).

⁷⁹Article 7(1)(c) of the African Charter on Human and Peoples' Rights: 'Every individual shall have the right to have his cause heard. This comprises: the right to defense, including the right to be defended by counsel of his choice', (<http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf>, last accessed on 9 December 2011).

⁸⁰ Article 14(3)(d) of the International Covenant on Civil and Political Rights: To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it', (<<http://www2.ohchr.org/english/law/ccpr.htm>>, last accessed on 9 December 2011).

⁸¹ Article 17(4)(d) of the Statute of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011).

In the *Taylor* case,⁸² the SCSL noted that the fundamental right of an accused person to have access to his lawyer applies throughout the entirety of criminal proceedings. Furthermore, if this right is restricted, then one of the most basic rights of an accused is undermined.⁸³

If an accused person in Sierra Leone does not have a lawyer, he/she should be able to represent himself or herself in court. In the *CDF* case, on the first day of the trial the SCSL considered the request of one of the accused-Norman- to remove his lawyer and represent himself. The SCSL stated that:⁸⁴

- a) *the right to self-representation at the SCSL is not absolute;*
- b) *as Norman was a co-accused, he should not be able to exercise this right to the detriment of the rights of his co-accused to a fair and expeditious trial.*

Furthermore, the SCSL identified six factors to be taken in to consideration when deciding whether an accused's right to self-representation should be limited:

- i. *the right to counsel is based on the idea that representation by a lawyer is an essential and necessary part of a fair trial;*
- ii. *a lawyer assists the trial Judge by removing the burden from the Judge of him or her having to explain and enforce basic courtroom protocol in addition to assisting the accused;*
- iii. *in complex trials, allowing an inexperienced and most likely untrained accused to represent him or herself risks unfairness to him or her;*
- iv. *there is a public interest both nationally and internationally [due to the nature of the trials] that the trial is completed swiftly;*
- v. *if an accused represents himself or herself, there is a strong likelihood that there will be more disruption to the court's calendar and timetable;*
- vi. *there is a tension between allowing one accused's right to self-representation and the right of his co-accused to a fair and swift trial.*

⁸² *Prosecutor v Taylor*, (Decision on Prosecution Motion for an Order Restricting Contact between the Accused and Defence Counsel during Cross-Examination), SCSL-03-1-T-861, 20 November 2009 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=N9U9HffZAb4=&tabid=159>>, last accessed on 9 December 2011).

⁸³ 'CONSIDERING that the fundamental right of an accused to have access to counsel applies at any stage of the proceedings' and that curtailing this right for an extended period of time could potentially undermine one of the most important basic rights of an accused and endanger the integrity and fairness of the proceedings as a whole'. *Idem* at 3.

⁸⁴ *Prosecutor v Fofana & Kondewa* (Decision on the application of Samuel Hinga Norman for self-representation under Article 17(4)(d) of the Statute of the Special Court), SCSL-04-14-T-125, 8 June 2004 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=1PnvYCyqWs8%3d&tabid=153>>, last accessed on 9 December 2011).

In the *RUF* case, the SCSL Appeals Chamber stated that an accused does not have the right not to have counsel assigned to him. However it did assert that an accused has the following rights under Article 17(4)(d):⁸⁵

- i. to defend himself or herself in person; or*
- ii. to defend himself or herself through legal assistance of his or her own choosing; and*
- iii. to have legal assistance assigned to him or her, in any case where the interests of justice so require’.*

The Trial Chamber also highlighted that it is important to consider the ‘interests of justice and fair hearing’ when looking at this right.⁸⁶

These cases therefore reiterate the importance of an accused person being assigned legal counsel or being able to represent himself or herself in person. Although these cases stem from the SCSL and these considerations may not always be applicable in Sierra Leone (as not all defendants can afford a lawyer and legal aid is not widely available), the principles which have been highlighted can be noted by the national courts in Sierra Leone in criminal proceedings in cases involving more than one defendant.

The following best practices provide guidance to stakeholders on the right to legal counsel.

Best Practices for Defence Counsel

- Defence Counsel should act honestly and professionally when representing an accused.⁸⁷
- Defence Counsel should act independently when representing an accused and should not accept any instructions from the Sierra Leone government or any other sources which may compromise his/her independence.⁸⁸
- Defence Counsel should act with integrity when representing his/her client.⁸⁹

⁸⁵ *Prosecutor v Sesay, Kallon & Gbao* (Gbao - Decision on Appeal against Decision on Withdrawal of Counsel), SCSL-04-15-T-285, 23 November 2004 at 19, para 57, (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=JFH%2bbQH4vPw%3d&tabid=195>>, last accessed on 9 December 2011).

⁸⁶ *Idem* at 19 para 55.

⁸⁷ Article 5(i) of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone: ‘Counsel shall act with: competence, honesty, skill and professionalism in the presentation and conduct of the case’, (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=IbTonPmXLHk%3d&tabid=176>>, last accessed on 9 December 2011).

⁸⁸ Article 5(ii) of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone: ‘Counsel shall act with independence in the performance of his functions, and shall not accept nor seek instructions from a Government or any other source, nor engage in any activity which compromises his independence or which reasonably creates the appearance of such compromise’, (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=IbTonPmXLHk%3d&tabid=176>>, last accessed on 9 December 2011).

- If Defence Counsel has been unable to meet with his/her client before the first appearance or has not been instructed until his/her first appearance, Defence Counsel should ask the court to:
 - a) adjourn to another day; or
 - b) adjourn for a long enough period to take instructions at court.⁹⁰

Principle

The right to legal counsel includes the provision of legal aid where the interests of justice require it, and where the accused does not have sufficient means to pay for legal representation.

Section 28(5) of the Sierra Leonean Constitution corroborates the need for legal aid in situations where an accused person cannot afford a lawyer.

This is consistent with international standards⁹¹ and the SCSL Statute:⁹²

'In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it'.

As noted above, in the *RUF* case, the SCSL noted that the right to legal counsel involves the accused being assigned legal assistance where the interests of justice require it.⁹³

⁸⁹ Article 5(ii) of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone: 'Counsel shall act with: integrity to ensure that his actions do not bring the administration of justice into disrepute', (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=IbTonPmXLHk%3d&tabid=176>>, last accessed on 9 December 2011).

⁹⁰ 'Where the Accused has been unable to instruct a solicitor prior to the first hearing, then if practicable the Court may allow time for instructions to be taken by Solicitors at Court'. Justice Sector Development Programme, 'Criminal Case Management: Best Practice Handbook', 2006 at 18, (<http://www.britishcouncil.org/criminal_case_management_handbook.pdf>, last accessed on 9 December 2011).

⁹¹ Article 14(3)(d) of the International Covenant on Civil and Political Rights, (<<http://www2.ohchr.org/english/law/ccpr.htm>>, last accessed on 9 December 2011).

⁹² Article 17(4)(d) of the Statute of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeFw%3d&tabid=176>>, last accessed on 9 December 2011).

⁹³ *Prosecutor v Sesay, Kallon & Gbao* (Gbao - Decision on Appeal against Decision on Withdrawal of Counsel), SCSL-04-15-T-285, 23 November 2004 at 19, para 57, (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=JEH%2bbQH4vPw%3d&tabid=195>>, last accessed on 9 December 2011).

The provision of legal services in Sierra Leone is essential as 70% of litigants cannot afford to hire a lawyer.⁹⁴ Until legal aid is widely available, it is recommended that the bar association create a list of lawyers who are currently working on a legal aid or pro bono basis.

The Sierra Leone Bar Association should require its members to carry out pro bono work in conjunction with the following TRC recommendation:⁹⁵

'The Commission calls on the Sierra Leone Bar Association to require its members to offer their services regularly on a pro bono basis. A particular onus rests on the Bar Association to provide legal representation for indigent accused in trials involving serious offences, where significant periods of imprisonment are at stake'.

In order to ensure that legal aid is provided for all accused persons in Sierra Leone, the TRC also recommended that Fourah Bay College incorporate legal aid clinics as part of the curriculum for law students:⁹⁶

'The establishment of legal aid clinics at universities and colleges and under the auspices of the law departments can fill in some of the gaps in the government funded system of legal aid. In each clinic, a qualified lawyer should supervise between 10 and 20 law students. The Commission calls upon universities and colleges to consider the establishment of legal aid clinics. The Commission calls upon Fourah Bay College to make service in the law school's legal aid clinic part of the curriculum for all law students'.

The following best practices should be considered in cases where legal aid is available to an accused person.

Best Practices for Judges

- The Judge should take into consideration the gravity of the offence with which the accused is charged when considering whether or not an accused is entitled to legal aid.
- The Judge should ensure that in cases which carry the death penalty, the accused is assigned legal aid and has access to a lawyer at all stages of the case.⁹⁷

⁹⁴ University of Nottingham Human Rights Law Centre, 'Assessment of Needs and Gaps in the Sierra Leonean Criminal Justice System' at Section 7.1.

⁹⁵ Truth and Reconciliation Commission, Final Report, Volume 2, 2004 at 147, para 172, (<<http://www.sierra-leone.org/TRCDocuments.html>>, last accessed on 9 December 2011).

⁹⁶ Idem at 146, para 168.

⁹⁷ 'In cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings. Counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused. Unlike in the case of privately retained lawyers, blatant misbehaviour or incompetence, for example the withdrawal of an appeal without consultation in a death penalty case, or absence during the hearing of a witness in such cases may entail the responsibility of the State concerned for a violation of article 14, paragraph 3 (d), provided that it was manifest to the judge

3.7. Right to Examine Witnesses⁹⁸

Principle

Every accused person has the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

In Sierra Leone, this right is embodied in the Constitution.⁹⁹ It is also in accordance with international standards.¹⁰⁰ This right is important to ensure that an accused person has an effective defence and that he/she has equal legal powers as the prosecution in getting witnesses to attend court and to examine or cross-examine the same witnesses as the prosecution.¹⁰¹

There are however inevitable barriers to the exercise of this right. For example, whether or not witnesses can attend depends on transport issues.¹⁰² Furthermore, in more serious criminal cases, it is likely that a witness may fear being identified or intimidated if he/she testifies in a court case.¹⁰³ Within courtrooms, it is not always possible to hear what witnesses are saying.

This right however is not an unlimited right and cannot be used to make a witness attend court. It nevertheless allows witnesses to be admitted that are available for the defence and to give the defence the chance to question and challenge the witnesses at some point in the proceedings.¹⁰⁴

that the lawyer's behaviour was incompatible with the interests of justice'. Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007 at 12 para 38, (<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>, last accessed on 9 December 2011).

⁹⁸ Article 14(3)(e) of the International Covenant on Civil and Political Rights: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him', (<<http://www2.ohchr.org/english/law/ccpr.htm>>, last accessed on 9 December 2011).

⁹⁹ Section 23(5)(d) of the Constitution of Sierra Leone, Act No. 6 of 1991 (<<http://www.sierra-leone.org/Laws/constitution1991.pdf>>, last accessed on 9 December 2011).

¹⁰⁰ Article 14(3)(e) of the International Covenant on Civil and Political Rights: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him', (<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>, last accessed on 9 December 2011).

¹⁰¹ Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007 at 11, para 39, (<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>, last accessed on 9 December 2011).

¹⁰² University of Nottingham Human Rights Law Centre, 'Assessment of Needs and Gaps in the Sierra Leonean Criminal Justice System' at Section 7.1.

¹⁰³ Idem at Section 7.1.

¹⁰⁴ Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007 at 11, para 39, (<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>, last accessed on 9 December 2011).

The right to examine witnesses is recognised by the SCSL:¹⁰⁵

*'In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her'.*

The following best practices can be considered by the stakeholders during criminal proceedings.

Best Practices for Judges

- The Judge should consider adjourning the case if a witness is absent or unavailable.
- Where a witness is absent or unavailable, the Judge should use all the powers at his/her disposal to secure his/her attendance.¹⁰⁶
- The Judge should order State Counsel to reduce the number of prosecution witnesses where State Counsel is calling a lot of witnesses to prove the same facts.¹⁰⁷
- The Judge should request State Counsel to shorten the examination of chief of some of its witnesses if it is proving to be excessive.¹⁰⁸

Best Practices for State Counsel

- If a witness is absent, State Counsel should inform the court that he/she was made aware of the court date and the consequences of non-attendance.¹⁰⁹
- State Counsel should request an adjournment if a witness is not present.
- If State Counsel is unable to hear what the witness is saying, he/she should inform the Judge and ask to approach the witness to hear him/her more clearly.

¹⁰⁵ Article 17(4)(e) of the Statute of the Special Court for Sierra Leone, (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011).

¹⁰⁶ Justice Sector Development Programme, 'Criminal Case Management: Best Practice Handbook', 2006 at 23, (<http://www.britishcouncil.org/criminal_case_management_handbook.pdf>, last accessed on 9 December 2011).

¹⁰⁷ Rule 73bis(D) of the Statute of the Special Court for Sierra Leone: 'The Trial Chamber or a Judge designated from among its members may order the Prosecutor to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts', (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011).

¹⁰⁸ Rule 73bis(C) of the Statute of the Special Court for Sierra Leone: 'The Trial Chamber or a Judge designated from among its members may order the Prosecutor to shorten the examination-in-chief of some witnesses', (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011).

¹⁰⁹ Justice Sector Development Programme, 'Criminal Case Management: Best Practice Handbook', 2006 at 23, (<http://www.britishcouncil.org/criminal_case_management_handbook.pdf>, last accessed on 9 December 2011).

Best Practices for Defence Counsel

- If a witness is absent from the court, Defence Counsel should inform the court that he/she was made aware of the court date and the consequences of non-attendance.¹¹⁰
- Defence Counsel should request an adjournment if a witness is not present.
- If Defence Counsel is unable to hear what the witness is saying, he/she should inform the Judge and ask to approach the witness to hear him/her more clearly.

3.8. Right to an Interpreter

Principle

A suspect or an accused has the right to the free assistance of an interpreter if he or she cannot understand or speak the language used in court.

This principle applies solely to the criminal trial process and is distinct from the right to be informed of the charges in a language the accused understands, which begins as soon as the accused is charged.

In international human rights law, there is no automatic right to an interpreter where the accused understands the language of the court but would prefer to speak another language. There is also no automatic right for an accused to speak his/her language in court.

In Sierra Leone every accused person has the right to an interpreter during legal proceedings.¹¹¹ This is in line with international standards.¹¹²

The right to an interpreter is an important part of criminal trials which has been incorporated into proceedings at the SCSL.¹¹³

‘Before performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality’.

¹¹⁰ Idem at 23.

¹¹¹ Section 23(5)(e) of the Constitution of Sierra Leone, Act No. 6 of 1991.

(<http://www.sierra-leone.org/Laws/constitution1991.pdf>), last accessed on 9 December 2011).

¹¹² Article 14(3)(f) of the International Covenant on Civil and Political Rights: ‘In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

To have the free assistance of an interpreter if he cannot understand or speak the language used in court’, (<http://www2.ohchr.org/english/law/ccpr.htm>), last accessed on 9 December 2011).

¹¹³ Article 17(4)(f) of the Statute of the Special Court for Sierra Leone

(<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176>), last accessed on 9 December 2011).

At the SCSL, where the language used in the court is also English, the indictment will be read to the accused or written in a language which he/she understands in situations where:

- a) the accused is illiterate;
- b) the accused does not know English;
- c) the accused's language is an oral language or a written language.¹¹⁴

It is important that interpreters act in a professional, independent and impartial manner as recommended by the SCSL Rules of Procedure and Evidence.¹¹⁵

*'In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court'.*

These rules of procedure from the SCSL should be followed where possible in Sierra Leone as the most commonly used language in Sierra Leone is Krio. This is particularly important as the majority of defendants do not speak English and are representing themselves. Without a lawyer to assist with the language barriers, the provision of an interpreter is essential.

The following best practices are important to ensure that an accused understands the proceedings at the trial stage of a criminal case.

Best Practices for Judges

- The Judge should consider hearing cases in Krio.
- If an accused person needs an interpreter and an interpreter is unavailable, proceedings should be adjourned until an interpreter can be located.
- In cases involving interpreters, no plea should be entered if the defendant does not understand the nature of the charges brought against him/her.¹¹⁶

¹¹⁴ Rule 52 of the Special Court for Sierra Leone, Rules of Procedure and Evidence: 'An indictment that has been permitted to proceed by the Designated Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Special Court. If the accused does not understand English and if the language understood is a written language known to the Registrar, a translation of the indictment in that language shall also be prepared. In the case that the accused is illiterate or his language is an oral language, the Registrar will ensure that the indictment is read to the accused by an interpreter, and that he is served with a recording of the interpretation', (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

¹¹⁵ Rule 76 of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

¹¹⁶ 'A plea is uninformed if the defendant has not fully understood the nature of the case to which he is pleading because of his inadequate understanding of the language and because of the inadequate explanation

- The Judge should advise police prosecutors that they should not be acting as interpreters.

Best Practices for Defence Counsel

- If an interpreter is required, Defence Counsel should consider asking the court for an adjournment whilst one is located.
- If an interpreter cannot be located, Defence Counsel should consider asking the court if it is possible for him/her to act as his/her client's interpreter throughout the trial instead of police prosecutors or court clerks.
- Defence Counsel should consider asking the court that his/her client be heard in Krio throughout the trial.

3.9. Freedom from Compulsory Self-Incrimination & the Right to Remain Silent¹¹⁷

Principle

An accused may not be compelled to testify against himself or herself or to confess guilt. No negative inferences should be taken from an accused not testifying or confessing guilt.

The SCSL recognises that a defendant has the right not to incriminate himself or herself.¹¹⁸

*'In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
Not to be compelled to testify against himself or herself or to confess guilt.'*

given by his legal representative', UK Crown Prosecution Services, 'Legal Guidance on Interpreters', 2011, (<http://www.cps.gov.uk/legal/h_to_k/interpreters/index.htm>, last accessed on 9 December 2011).

¹¹⁷ Article 14(3)(g) of the International Covenant on Civil and Political Rights: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: Not to be compelled to testify against himself or to confess guilt', (<<http://www2.ohchr.org/english/law/ccpr.htm>>, last accessed on 9 December 2011).

¹¹⁸ Statute of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011).

The following SCSL cases have acknowledged a defendant's right not to incriminate himself or herself and the right to remain silent:

- i. The *AFRC* case¹¹⁹

The court in its judgment stated that two of the accused (Kamara & Kanu) had invoked the right to remain silent and not testify. No adverse inferences were drawn from this by the court.

- ii. The *RUF* case¹²⁰

The court in its judgment acknowledged this right. One of the accused (Gbao) invoked his right to remain silent and did not testify. The SCSL stated that:

a) *no adverse inferences were drawn from his silence and [the SCSL] did not comment on this decision;*
 b) *the fact that he remained silent did not mean he was acknowledging that he was guilty.*

These SCSL guidelines, if respected, ensure that an accused is not compelled to testify against himself or herself or to confess guilt. They therefore constitute the basis for the following best practices which should be followed in Sierra Leone during criminal trials.

Best Practices for Judges

- The Judge should inform the accused person that he/she has the right to remain silent.
- The Judge should tell the jury that although the accused is not giving evidence, this does not mean he/she is guilty.¹²¹

Best Practices for Defence Counsel

- Defence Counsel should advise his/her client of the right to remain silent.

¹¹⁹ *Prosecutor v Brima, Kamara & Kanu* (Judgement), SCSL-2004-16-T, 20 June 2007, (<<http://www.scl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/TrialChamberJudgment/tabid/173/Default.aspx>>, last accessed on 9 December 2011).

¹²⁰ *Prosecutor v Sesay, Kallon & Gbao* (Judgement), SCSL-04-15-T, 2 March 2009, (<<http://www.scl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/TrialChamberJudgment/tabid/215/Default.aspx>>, last accessed on 9 December 2011).

¹²¹ Section 38(3) of the Criminal Justice & Public Order Act, 1994 (UK) (<<http://www.legislation.gov.uk/ukpga/1994/33/contents>>, last accessed on 9 December 2011).

4. BEST PRACTICES REGARDING WITNESSES

Following on from accused persons, Section 4 turns next to witnesses as actors in the Sierra Leonean criminal justice system. However, it also includes victims when they are called to testify, and are therefore acting as witnesses. Consequently, in this Section, 'witnesses' should be understood as including victims when they are called to testify.

Overview

Witness testimony is one of the main sources of evidence in criminal trials. Therefore, it is particularly important to encourage witnesses to come forward and give testimony.¹²² However, in Sierra Leone the prosecution of serious crimes is affected by the reluctance of witnesses to participate in trials.¹²³ This unwillingness of witnesses to cooperate can generally be explained due to the fear of any risk to their lives or the lives of their family members by alleged perpetrators or other persons acting on their behalf.¹²⁴ In addition, all stakeholders should take into consideration the initial trauma experienced by witnesses, in particular when they are victims of the crimes, and should be aware that testifying in a criminal trial might lead to future traumatisation.¹²⁵

Consequently, the quality of witness protection and support within the criminal justice system is crucial, as it will impact on the quality of the testimony that the witness is able to give. If the experience of testifying is positive and not too distressing or dangerous, it will encourage future witnesses to testify.¹²⁶

There are two main categories of witnesses in need of protection and support:

- i. Witnesses under threat. These are witnesses whose personal security or whose family member's¹²⁷ personal security is endangered as a result of threats, intimidation, or similar actions relating to the participation of the witness in criminal proceedings;
- ii. Vulnerable witnesses. These can include:
 - a) witnesses who have been severely physically or mentally traumatised by the criminal offence;
 - b) child witnesses;¹²⁸
 - c) witnesses who have a mental disorder, a physical disability, or are significantly impaired in relation to intelligence and social functioning, if the

¹²² L. Toomey, 'Witness Protection in Countries Emerging from Conflict', International Network to Promote the Rule of Law, 2007 at 1 (<<http://www.inprol.org/files/CR07008.pdf>>, last accessed on 9 December 2011).

¹²³ University of Nottingham Human Rights Law Centre, 'Assessment of Needs and Gaps in the Sierra Leonean Criminal Justice System' at Section 7.1.

¹²⁴ L. Toomey, 'Witness Protection in Countries Emerging from Conflict', International Network to Promote the Rule of Law, 2007 at 1 (<<http://www.inprol.org/files/CR07008.pdf>>, last accessed on 9 December 2011).

¹²⁵ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 2 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqgzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

¹²⁶ *Idem* at 2.

¹²⁷ 'Family members' should be understood as including a spouse, a brother or sister, a parent, a child, a grandparent, a grandchild, an adopted parent or adopted child, a foster parent or child, or a cohabiting partner.

¹²⁸ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 4 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

quality¹²⁹ of their testimony is likely to be diminished because of the disorder or disability.¹³⁰

It must be emphasised that all vulnerable witnesses or witnesses under threat should not be viewed as identical: different witnesses have different needs. It is also recommended that the court take into account the views of the witness when determining whether he/she may be regarded as vulnerable or under threat.¹³¹

At each stage of the proceedings, stakeholders should aim at keeping the witnesses' needs and interests in mind, in particular in respect of vulnerable witnesses and witnesses under threat.

However, providing protection and assistance to witnesses can sometimes be considered as conflicting with the fair trial rights of the accused. In Sierra Leone, Section 23(5) of the Constitution guarantees the right of the accused to examine or have examined the witnesses against him and the equality of arms between the prosecution and the defence regarding the conditions of examination of witnesses.¹³²

As a result of its legal texts and cases, the SCSL can be considered as having developed an innovative witness-oriented approach. Many best practices can therefore be drawn from its experience with respect to the protection of witnesses, as well as the treatment they receive throughout the proceedings.

Moreover, the developed best practices will participate in implementing the following TRC recommendations:¹³³

'The Commission calls on the judiciary to take a pro-active approach to the protection of human rights';

'The Commission calls upon the Sierra Leone Bar Association to become the guardians of the protection of the Rule of Law and the human rights of Sierra Leoneans'.

In addition, the TRC recommendation which encourages the development of a human rights culture in Sierra Leone will be further enhanced by ensuring that the rights of victims and witnesses are respected.¹³⁴

¹²⁹ The UK Ministry of Justice defines the quality of the evidence as the completeness, coherence and accuracy of the testimony.

¹³⁰ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 4 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

¹³¹ Idem at 4.

¹³² Section 23(5) of the Constitution of Sierra Leone, 1991: 'Every person who is charged with a criminal offence— shall be afforded facilities to examine in person or by his legal practitioner the witnesses called by the prosecution before any court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution' (<<http://www.sierra-leone.org/Laws/constitution1991.pdf>>, last accessed on 9 December 2011).

¹³³ Truth and Reconciliation Commission, Final Report, Volume 2, 2004, at 148, para 182 and 147, para 174 (<<http://www.sierra-leone.org/TRCDocuments.html>>, last accessed on 9 December 2011).

¹³⁴ 'The Commission seeks to promote the creation of a human rights culture in Sierra Leone. A rights culture is one in which there is knowledge and recognition of the basic rights to which all human beings are entitled. A rights culture demands that we respect each other's human rights, without exception'. Idem at 125, para 45.

4.1. Protection of Witnesses & Victims Called to Testify

Principle

All stakeholders should strive to ensure that witnesses' security is not negatively affected by the fact that they testified at a criminal trial.

The first objective of protective measures is to ensure the physical security of witnesses under threat.¹³⁵ Often witnesses will provide information at great personal risk to themselves and their families. Therefore, all stakeholders have a moral duty to protect witnesses from any harm that may result from providing such information.¹³⁶ In respect of corruption cases, providing effective protection from potential retaliation or intimidation for witnesses who give testimony is an obligation under the UN Convention against Corruption, ratified by Sierra Leone.¹³⁷

There are three groups of protective measures:¹³⁸

- i. Measures aimed at reducing a witness' fear by avoiding face-to-face confrontation with the defendant;
- ii. Measures aimed at making it difficult or impossible for the defendant to trace the identity of the witness;
- iii. Measures aimed at limiting the trauma experienced by vulnerable witnesses at all stages of the proceedings. Victims of serious crimes, especially gender-based crimes, can also be afraid of social stigma and may not be willing to testify publicly.¹³⁹

Although all stakeholders have to bear in mind the need to ensure the security of witnesses, their interests have to be balanced with the right of the accused to a fair trial.¹⁴⁰ It is particularly important that when protective measures are granted to

¹³⁵ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 21 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>. Last accessed on 9 December 2011).

¹³⁶ International Criminal Tribunal for the former Yugoslavia and United Nations Interregional Crime and Justice Research Institute, 'ICTY Manual on Developed Practices', 2009 at 22 (<http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf>, last accessed on 9 December 2011).

¹³⁷ Article 32 of the United Nations Convention against Corruption (<http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>, last accessed on 9 December 2011). See also Article 24 of the United Nations Convention against Transnational Organized Crime (<<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>>, last accessed on 9 December 2011). Sierra Leone signed this Convention on 27 November 2001 but has not ratified it yet.

¹³⁸ United Nations Office on Drugs and Crime, 'Good practices for the protection of witnesses in criminal proceedings involving organized crime', 2008 at 32 (<<http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>>, last accessed on 9 December 2011).

¹³⁹ Judge Julia Sebutinde, 'Witness Protection in Post-Conflict Situations, a Perspective from the Special Court for Sierra Leone' (Judicial Workshop on Victim and Witness Protection and the Administration of Justice held at Gulu, Uganda, 1-3 August 2011) at 4 (<http://www.jlos.go.ug/uploads/WITNESS%20PROTECTION_Justice%20Julia%20Sebutinde%20presentation.pdf>, last accessed on 9 December 2011).

¹⁴⁰ Article 17(2) of the Statute of the Special Court for Sierra Leone: 'The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses' (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uCInd1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011). Rule 75(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone: 'A Judge or a Chamber may, on its own motion, or at the request of either party, or of the victim or witness concerned, or of the Witnesses and Victims Section, order appropriate measures to safeguard the privacy and security of victims

witnesses, they do not conflict with the constitutional right of the accused to examine, or have examined the witnesses against him/her.¹⁴¹

Article 17(2) of the Statute of the Special Court for Sierra Leone recognised the necessity of balancing the rights of the accused with the needs of witnesses:

'The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses'.

At the SCSL, the Witnesses and Victims Section is responsible for providing adequate protection to witnesses testifying before the Court:¹⁴²

'The Registrar shall set up a Witnesses and Victims Section which ... shall, amongst other things, perform the following functions with respect to all witnesses, victims who appear before the Special Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:

- (i) Recommend to the Special Court the adoption of protective and security measures for them;*
- (ii) Provide them with adequate protective measures and security arrangements and develop long- and short-term plans for their protection and support'.*

As a result, the Special Court for Sierra Leone provided its witnesses with a good level of protection in practice as evidenced in the *RUF* Judgment.¹⁴³

'In the case of each of the Accused, the Trial Chamber granted Prosecution pre-trial motions seeking immediate protective measures for its witnesses and for non-public disclosure of their identities. These measures included inter alia the use of pseudonyms, the nondisclosure of identifying information to the public and a regime of rolling disclosure in which the Prosecution was required to disclose identifying information of witnesses to the Defence 42 days prior to their testimony at trial'.

As there is currently no witness protection system in Sierra Leone, the guidance drawn from the SCSL Rules of Procedure and Evidence,¹⁴⁴ as well as from its jurisprudence,¹⁴⁵

and witnesses, provided that the measures are consistent with the rights of the accused' (<<http://www.scs-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

¹⁴¹ Section 23(5) of the Constitution of Sierra Leone, 1991: 'Every person who is charged with a criminal offence—

d. shall be afforded facilities to examine in person or by his legal practitioner the witnesses called by the prosecution before any court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution' (<<http://www.sierra-leone.org/Laws/constitution1991.pdf>>, last accessed on 9 December 2011).

¹⁴² Rule 34(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (<<http://www.scs-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

¹⁴³ *Prosecutor v Sesay, Kallon & Gbao* (Judgement), SCSL-04-15-T, 2 March 2009 at 742, para 17 of 'Annex B: Procedural History'

(<<http://www.scs-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/TrialChamberJudgment/tabid/215/Default.aspx>>, last accessed on 9 December 2011).

is of particular value. Therefore, the following best practices aim at ensuring the legacy of the SCSL in this respect.

Best Practices for Judges

- The Judge may, on his/her own initiative or at the request of either party, order one or several protective measures to safeguard the security and privacy of witnesses.¹⁴⁶ Any decision on protective measures has to be tailored to the needs and situation of each particular witness and has to take into account the rights of the accused.¹⁴⁷
- The following protective measures can be ordered:
 - Removing from the public record names and any other identifying information on the witness (addresses, workplace, profession etc);¹⁴⁸
 - Ordering the non-disclosure of any public record that identifies the witness until such time as the Judge decides;
 - Ordering the assignment of a pseudonym to the witness, provided that the full name of the witness is revealed to the defence within a reasonable time prior to trial. In this case, the identity of the witness should never be revealed to the public;¹⁴⁹
 - Prohibiting State Counsel and Defence Counsel from revealing the identity of the witness or disclosing any information that may reveal his/her identity;¹⁵⁰

¹⁴⁴ Rules 69 and 75 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

¹⁴⁵ See *Prosecutor v. Brima, Kamara and Kanu* (AFRC case), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case), *Prosecutor v. Fofana and Kondewa* (CDF Case) and *Prosecutor v. Charles Ghankay Taylor* (<<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>>, last accessed on 9 December 2011).

¹⁴⁶ Rule 75(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

¹⁴⁷ Article 17(2) of the Statute of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeW%3d&tabid=176>>, last accessed on 9 December 2011).

¹⁴⁸ Rule 75(B)(i)(a) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011). This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decisions SCSL-03-06-PT-036, SCSL-03-10-PT-040, SCSL-03-13-PT-037, SCSL-04-16-T-223, SCSL-04-16-T-488), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decisions SCSL-03-07-PT-033, SCSL-03-05-PT-038, SCSL-03-09-PT-048, SCSL-03-07-PT-148, SCSL-04-15-T-320, SCSL-04-15-T-716, SCSL-04-15-T-668, SCSL-04-15-T-739), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decisions SCSL-03-08-PT-033, SCSL-03-11-PT-039, SCSL-04-14-T-126, SCSL-04-14-T-405), and *Prosecutor v. Charles Ghankay Taylor* (decisions SCSL-03-01-PT-99, SCSL-03-01-PT-129, SCSL-03-01-PT-163, SCSL-03-01-T-368, SCSL-03-01-T-782). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

¹⁴⁹ Rule 69(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone: 'Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence' (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decisions SCSL-03-06-PT-036, SCSL-03-10-PT-040, SCSL-03-13-PT-037, SCSL-04-16-T-223, SCSL-04-16-T-488), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decisions SCSL-03-07-PT-033, SCSL-03-05-PT-038, SCSL-03-09-PT-048, SCSL-03-07-PT-148, SCSL-04-15-T-320, SCSL-04-15-T-716, SCSL-04-15-T-668, SCSL-04-15-T-739), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decisions SCSL-03-08-PT-033, SCSL-03-11-PT-039, SCSL-04-14-T-126, SCSL-04-14-T-405), and *Prosecutor v. Charles Ghankay Taylor* (decisions SCSL-03-01-PT-99, SCSL-03-01-PT-129, SCSL-03-01-PT-163, SCSL-03-01-T-368, SCSL-03-01-T-782). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

¹⁵⁰ This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decisions SCSL-03-06-PT-036, SCSL-03-10-PT-040, SCSL-03-13-PT-037), *Prosecutor v. Sesay,*

- Allowing the witness to testify behind a screen or curtains, where available. In this case the defence will be aware of the identity of the witness but the public will not;¹⁵¹
- In order to prevent the defendant from seeing the witness, allowing the witness to testify behind a screen or curtains, where available. In this case the Judge, the jury and at least one legal representative of each party to the case should be able to see the witness. If screens are not available, arrangements can be made in the courtroom to stop the defendant from seeing the witness (for instance by requiring the defendant to move from the dock to another position);¹⁵²
- Ordering the temporary removal of the defendant from the courtroom.¹⁵³ Defence Counsel should remain in the courtroom and at the end of the testimony, the defendant may be allowed back in the courtroom to read the transcript of the testimony and dictate questions to the witness. He/she will then be removed from the courtroom again to allow the witness to respond;¹⁵⁴
- Allowing the witness to testify in a closed session. Only the parties will be present in the courtroom but the portions of the testimony which do not disclose the identity of the witness can afterwards be publicly released;¹⁵⁵
- Ordering the complete anonymity of the witness. The witness will either testify behind a screen or be disguised and his/her identity will never be revealed either to the public or to the defence. The defence will be able to cross-examine the witness on all issues except the identity of the witness and other personal details;

This is an exceptional measure that impacts greatly on the right of the accused. Therefore, it may only be granted when other protective measures

Kallon and Gbao (RUF Case) (decisions SCSL-03-07-PT-033, SCSL-03-05-PT-038, SCSL-03-09-PT-048, SCSL-03-07-PT-148, SCSL-04-15-T-320, SCSL-04-15-T-716, SCSL-04-15-T-668, SCSL-04-15-T-739, SCSL-04-15-T-788), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decisions SCSL-03-08-PT-033, SCSL-03-11-PT-039, SCSL-04-14-T-126, SCSL-04-14-T-405), and *Prosecutor v. Charles Ghankay Taylor* (decisions SCSL-03-01-PT-99, SCSL-03-01-PT-129, SCSL-03-01-PT-163, SCSL-03-01-T-368, SCSL-03-01-T-782). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

¹⁵¹ This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decisions SCSL-04-16-T-223, SCSL-04-16-T-488), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decisions SCSL-04-15-T-716, SCSL-04-15-T-668, SCSL-04-15-T-739), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decision SCSL-04-14-T-126), and *Prosecutor v. Charles Ghankay Taylor* (decision SCSL-03-01-T-437). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

¹⁵² When ordering an alternative arrangement for the courtroom, a Judge has to make sure that the defendant is still able to communicate with his/her legal representative, for instance by ordering a break in the witness' testimony. UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 162 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

¹⁵³ This protective measure can be used when the witness refuses to give testimony in the presence of the defendant, or if the circumstances indicate that he/she will not testify truthfully in the presence of the defendant.

¹⁵⁴ United Nations Office on Drugs and Crime, 'Good practices for the protection of witnesses in criminal proceedings involving organized crime', 2008 at 36 (<<http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>>, last accessed on 9 December 2011).

¹⁵⁵ Rule 75(B)(ii) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011). This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decision SCSL-04-16-T-223), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decision SCSL-04-15-T-551 and Trial Chamber judgement, Case No. SCSL-04-15-T at 753-754), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decisions SCSL-04-14-T-405, SCSL-04-14-T-432) and *Prosecutor v. Charles Ghankay Taylor* (decision SCSL-03-01-T-437). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

This protective measure has frequently been used at the SCSL when child soldiers were called to testify. However, it can also be adequate in sexual offences cases or for the testimony of child witnesses.

are insufficient to ensure the witness' safety. The Judge should also apply a higher threshold when granting it, if he/she determines that:

- a) there is a serious risk to the witness' security or his/her family members if complete anonymity is not granted; and
 - b) the testimony of the witness is so important that it would be unfair to compel the defence or the prosecution to proceed without it; and
 - c) the witness is fully credible; and
 - d) the need for anonymity of the witness is more important than the interest of the public or the defence to know his/her identity.¹⁵⁶
- When receiving a motion for protective measures, the Judge may:
 - decide to schedule a closed protective measures hearing. The hearing should only include the prosecutor and/or the defence, the witness and essential court personnel. It is particularly recommended that the Judge schedule a closed hearing when a motion for protective measures requests the complete anonymity of a witness, in order to question the witness and establish both his/her credibility as well as the seriousness of his/her fears;
 - decide not to conduct a hearing but to make an immediate order for protective measures by releasing a written and reasoned decision, in order to avoid delays.
 - The Judge may make an order for protective measures if he/she is satisfied that the following criteria are met:¹⁵⁷
 - the witness is a vulnerable witness or there is a credible threat to his/her security or his/her family's security;¹⁵⁸
 - the witness is a credible witness;
 - the testimony of the witness is important for the criminal proceedings;
 - the need to grant the protective measure is adequately balanced against the rights of the accused; and
 - the protective measure will improve the quality (i.e. the completeness, coherence and accuracy) of the evidence of the witness.¹⁵⁹

¹⁵⁶ United Nations Office on Drugs and Crime, 'Good practices for the protection of witnesses in criminal proceedings involving organized crime', 2008 at 39 (<<http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>>, last accessed on 9 December 2011).

¹⁵⁷ These conditions apply to any order for protective measures. A higher threshold should be applied in the case of an order for witness anonymity.

¹⁵⁸ When assessing this criteria, a Judge should take into account: the nature of the alleged crime, the nature of the threat, the relationship between the witness and the alleged perpetrator, the criminal record of the alleged perpetrator and his status (in custody or released on bail), the psychological state of the witness, and the period in which the witness is likely to be at risk. L. Toomey, 'Witness Protection in Countries Emerging from Conflict', International Network to Promote the Rule of Law, 2007 at 2 (<<http://www.inprol.org/files/CR07008.pdf>>, last accessed on 9 December 2011).

According to the ICTY, most witnesses honestly believe that they have legitimate security concerns and need protection. However, it can become obvious after a constructive interview that there is no basis for concluding that protective measures are needed. International Criminal Tribunal for the former Yugoslavia and United Nations Interregional Crime and Justice Research Institute, 'ICTY Manual on Developed Practices', 2009 at 21 (<http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf>, last accessed on 9 December 2011).

¹⁵⁹ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 138-139

- When a less restrictive measure can satisfy the requested protection, the Judge should order that measure.¹⁶⁰ For instance, orders for anonymity or closed sessions should only be granted when it is established that there is a real and specific risk to the witness' security or the security of his/her family, and that a no less restrictive measure can adequately deal with the witness' concerns.¹⁶¹
- In the order for protective measures, the Judge should specify the particular protective measure that will apply to the witness, the duration of the application of the protective measure and that all persons with access to the order for protective measure must not reveal its content. The order must not contain any information that could lead to the discovery of the identity of the witness.
- The record of the closed session and any related information must be removed from the court file and be sealed and stored in a secure place.
- The Judge, when granting protective measures, may request State Counsel and Defence Counsel to return to the court all disclosed materials and copies which have not become part of the public record at the conclusion of the proceedings in the case.¹⁶²
- An order for protective measures may be amended upon the motion of any of the parties. The Judge may decide on any amendment, with or without a closed hearing, if he/she is satisfied that a significant change of circumstances justifies a variation of the protective measures.¹⁶³
- Orders for protective measures are binding until the end of the trial but new orders are needed for appeal proceedings.¹⁶⁴
- When the trial involves a jury, the Judge should warn them not to infer from protective measures that the defendant is dangerous and not to be prejudiced against him/her.¹⁶⁵

(<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

¹⁶⁰ *Prosecutor v Fofana & Kondewa* (Ruling on motion for modification of protective measures for witnesses), SCSL-04-14-T-274, 18 November 2004

(<<http://www.sc-sl.org/LinkClick.aspx?fileticket=9DtJR0Nko9Q%3d&tabid=153>>, last accessed on 9 December 2011).

¹⁶¹ *Prosecutor v Taylor* (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, SCSL-03-01-T-427), 27 February 2008

(<<http://www.sc-sl.org/LinkClick.aspx?fileticket=MLDrB0dCKIE=&tabid=159>>, last accessed on 9 December 2011).

¹⁶² This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decisions SCSL-03-06-PT-036, SCSL-03-10-PT-040, SCSL-03-13-PT-037), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decisions SCSL-03-07-PT-033, SCSL-03-05-PT-038, SCSL-03-09-PT-048, SCSL-03-07-PT-148, SCSL-04-15-T-320, SCSL-04-15-T-716, SCSL-04-15-T-668, SCSL-04-15-T-739), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decisions SCSL-03-08-PT-033, SCSL-03-11-PT-039, SCSL-04-14-T-126, SCSL-04-14-T-405), and *Prosecutor v. Charles Ghankay Taylor* (decisions SCSL-03-01-PT-99, SCSL-03-01-PT-129, SCSL-03-01-PT-163, SCSL-03-01-T-368, SCSL-03-01-T-782). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

¹⁶³ *Prosecutor v Fofana & Kondewa* (Ruling on motion for modification of protective measures for witnesses), SCSL-04-14-T-274, 18 November 2004 at para 43

(<<http://www.sc-sl.org/LinkClick.aspx?fileticket=9DtJR0Nko9Q%3d&tabid=153>>, last accessed on 9 December 2011).

¹⁶⁴ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 138-139 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

¹⁶⁵ For instance the jury might assume that the defendant has done something wrong if the witness has been granted visible protective measures. UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 162 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011); United Nations Office on Drugs and Crime, 'Good practices for the protection of witnesses in criminal proceedings involving organized crime', 2008

- When deciding upon a sentence, the Judge should avoid basing his/her decision solely or to a decisive extent on statements from anonymous witnesses. When the trial involves a jury, the Judge should advise the jurors accordingly.¹⁶⁶
- Irrespective of whether protective measures are granted or not, it is recommended that witnesses be brought in to the courtroom after the Judge has entered and that they are brought out before the Judge leaves the courtroom.¹⁶⁷

Best Practices for State Counsel

- Prior to the trial, State Counsel should contact potential prosecution witnesses and inform them of the available protective measures that can be granted.
- State Counsel may request one or several protective measures from the following:
 - Removing from the public record names and any other identifying information on the witness (addresses, workplace, profession etc);¹⁶⁸
 - Ordering the non-disclosure of any public record that identifies the witness until such time as the Judge decides;
 - Ordering the assignment of a pseudonym to the witness, provided that the full name of the witness is revealed to the defence within a reasonable time prior to trial. In this case, the identity of the witness should never be revealed to the public;¹⁶⁹

at 33 (<<http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>>, last accessed on 9 December 2011).

¹⁶⁶ United Nations Office on Drugs and Crime, 'Good practices for the protection of witnesses in criminal proceedings involving organized crime', 2008 at 41 (<<http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>>, last accessed on 9 December 2011).

¹⁶⁷ The Victims and Witnesses Unit of the ICTY has observed that there is a real risk of intimidation of witnesses when they are left in the courtroom in the presence of the accused, in the absence of a Judge. International Criminal Tribunal for the former Yugoslavia and United Nations Interregional Crime and Justice Research Institute, 'ICTY Manual on Developed Practices', 2009 at 201 (<http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf>, last accessed on 9 December 2011).

¹⁶⁸ Rule 75(B)(i)(a) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011). This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decisions SCSL-03-06-PT-036, SCSL-03-10-PT-040, SCSL-03-13-PT-037, SCSL-04-16-T-223, SCSL-04-16-T-488), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decisions SCSL-03-07-PT-033, SCSL-03-05-PT-038, SCSL-03-09-PT-048, SCSL-03-07-PT-148, SCSL-04-15-T-320, SCSL-04-15-T-716, SCSL-04-15-T-668, SCSL-04-15-T-739), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decisions SCSL-03-08-PT-033, SCSL-03-11-PT-039, SCSL-04-14-T-126, SCSL-04-14-T-405), and *Prosecutor v. Charles Ghankay Taylor* (decisions SCSL-03-01-PT-99, SCSL-03-01-PT-129, SCSL-03-01-PT-163, SCSL-03-01-T-368, SCSL-03-01-T-782). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

¹⁶⁹ Rule 69(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone: 'Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence' (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011). This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decisions SCSL-03-06-PT-036, SCSL-03-10-PT-040, SCSL-03-13-PT-037, SCSL-04-16-T-223, SCSL-04-16-T-488), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decisions SCSL-03-07-PT-033, SCSL-03-05-PT-038, SCSL-03-09-PT-048, SCSL-03-07-PT-148, SCSL-04-15-T-320, SCSL-04-15-T-716, SCSL-04-15-T-668, SCSL-04-15-T-739), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decisions SCSL-03-08-PT-033, SCSL-03-11-PT-039, SCSL-04-14-T-126, SCSL-04-14-T-405), and *Prosecutor v. Charles Ghankay Taylor* (decisions SCSL-03-01-PT-99, SCSL-03-01-PT-129, SCSL-03-01-PT-163, SCSL-03-01-T-368, SCSL-03-01-T-

- Prohibiting Defence Counsel from revealing the identity of the witness or disclosing any information that may reveal his/her identity;¹⁷⁰
- Allowing the witness to testify behind a screen or curtains, where available. In this case, the defence will be aware of the identity of the witness but the public will not;¹⁷¹
- In order to prevent the defendant from seeing the witness, allowing the witness to testify behind a screen or curtains, where available. In this case the Judge, the jury and at least one legal representative of each party to the case should be able to see the witness. If screens are not available, arrangements can be made in the courtroom to stop the defendant from seeing the witness (for instance by requiring the defendant to move from the dock to another position);¹⁷²
- Ordering the temporary removal of the defendant from the courtroom.¹⁷³ Defence Counsel should remain in the courtroom and at the end of the testimony, the defendant may be allowed back in the courtroom to read the transcript of the testimony and dictate questions to the witness. He/she will then be removed from the courtroom again to allow the witness to respond;¹⁷⁴
- Allowing the witness to testify in a closed session. Only the parties will be present in the courtroom but the portions of the testimony which do not disclose the identity of the witness can afterwards be publicly released;¹⁷⁵

782). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

¹⁷⁰ This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decisions SCSL-03-06-PT-036, SCSL-03-10-PT-040, SCSL-03-13-PT-037), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decisions SCSL-03-07-PT-033, SCSL-03-05-PT-038, SCSL-03-09-PT-048, SCSL-03-07-PT-148, SCSL-04-15-T-320, SCSL-04-15-T-716, SCSL-04-15-T-668, SCSL-04-15-T-739, SCSL-04-15-T-788), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decisions SCSL-03-08-PT-033, SCSL-03-11-PT-039, SCSL-04-14-T-126, SCSL-04-14-T-405), and *Prosecutor v. Charles Ghankay Taylor* (decisions SCSL-03-01-PT-99, SCSL-03-01-PT-129, SCSL-03-01-PT-163, SCSL-03-01-T-368, SCSL-03-01-T-782). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

¹⁷¹ This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decisions SCSL-04-16-T-223, SCSL-04-16-T-488), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decisions SCSL-04-15-T-716, SCSL-04-15-T-668, SCSL-04-15-T-739), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decision SCSL-04-14-T-126), and *Prosecutor v. Charles Ghankay Taylor* (decision SCSL-03-01-T-437). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

¹⁷² When ordering an alternative arrangement for the courtroom, a Judge has to make sure that the defendant is still able to communicate with his/her legal representative, for instance by ordering a break in the witness' testimony. UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 162 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

¹⁷³ This protective measure can be used when the witness refuses to give testimony in the presence of the defendant, or if the circumstances indicate that he/she will not testify truthfully in the presence of the defendant.

¹⁷⁴ United Nations Office on Drugs and Crime, 'Good practices for the protection of witnesses in criminal proceedings involving organized crime', 2008 at 36 (<<http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>>, last accessed on 9 December 2011).

¹⁷⁵ Rule 75(B)(ii) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011). This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decision SCSL-04-16-T-223), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decision SCSL-04-15-T-551 and Trial Chamber judgement, Case No. SCSL-04-15-T at 753-754), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decisions SCSL-04-14-T-405, SCSL-04-14-T-432) and *Prosecutor v. Charles Ghankay Taylor* (decision SCSL-03-01-T-437). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

This protective measure has frequently been used at the SCSL when child soldiers were called to testify. However, it can also be adequate in sexual offences cases or for the testimony of child witnesses.

- Ordering the complete anonymity of the witness. The witness will either testify behind a screen or be disguised and his/her identity will never be revealed either to the public or to the defence. The defence will be able to cross-examine the witness on all issues except the identity of the witness and other personal details.

This is an exceptional measure that impacts greatly on the right of the accused. Therefore, it may only be granted when other protective measures are insufficient to ensure the witness' safety. State Counsel should be aware that the Judge will therefore apply a higher threshold when granting it, if he/she determines that:

- a) there is a serious risk to the witness' security or his/her family member if complete anonymity is not granted; and
 - b) the testimony of the witness is so important that it would be unfair to compel the prosecution to proceed without it; and
 - c) the witness is fully credible; and
 - d) the need for anonymity of the witness is more important than the interest of the public or the defence to know his/her identity.¹⁷⁶
- If State Counsel has a choice between a witness who will testify openly and one who requires protective measures, the former should be called to testify.
 - State Counsel should not make any promises to a witness regarding protective measures, prior to applying for them.¹⁷⁷
 - When seeking an order for protective measures, State Counsel should file a sealed written motion indicating:
 - the identity of the proposed witness;
 - information relating to the evidence the proposed witness will provide at the trial;
 - the protective measure(s) sought; and
 - a description of the factual circumstances that substantiate the need for the protective measure(s).
 - State Counsel should assess the witness' situation and needs by determining whether he/she is a vulnerable witness or whether there is a credible threat to his/her security or his/her family's security. The requested protective measure(s) should be tailored to the situation and needs of each particular witness.
 - State Counsel should establish that no less restrictive measure could provide the necessary protection.¹⁷⁸ When requesting orders for closed sessions or anonymity in particular, the burden is on State Counsel to demonstrate that there is a real

¹⁷⁶ United Nations Office on Drugs and Crime, 'Good practices for the protection of witnesses in criminal proceedings involving organized crime', 2008 at 39 (<<http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>>, last accessed on 9 December 2011).

¹⁷⁷ International Criminal Tribunal for the former Yugoslavia and United Nations Interregional Crime and Justice Research Institute, 'ICTY Manual on Developed Practices', 2009 at 21 (<http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf>, last accessed on 9 December 2011).

¹⁷⁸ *Prosecutor v Fofana & Kondewa* (Ruling on motion for modification of protective measures for witnesses), SCSL-04-14-T-274, 18 November 2004 at para 42 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=9DtJR0Nko9Q%3d&tabid=153>>, last accessed on 9 December 2011).

and specific risk to the witness' security or the security of his/her family, and that a no less restrictive measure can adequately deal with the witness' concerns.¹⁷⁹

- State Counsel should be aware that when he/she makes a motion for protective measures, the Judge may:
 - decide to schedule a closed protective measures hearing. The hearing should only include State Counsel and/or Defence Counsel, the witness and essential court personnel. It is particularly likely that the Judge schedules a closed hearing when State Counsel requests an order for the complete anonymity of a witness, in order to question the witness and establish both his/her credibility as well as the seriousness of his/her fears;
 - decide not to conduct a hearing but to make an immediate order for protective measures by releasing a written and reasoned decision, in order to avoid delays.
- State Counsel should be aware that once his/her motion has been received, the Judge may make an order for protective measures if he/she is satisfied that the following criteria are met:¹⁸⁰
 - the witness is a vulnerable witness or there is a credible threat to his/her security or his/her family's security;¹⁸¹
 - the witness is a credible witness;
 - the testimony of the witness is important for the criminal proceedings;
 - the need to grant the protective measure is adequately balanced against the rights of the accused; and
 - the protective measure will improve the quality (i.e. the completeness, coherence and accuracy) of the evidence of the witness.¹⁸²
- State Counsel can file a motion for an amendment of an order for protective measures if he/she can establish that a significant change of circumstances justifies an alteration of the protective measures. The Judge may decide on the motion with or without a closed hearing.¹⁸³

¹⁷⁹ *Prosecutor v Taylor* (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, SCSL-03-01-T-427), 27 February 2008 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=MLDrB0dCKIE=&tabid=159>>, last accessed on 9 December 2011).

¹⁸⁰ These conditions apply to any order for protective measures. A higher threshold should be applied in the case of an order for anonymity of a witness.

¹⁸¹ When assessing this criteria, a Judge should take into account: the nature of the alleged crime, the nature of the threat, the relationship between the witness and the alleged perpetrator, the criminal record of the alleged perpetrator and his status (in custody or released on bail), the psychological state of the witness, and the period in which the witness is likely to be at risk. L. Toomey, 'Witness Protection in Countries Emerging from Conflict', International Network to Promote the Rule of Law, 2007 at 2 (<<http://www.inprol.org/files/CR07008.pdf>>, last accessed on 9 December 2011).

According to the ICTY, most witnesses honestly believe that they have legitimate security concerns and need protection. However, it can become obvious after a constructive interview that there is no basis for concluding that protective measures are needed. International Criminal Tribunal for the former Yugoslavia and United Nations Interregional Crime and Justice Research Institute, 'ICTY Manual on Developed Practices', 2009 at 21 (<http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf>, last accessed on 9 December 2011).

¹⁸² UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 138-139 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

¹⁸³ *Prosecutor v Fofana & Kondewa* (Ruling on motion for modification of protective measures for witnesses), SCSL-04-14-T-274, 18 November 2004 at para 43

- Orders for protective measures are binding until the end of the trial but State Counsel should file new motions for protective measures for appeal proceedings.¹⁸⁴

Best Practices for Defence Counsel

- Prior to the trial, Defence Counsel should contact potential defence witnesses and inform them of the available protective measures that can be granted.
- Defence Counsel may request one or several protective measures amongst the following:¹⁸⁵
 - Removing from the public record names and any other identifying information on the witness (addresses, workplace, profession etc);¹⁸⁶
 - Ordering the non-disclosure of any public record that identifies the witness until such time as the Judge decides;
 - Ordering the assignment of a pseudonym to the witness, provided that the full name of the witness is revealed to the prosecution within a reasonable time prior to trial. In this case, the identity of the witness should never be revealed to the public;¹⁸⁷
 - Prohibiting State Counsel from revealing the identity of the witness or disclosing any information that may reveal his/her identity;¹⁸⁸

(<<http://www.sc-sl.org/LinkClick.aspx?fileticket=9DtJR0Nko9Q%3d&tabid=153>>, last accessed on 9 December 2011).

¹⁸⁴ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 138-139

(<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

¹⁸⁵ Defence Counsel should be aware that State Counsel can request a broader range of protective measures aiming at protecting prosecution witnesses from the defendant. For further information, refer to the previous Section on Best Practices for State Counsel.

¹⁸⁶ Rule 75(B)(i)(a) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bWsi%3d&tabid=176>>, last accessed on 9 December 2011). This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decisions SCSL-03-06-PT-036, SCSL-03-10-PT-040, SCSL-03-13-PT-037, SCSL-04-16-T-223, SCSL-04-16-T-488), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decisions SCSL-03-07-PT-033, SCSL-03-05-PT-038, SCSL-03-09-PT-048, SCSL-03-07-PT-148, SCSL-04-15-T-320, SCSL-04-15-T-716, SCSL-04-15-T-668, SCSL-04-15-T-739), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decisions SCSL-03-08-PT-033, SCSL-03-11-PT-039, SCSL-04-14-T-126, SCSL-04-14-T-405), and *Prosecutor v. Charles Ghankay Taylor* (decisions SCSL-03-01-PT-99, SCSL-03-01-PT-129, SCSL-03-01-PT-163, SCSL-03-01-T-368, SCSL-03-01-T-782). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

¹⁸⁷ Rule 69(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone: 'Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence' (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bWsi%3d&tabid=176>>, last accessed on 9 December 2011).

This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decisions SCSL-03-06-PT-036, SCSL-03-10-PT-040, SCSL-03-13-PT-037, SCSL-04-16-T-223, SCSL-04-16-T-488), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decisions SCSL-03-07-PT-033, SCSL-03-05-PT-038, SCSL-03-09-PT-048, SCSL-03-07-PT-148, SCSL-04-15-T-320, SCSL-04-15-T-716, SCSL-04-15-T-668, SCSL-04-15-T-739), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decisions SCSL-03-08-PT-033, SCSL-03-11-PT-039, SCSL-04-14-T-126, SCSL-04-14-T-405), and *Prosecutor v. Charles Ghankay Taylor* (decisions SCSL-03-01-PT-99, SCSL-03-01-PT-129, SCSL-03-01-PT-163, SCSL-03-01-T-368, SCSL-03-01-T-782). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

¹⁸⁸ This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decisions SCSL-03-06-PT-036, SCSL-03-10-PT-040, SCSL-03-13-PT-037), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decisions SCSL-03-07-PT-033, SCSL-03-05-PT-038, SCSL-03-09-PT-048, SCSL-03-07-PT-148, SCSL-04-15-T-320, SCSL-04-15-T-716, SCSL-04-15-T-668, SCSL-04-15-T-739, SCSL-04-15-T-

- Allowing the witness to testify behind a screen or curtains, where available. In this case the prosecution will be aware of the identity of the witness but the public will not;¹⁸⁹
- Allowing the witness to testify in a closed session. Only the parties will be present in the courtroom but the portions of the testimony which do not disclose the identity of the witness can afterwards be publicly released;¹⁹⁰
- Ordering the complete anonymity of the witness. The witness will either testify behind a screen or be disguised and his/her identity will never be revealed either to the public or to the prosecution. The prosecution will be able to cross-examine the witness on all issues except the identity of the witness and other personal details.

This is an exceptional measure that may only be granted when other protective measures are insufficient to ensure the witness' safety. Defence Counsel should be aware that the Judge will therefore apply a higher threshold when granting such a measure, if he/she determines that:

- a) there is a serious risk to the witness' security or his/her family members if complete anonymity is not granted; and
 - b) the testimony of the witness is so important that it would be unfair to compel the defence to proceed without it; and
 - c) the witness is fully credible; and
 - d) the need for anonymity of the witness is more important than the interest of the public or the prosecution to know his/her identity.¹⁹¹
- If Defence Counsel has a choice between a witness who will testify openly and one who requires protective measures, the former should be called to testify.
 - Defence Counsel should not make any promises to a witness regarding protective measures, prior to applying for them.¹⁹²

788), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decisions SCSL-03-08-PT-033, SCSL-03-11-PT-039, SCSL-04-14-T-126, SCSL-04-14-T-405), and *Prosecutor v. Charles Ghankay Taylor* (decisions SCSL-03-01-PT-99, SCSL-03-01-PT-129, SCSL-03-01-PT-163, SCSL-03-01-T-368, SCSL-03-01-T-782). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

¹⁸⁹ This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decisions SCSL-04-16-T-223, SCSL-04-16-T-488), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decisions SCSL-04-15-T-716, SCSL-04-15-T-668, SCSL-04-15-T-739), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decision SCSL-04-14-T-126), and *Prosecutor v. Charles Ghankay Taylor* (decision SCSL-03-01-T-437). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

¹⁹⁰ Rule 75(B)(ii) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011). This protective measure was ordered by the SCSL Trial Chamber in *Prosecutor v. Brima, Kamara and Kanu* (AFRC case) (decision SCSL-04-16-T-223), *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case) (decision SCSL-04-15-T-551 and Trial Chamber judgement, Case No. SCSL-04-15-T at 753-754), *Prosecutor v. Fofana and Kondewa* (CDF Case) (decisions SCSL-04-14-T-405, SCSL-04-14-T-432) and *Prosecutor v. Charles Ghankay Taylor* (decision SCSL-03-01-T-437). These decisions are available at <<http://www.sc-sl.org/CASES/tabid/71/Default.aspx>> (last accessed on 9 December 2011).

This protective measure has frequently been used at the SCSL when child soldiers were called to testify. However, it can also be adequate in sexual offences cases or for the testimony of child witnesses.

¹⁹¹ United Nations Office on Drugs and Crime, 'Good practices for the protection of witnesses in criminal proceedings involving organized crime', 2008 at 39 (<<http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>>, last accessed on 9 December 2011).

¹⁹² International Criminal Tribunal for the former Yugoslavia and United Nations Interregional Crime and Justice Research Institute, 'ICTY Manual on Developed Practices', 2009 at 21 (<http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf>, last accessed on 9 December 2011).

- When seeking an order for protective measures, Defence Counsel should file a sealed written motion indicating:
 - the identity of the proposed witness;
 - information relating to the evidence the proposed witness will provide at the trial;
 - the protective measure(s) sought; and
 - a description of the factual circumstances that substantiate the need for the protective measure(s).
- Defence Counsel should assess the witness' situation and needs by determining whether he/she is a vulnerable witness or whether there is a credible threat to his/her security or his/her family's security. The requested protective measure(s) should be tailored to the situation and needs of each particular witness.
- Defence Counsel should establish that no less restrictive measure could provide the necessary protection.¹⁹³ When requesting orders for closed sessions or anonymity in particular, the burden is on Defence Counsel to demonstrate that there is a real and specific risk to the witness' security or the security of his/her family, and that a no less restrictive measure can adequately deal with the witness' concerns.¹⁹⁴
- Defence Counsel should be aware that when he/she makes a motion for protective measures, the Judge may:
 - decide to schedule a closed protective measures hearing. The hearing should only include State Counsel and/or Defence Counsel, the witness and essential court personnel. It is particularly likely that the Judge schedules a closed hearing when Defence Counsel requests an order for the complete anonymity of a witness, in order to question the witness and establish both his/her credibility as well as the seriousness of his/her fears;
 - decide not to conduct a hearing but to make an immediate order for protective measures by releasing a written and reasoned decision, in order to avoid delays.
- Defence Counsel should be aware that once his/her motion has been received, the Judge may make an order for protective measures if he/she is satisfied that the following criteria are met:¹⁹⁵
 - the witness is a vulnerable witness or there is a credible threat to his/her security or his/her family's security;¹⁹⁶

¹⁹³ *Prosecutor v Fofana & Kondewa* (Ruling on motion for modification of protective measures for witnesses), SCSL-04-14-T-274, 18 November 2004, at para 42 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=9DtJR0Nko9Q%3d&tabid=153>>, last accessed on 9 December 2011).

¹⁹⁴ *Prosecutor v Taylor* (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, SCSL-03-01-T-427), 27 February 2008 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=MLDrB0dCKIE=&tabid=159>>, last accessed on 9 December 2011).

¹⁹⁵ These conditions apply to any order for protective measures. A higher threshold should be applied in the case of an order for anonymity of a witness.

¹⁹⁶ When assessing this criteria, a Judge should take into account: the nature of the alleged crime, the nature of the threat, the relationship between the witness and the alleged perpetrator, the criminal record of the alleged perpetrator and his status (in custody or released on bail), the psychological state of the witness, and the period in which the witness is likely to be at risk. L. Toomey, 'Witness Protection in Countries Emerging from Conflict', International Network to Promote the Rule of Law, 2007 at 2

- the witness is a credible witness;
 - the testimony of the witness is important for the criminal proceedings;
 - the need to grant the protective measure is adequately balanced against the rights of the accused; and
 - the protective measure will improve the quality (i.e. the completeness, coherence and accuracy) of the evidence of the witness.¹⁹⁷
- Defence Counsel can file a motion for an amendment of an order for protective measures if he/she can establish that a significant change of circumstances justifies an alteration of the protective measures. The Judge may decide on the motion with or without a closed hearing.¹⁹⁸
 - Orders for protective measures are binding until the end of the trial but Defence Counsel should file new motions for protective measures for appeal proceedings.¹⁹⁹

4.2. Treatment of Witnesses & Victims Called to Testify

Principle

All stakeholders should strive to ensure that when witnesses testify at a criminal trial, any distress or intimidation associated with this experience is kept to a minimum.

The prospect of testifying at a criminal trial can cause considerable anxiety amongst witnesses. Witnesses often find the legal environment intimidating, especially when they are not familiar with the court process.²⁰⁰ Some witnesses are motivated to see the accused in the courtroom, however for many others this experience is likely to be

(<<http://www.inprol.org/files/CR07008.pdf>>, last accessed on 9 December 2011).

According to the ICTY, most witnesses honestly believe that they have legitimate security concerns and need protection. However, it can become obvious after a constructive interview that there is no basis for concluding that protective measures are needed. International Criminal Tribunal for the former Yugoslavia and United Nations Interregional Crime and Justice Research Institute, 'ICTY Manual on Developed Practices', 2009 at 21 (<http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf>, last accessed on 9 December 2011).

¹⁹⁷ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 138-139

(<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

¹⁹⁸ *Prosecutor v Fofana & Kondewa* (Ruling on motion for modification of protective measures for witnesses), SCSL-04-14-T-274, 18 November 2004, at para 43

(<<http://www.sc-sl.org/LinkClick.aspx?fileticket=9DtJR0Nko9Q%3d&tabid=153>>, last accessed on 9 December 2011).

¹⁹⁹ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 138-139

(<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁰⁰ The Witnesses and Victims Section of the SCSL concluded that the main reason for witnesses' anxiety was their lack of familiarity with the court process. Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 22 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

traumatic.²⁰¹ It is also expected that this situation will bring back painful memories. In addition, cross-examination can cause particular distress to witnesses, as they might get the feeling that they are on trial, instead of the accused.²⁰²

The psychological well-being of witnesses will impact on the quality of the evidence given by them, as stress can reduce the ability to provide accurate testimony. Therefore it is very important to provide adequate pre-trial support to witnesses in order to help them understand the legal process and their role within it, and to make them feel more confident and better equipped to give evidence.²⁰³

Although State and Defence Counsel are mainly responsible for providing pre-trial witness assistance, the behaviour of all court staff is one of the strongest influences on the witness' experience. Therefore, it is of the greatest importance that all stakeholders adopt a supportive, respectful and friendly attitude towards witnesses at all times.²⁰⁴ Moreover, all stakeholders should avoid being judgemental,²⁰⁵ and should show appreciation to witnesses for their testimony.²⁰⁶

When dealing with witnesses, all stakeholders should take into consideration their individual characteristics and situation including their current emotional state, their relationship with the alleged perpetrator, their experiences of abuse, neglect, domestic violence or discrimination, and the likely impact on their testimony of traumatic memories.²⁰⁷ All stakeholders should bear in mind that victims of criminal offences and other vulnerable witnesses including child witnesses or adults with mental health issues will undoubtedly find the experience of testifying especially stressful and distressing.²⁰⁸ In respect of child witnesses, it is recommended that all stakeholders keep in mind the best interests of children and give them primary consideration throughout the criminal proceedings.²⁰⁹ Child witnesses should thus be treated in a caring and sensitive manner, taking account of their personal situation and needs, age, gender, disability, level of maturity and confidence.²¹⁰

²⁰¹ Idem at 17.

²⁰² UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 100 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁰³ Idem at 116.

²⁰⁴ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 15-16 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

²⁰⁵ International Criminal Tribunal for the former Yugoslavia and United Nations Interregional Crime and Justice Research Institute, 'ICTY Manual on Developed Practices', 2009 at 198 (<http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf>, last accessed on 9 December 2011).

²⁰⁶ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 15-16 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

²⁰⁷ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁰⁸ Idem at 100.

²⁰⁹ United Nations Economic and Social Council, 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', Resolution 2005/20, 22 July 2005, at para 8 (<<http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>>, last accessed on 9 December 2011).

²¹⁰ Idem at para 10.

At the SCSL, the Witnesses and Victims Section is responsible for the welfare of the witnesses testifying before the Court:²¹¹

'The Registrar shall set up a Witnesses and Victims Section which ... shall, amongst other things, perform the following functions with respect to all witnesses, victims who appear before the Special Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:

(iii) Ensure that they receive relevant support, counselling and other appropriate assistance, including medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault and crimes against children'.

The

support and assistance provided by the SCSL cannot be implemented as such in Sierra Leone, taking into account the current domestic infrastructural framework. However, the SCSL has published 'Best Practice Recommendations for the Protection and Support of Witnesses', which can be used as a reference by stakeholders when interacting with witnesses. In his foreword to this document, the Registrar of the SCSL acknowledged 'the importance of a thorough and structured approach to the protection and support of witnesses', as well as highlighting the manner in which witnesses are treated:²¹²

'The protection and support of witnesses and victims is of seminal importance to the functioning of the Special Court for Sierra Leone. As with any judicial process that relies on witness testimony, ensuring that witnesses' security and wellbeing are well catered for is a priority: a witness who is uncomfortable with what is being asked of them undermines the delivery of justice'.

Many best practices on the way in which witnesses are treated at the pre-trial, trial and post-trial stages can therefore be drawn from the SCSL experience.

²¹¹ Rule 34(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (<<http://www.scs-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

²¹² H. von Hebel, Registrar of the Special Court for Sierra Leone, 'Foreword' in Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 (<<http://www.scs-sl.org/LinkClick.aspx?fileticket=0LBKqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

Best Practices for Judges

Pre-Trial Stage

- In cases involving vulnerable witnesses, the Judge should aim towards giving the case priority in respect of times and dates of hearings.²¹³
- The Judge should consider the order and timing of witness testimony in order to minimise inconvenience for vulnerable witnesses, in particular for child witnesses.²¹⁴
- The Judge may decide to meet a vulnerable witness before the trial if he/she considers it appropriate and if he/she is concerned that the witness is particularly vulnerable or anxious about testifying. This practice can be helpful to put child witnesses at ease. In this case, State Counsel and Defence Counsel should be informed of the meeting and should have the right to attend if they want to.²¹⁵

Trial Stage

- It is recommended that witnesses be brought into the courtroom after the Judge has entered and that they are brought out before the Judge leaves the courtroom.²¹⁶
- It is recommended that witnesses enter and leave the courtroom by a side door, if available, in order to avoid contact with relatives or friends of the accused.²¹⁷
- The Judge should monitor that a witness who has not yet testified is not present in the courtroom when another witness is giving evidence.
- When child witnesses are involved, the Judge should order the removal of any formal court attire in order to make the experience less intimidating.²¹⁸

²¹³ This practice is particularly recommended in respect of child witnesses and vulnerable adults with learning disabilities as delays are likely to affect their memory and they may have particular difficulty understanding the basis and reasons for a delay. UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 124-130 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011). See also United Nations Economic and Social Council, 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', Resolution 2005/20, 22 July 2005, at para 30 (<<http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>>, last accessed on 9 December 2011).

²¹⁴ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 116-123 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011); United Nations Office on Drugs and Crime and UNICEF, 'Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary', 2009, Article 24(5) (<http://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf>, last accessed on 9 December 2011).

²¹⁵ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 116-123 and 135 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²¹⁶ The Victims and Witnesses Unit of the ICTY has observed that there is a real risk of intimidation of witnesses when they are left in the courtroom in the presence of the accused, in the absence of a Judge. International Criminal Tribunal for the former Yugoslavia and United Nations Interregional Crime and Justice Research Institute, 'ICTY Manual on Developed Practices', 2009 at 201 (<http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf>, last accessed on 9 December 2011).

²¹⁷ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 105-116 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

- If a witness was granted anonymity or was allowed to testify behind a screen, the Judge should verify that it is the same witness for which the protective measure was granted.
- The Judge should ensure that, before beginning to testify, child witnesses have received appropriate information about the justice process and understand the role of the different legal actors in court. The Judge should also explain to child witnesses the importance of their testimony.²¹⁹
- When a child witness is involved, the Judge should allow his/her parents or guardian to be present in the courtroom and to sit close to the child.²²⁰
- Where available, the Judge should allow the presence of a support person in the courtroom during the testimony of vulnerable witnesses. The support person should preferably be a professional or a member of a civil society organisation, independent from the witness, not involved in the case, and with some experience of the criminal justice system. When this is not possible, a friend or a relative of the witness can be acting as a support person provided that he/she is not involved in the case and is not given the details of the case or the evidence of the witness.²²¹
- The Judge should allow the support person to wait with the witness and to accompany him/her to court. The support person will sit behind the witness in the courtroom and provide emotional support while remaining neutral. He/she should be able to comfort a distressed witness and to alert the Judge in cases of problems during the testimony. For instance, the support person should be able to alert the court to the witness' need for a break in proceedings.²²²
- If, according to the Judge, a child witness understands the nature of the oath, he/she must take an oath. However, the Judge should allow a child witness who does not understand the nature of the oath to testify without taking an oath, if the Judge considers that the child is sufficiently mature to be able to report the facts of which he/she had knowledge, that he/she understands the duty to tell the truth²²³ and is not subject to undue influence.²²⁴ In this case, the Judge should caution the child witness to tell the truth.²²⁵

²¹⁸ United Nations Office on Drugs and Crime and UNICEF, 'Handbook for Professionals and Policymakers on Justice in matters involving child victims and witnesses of crime', Criminal Justice Handbook Series, 2009, at 84 (<http://www.unicef.org/protection/files/UNODC_Handbook_on_Justice.pdf>, last accessed on 9 December 2011); UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 165 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²¹⁹ Studies of child witnesses have shown that children with a greater understanding of the court system provided more accurate answers to questions than children of the same age with less understanding of the court system. United Nations Office on Drugs and Crime and UNICEF, 'Handbook for Professionals and Policymakers on Justice in matters involving child victims and witnesses of crime', Criminal Justice Handbook Series, 2009, at 37 and 84 (<http://www.unicef.org/protection/files/UNODC_Handbook_on_Justice.pdf>, last accessed on 9 December 2011).

²²⁰ United Nations Office on Drugs and Crime and UNICEF, 'Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary', 2009, Articles 25 and 26 (<http://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf>, last accessed on 9 December 2011).

²²¹ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 105-116 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²²² Idem at 116-123.

²²³ It is not recommended to ask children to give general definitions of what is the truth, rather they should be asked to judge from example. A Judge should use examples suitable to the child's age, experience and understanding. It is important that the examples chosen really are lies, not merely incorrect statements. A

- A witness should not be compelled to answer any question that would incriminate him/her. The Judge should advise the witness of his/her right not to answer such questions.
- The Judge should control the examination of witnesses in order to (a) make the interrogation effective for the determination of the truth, and (b) avoid the wasting of time.²²⁶
- At all times, the Judge should control the manner of questioning to avoid any harassment or intimidation of witnesses.²²⁷
- The Judge should monitor the language of State Counsel and Defence Counsel's questions to ensure that they are tailored to each witness and that the witness is able to understand the questions. It is recommended that questions be kept as short and simple as possible, with only one point per question.²²⁸ State Counsel and Defence Counsel should try to use the same words that the witness used and legal terminology should be avoided. When a witness does not understand a question, the Judge should order the question to be reworded instead of repeated.²²⁹
- When an order for anonymity of a witness has been granted, the Judge should prohibit State Counsel and Defence Counsel from asking any questions related to the identity of the witness.
- When child witnesses are involved, the Judge should ensure that they are questioned in a caring and sensitive manner and that proceedings are conducted in a language that is simple and comprehensible to a child.²³⁰

Judge should also ask vulnerable adult witnesses about truth and lies, only when it is unclear whether they understand the value and importance of telling the truth in court. *Idem* at 72-73.

²²⁴ Rule 90(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (<<http://www.scsl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

Therefore, every child should be treated as a capable witness subject to examination and a child's testimony should not be presumed untrustworthy by reason of his/her age only. United Nations Economic and Social Council, 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', Resolution 2005/20, 22 July 2005, at para 18 (<<http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>>, last accessed on 9 December 2011).

²²⁵ For instance the Judge could tell a child witness: 'Tell us all you can remember of what happened. Do not make anything up or leave anything out. This is very important'. UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 137

(<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²²⁶ Rule 90(F) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (<<http://www.scsl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

²²⁷ Rule 75(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (<<http://www.scsl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011). Questioning may be intimidating because of its content or because of the tone of voice employed by the person asking the question. UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 135 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²²⁸ At the SCSL there is a great concern about witnesses' ability to understand questions which address multiple points as they are confusing and can lead witnesses to provide inaccurate answers.

²²⁹ It has been observed that witnesses who do not understand the question tend to answer with 'yes', as they feel embarrassed to admit that they do not understand. UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 79

(<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²³⁰ It is important to remember that many concepts that are taken for granted in adult conversation (such as dates, time, length and frequency of events, weight, height, age estimates) are only gradually acquired as children develop. Therefore questions should take into account the stage of development of the child. UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and

- Where possible, the Judge should strive to avoid direct cross-examination by the accused of child witnesses or victims of sexual violence. If the accused has a legal representative, the Judge should order that Defence Counsel cross-examines such witnesses.²³¹
- The Judge should order breaks during the testimony of child witnesses when the testimony is too long for the child's ability to concentrate, or should limit the duration of the testimony.²³²
- The Judge should decide on the weight to give to the testimony of a child depending on his/her age and maturity.²³³ The Judge should avoid basing his/her decision solely on the testimony of a child witness who has not taken an oath. When the trial involves a jury, the Judge should advise the jurors accordingly.
- Upon receiving State Counsel's motion for the reduction of the sentence of an accused person who is providing or has provided substantial cooperation as a witness in another criminal case, and can therefore be considered as a 'cooperative witness',²³⁴ the Judge may decide whether to follow it or not.
- State Counsel's motion for the reduction of the sentence of an accused/cooperative witness should include:

Witnesses, and Guidance on Using Special Measures', 2011 at 82-84 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011). See also United Nations Economic and Social Council, 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', Resolution 2005/20, 22 July 2005, at para 31

(<<http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>>, last accessed on 9 December 2011); United Nations Office on Drugs and Crime and UNICEF, 'Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary', 2009, Article 12(1) (<http://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf>, last accessed on 9 December 2011).

²³¹ United Nations Office on Drugs and Crime and UNICEF, 'Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary', 2009, Article 27 (<http://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf>, last accessed on 9 December 2011); UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 142 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²³² This is also a best practice in respect of vulnerable witnesses who have a limited span of concentration or who are giving distressing evidence. UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 124-128 and 134 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011). See also United Nations Economic and Social Council, 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', Resolution 2005/20, 22 July 2005, at para 30 (<<http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>>, last accessed on 9 December 2011).

²³³ United Nations Office on Drugs and Crime and UNICEF, 'Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary', 2009, Article 20(3) (<http://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf>, last accessed on 9 December 2011); UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 137 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²³⁴ This best practice aims at encouraging witnesses to testify at criminal trials, especially with respect to the most serious criminal offences. A cooperative witness can be defined as a person who is suspected or convicted of a criminal offence and agrees to give evidence in court that (a) is likely to prevent criminal offences by another person or that may lead to the successful prosecution of the perpetrator of a criminal offence, and (b) is judged by the court to be truthful and complete. However this best practice should not be applied to persons convicted of the most serious crimes such as genocide, crimes against humanity or war crimes.

Article 26(2) of the United Nations Convention against Transnational Organized Crime: 'Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention' (<<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>>, last accessed on 9 December 2011). Sierra Leone signed this Convention on 27 November 2001 but has not ratified it yet.

- the name of the accused/cooperative witness;
- details of the criminal proceedings in which he/she has agreed to testify in or has already testified in; and
- the evidence that he/she has agreed to provide or has already provided.

Best Practices for State Counsel

Pre-Trial Stage

- Once a trial date has been set or if it becomes apparent that the trial will not proceed, State Counsel should notify prosecution witnesses as soon as possible.²³⁵
- In cases involving vulnerable witnesses, State Counsel should ask the court to give the case priority in respect of times and dates of hearings.²³⁶
- State Counsel should notify prosecution witnesses of the delays within the criminal justice system and of the fact that trials may need to be adjourned.²³⁷
- State Counsel should give clear explanations of what support witnesses can expect to receive before, during, and after the testimony. For instance, when it is unlikely that witnesses will receive any financial compensation, State Counsel should make it clear to them, in order to avoid unrealistic expectations. He/she should then ensure that witnesses receive what they have been told to expect.²³⁸
- State Counsel should ensure that witnesses are well prepared for the experience of testifying in court.²³⁹ This preparation process is particularly important in respect of child witnesses.²⁴⁰

²³⁵ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 116-123 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²³⁶ This practice is particularly recommended in respect of child witnesses and vulnerable adults with learning disabilities as delays are likely to affect their memory and they may have particular difficulty understanding the basis and reasons for a delay. *Idem* at 124-130. See also United Nations Economic and Social Council, 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', Resolution 2005/20, 22 July 2005, at para 30 (<<http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>>, last accessed on 9 December 2011).

²³⁷ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 116-123 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²³⁸ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 15 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

²³⁹ The Witnesses and Victims Section of the Special Court for Sierra Leone found that the main reason for witnesses' anxiety was their lack of familiarity with the court and the trial chamber process. Therefore introducing witnesses to the criminal justice process is of the greatest importance, especially for the most vulnerable witnesses. *Idem* at 23-24.

²⁴⁰ Studies of child witnesses have shown that children with a greater understanding of the court system provided more accurate answers to questions than children of the same age with less understanding of the court system. United Nations Economic and Social Council, 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', Resolution 2005/20, 22 July 2005, at para 30 (<<http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>>, last accessed on 9 December 2011).

- State Counsel should give witnesses clear explanations of courtroom procedures and should tell them what is expected of them as witnesses. Witnesses' anxiety can be reduced by telling them 'you only have to say what you know'.²⁴¹
- State Counsel should conduct a pre-trial visit of the courtroom with the witness in advance of his/her testimony.²⁴² The visit should demonstrate how protective measures will be applied if they have been granted.²⁴³
- State Counsel should provide the witness with a copy of his/her statement before the testimony in order to refresh his/her memory.²⁴⁴
- State Counsel should prepare witnesses for cross-examination: he/she should explain the questioning process and explain to witnesses how to answer different types of questions.²⁴⁵ However State Counsel should refrain from 'training' the witnesses, i.e. discussing or rehearsing the witness' evidence or otherwise coaching the witness before his/her testimony.²⁴⁶
- State Counsel should inform prosecution witnesses of their right not to answer any questions that would incriminate him/her.²⁴⁷
- State Counsel should encourage, reassure and build the confidence of witnesses and make any effort to reduce the witness' anxiety before his/her testimony.²⁴⁸ State Counsel should therefore ensure that witnesses have an opportunity to discuss anything that concerns them in preparing for their testimony.²⁴⁹
- State Counsel should do his/her best to prevent feelings of distress from interfering with the witness' testimony. It is recommended that the most

²⁴¹ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 13 & 23-24 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

²⁴² *Idem* at 13.

²⁴³ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 116-123 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁴⁴ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 13 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011). See also UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 116-123

(<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

The UK Court of Appeal approved this practice (*R v Richardson* [1971] 2 QB 484): it recognised that requiring a witness to give evidence without the opportunity to refresh his/her memory would reduce his/her testimony to more of a test of memory than of truthfulness. However, the Court found that the defence should be informed if prosecution witnesses have refreshed their memory before giving evidence (*Worley v Bentley* [1976] 2 All ER 449) and that the defence should be entitled to cross-examine the witness on a document used to refresh his/her memory.

²⁴⁵ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 18 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

²⁴⁶ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 100 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁴⁷ *The Prosecutor v Lubanga* (Transcript 'Ruling'), ICC-01/04-01/06-T-110, 28 January 2009 (<<http://www.icc-cpi.int/iccdocs/doc/doc976333.pdf>>, last accessed on 9 December 2011).

²⁴⁸ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 13 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

²⁴⁹ International Criminal Tribunal for the former Yugoslavia and United Nations Interregional Crime and Justice Research Institute, 'ICTY Manual on Developed Practices', 2009 at 198 (<http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf>, last accessed on 9 December 2011).

vulnerable witnesses (child witnesses, victims of sexual violence) be taught ways of reducing their anxiety and of managing any painful feelings during the testimony.²⁵⁰

- When available, State Counsel should encourage the involvement of a support person at the pre-trial stage for vulnerable witnesses. The support person should preferably be a professional or a member of a civil society organisation, independent from the witness, not involved in the case, and with some experience of the criminal justice system. When this is not possible, a friend or a relative of the witness can act as a support person provided that he/she is not involved in the case and is not given the details of the case or the evidence of the witness.²⁵¹
- State Counsel should advise the support person against discussing with the witness the details of the case or the evidence the witness will be giving.²⁵²
- The support person's role is to: provide emotional support, understand the witness' views, wishes, concerns and vulnerabilities and convey them to the relevant stakeholders, familiarise the witness with the court and its procedure and accompany the witness during the pre-trial visit to court and while he/she gives evidence in court.²⁵³
- State Counsel should inform the Judge of any special need or requirement a witness may have prior to the trial and of the presence of a support person during the witness testimony.²⁵⁴

Trial Stage

- When available, State Counsel should encourage the presence of a support person in the courtroom during the testimony of vulnerable witnesses. The support person should preferably be the one who became involved at the pre-trial stage.²⁵⁵ He/she will wait with the witness and accompany him/her to court. The support person will sit behind the witness in the courtroom and provide emotional support while remaining neutral. He/she should be able to comfort a distressed witness and to alert the Judge in cases of problems during the testimony. For instance, the support person should be able to alert the court to the witness' need for a break in proceedings.²⁵⁶
- When an order for the anonymity of a witness has been granted, State Counsel should refrain from asking any questions related to the identity of the witness.

²⁵⁰ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 17 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

²⁵¹ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 105-116 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁵² Idem at 105-116.

²⁵³ The witness support person should not accompany the witness when he/she reviews his/her statement prior to the trial. Otherwise this witness support person should not accompany the witness when giving evidence in court. Idem at 104.

²⁵⁴ Idem at 105-116 and 135.

²⁵⁵ The support person should preferably be a professional or a member of a civil society organisation, independent from the witness, not involved in the case, and with some experience of the criminal justice system. When this is not possible, a friend or a relative of the witness can act as a support person provided that he/she is not involved in the case and is not given the details of the case or the evidence of the witness. Idem at 105-116.

²⁵⁶ Idem at 116-123.

- State Counsel should tailor the language of the questions to each witness and make sure that the witness is able to understand the questions. State Counsel should keep questions as short and simple as possible, with only one point per question.²⁵⁷ State Counsel should try to use the same words that the witness used and should avoid using legal terminology. When a witness does not understand a question, State Counsel should reword it instead of repeating it.²⁵⁸
- State Counsel should question child witnesses in a caring and sensitive manner and in a language that is simple and comprehensible to a child.²⁵⁹
- State Counsel should ask the court for breaks during the testimony of child witnesses when the testimony is too long for the child's ability to concentrate.²⁶⁰
- State Counsel should keep in mind the needs of vulnerable witnesses who are giving evidence for the prosecution. For instance, if the defence seeks an adjournment, State Counsel should inform the Judge of any effect that this might have on the witness.²⁶¹
- State Counsel should consider filing a motion with the court suggesting that the sentence of an accused person be reduced, when this person is providing or has provided substantial cooperation as a witness in another criminal case and can therefore be considered as a 'cooperative witness'.²⁶² Upon receiving this motion, the Judge may decide whether to follow it or not.

²⁵⁷ At the SCSL there is a great concern about witnesses' ability to understand questions which address multiple points as they are confusing and can lead witnesses to provide inaccurate answers.

²⁵⁸ It has been observed that witnesses who do not understand the question tend to answer with 'yes', as they feel embarrassed to admit that they do not understand. UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 79

(<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁵⁹ It is important to remember that many concepts that are taken for granted in adult conversation (such as dates, time, length and frequency of events, weight, height, age estimates) are only gradually acquired as children develop. Therefore questions should take into account the stage of development of the child. *Idem* at 82-84. See also United Nations Economic and Social Council, 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', Resolution 2005/20, 22 July 2005, at para 31 (<<http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>>, last accessed on 9 December 2011); United Nations Office on Drugs and Crime and UNICEF, 'Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary', 2009, Article 12(1) (<http://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf>, last accessed on 9 December 2011).

²⁶⁰ This is also a best practice in respect of vulnerable adult witnesses who have a limited span of concentration or who are giving distressing evidence. UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 124-128 and 134

(<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011). See also United Nations Economic and Social Council, 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', Resolution 2005/20, 22 July 2005, at para 30

(<<http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>>, last accessed on 9 December 2011).

²⁶¹ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 135 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁶² This best practice aims at encouraging witnesses to testify at criminal trials, especially with respect to the most serious criminal offences. A cooperative witness can be defined as a person who is suspected or convicted of a criminal offence and agrees to give evidence in court that (a) is likely to prevent criminal offences by another person or that may lead to the successful prosecution of the perpetrator of a criminal offence, and (b) is judged by the court to be truthful and complete. However, this best practice should not be applied to persons convicted of the most serious crimes such as genocide, crimes against humanity or war crimes.

Article 26(2) of the United Nations Convention against Transnational Organized Crime: 'Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention'

- State Counsel’s motion for the reduction of the sentence of a cooperative witness should include:
 - the name of the cooperative witness;
 - details of the criminal proceedings in which he/she has agreed to testify in or has already testified in; and
 - the evidence that he/she has agreed to provide or has already provided.

Post-Trial Stage

- State Counsel should communicate clearly to witnesses what they can and cannot expect following their testimony. For instance, when it is unlikely that witnesses will receive any financial compensation, State Counsel should make it clear to them, in order to avoid unrealistic expectations. He/she should then ensure that witnesses receive what they have been told to expect.²⁶³
- State Counsel should encourage witnesses to seek the assistance of the local police station if they fear for their security.²⁶⁴
- State Counsel should provide details of the outcome of the case to witnesses after the conclusion of proceedings.²⁶⁵

Best Practices for Defence Counsel

Pre-Trial Stage

- Once a trial date has been set, or if it becomes apparent that the trial will not proceed, Defence Counsel should notify defence witnesses as soon as possible.²⁶⁶
- In cases involving vulnerable witnesses, Defence Counsel should ask the court to give the case priority in respect of times and dates of hearings.²⁶⁷

(<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>), last accessed on 9 December 2011). Sierra Leone signed this Convention on 27 November 2001 but has not ratified it yet.

²⁶³ Special Court for Sierra Leone, ‘Best Practice Recommendations for the Protection and Support of Witnesses’, 2008 at 18-19 (<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>), last accessed on 9 December 2011).

²⁶⁴ Idem at 18-19.

²⁶⁵ According to the Witnesses and Victims Section of the Special Court for Sierra Leone, witnesses who receive no post-trial follow-up have reported feeling abandoned. Special Court for Sierra Leone, ‘Best Practice Recommendations for the Protection and Support of Witnesses’, 2008 at 18-19 (<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>), last accessed on 9 December 2011). See also UK Ministry of Justice, ‘Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures’, 2011 at 130 (<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>), last accessed on 9 December 2011).

²⁶⁶ UK Ministry of Justice, ‘Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures’, 2011 at 116-123 (<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>), last accessed on 9 December 2011).

²⁶⁷ This practice is particularly recommended in respect of child witnesses and vulnerable adults with learning disabilities as delays are likely to affect their memory and they may have particular difficulty understanding the basis and reasons for a delay. Idem at 124-130. See also United Nations Economic and Social Council, ‘Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime’, Resolution 2005/20, 22 July

- Defence Counsel should notify defence witnesses of the delays within the criminal justice system and of the fact that trials may need to be adjourned.²⁶⁸
- Defence Counsel should give clear explanations of what support witnesses can expect to receive before, during, and after the testimony. For instance, when it is unlikely that witnesses will receive any financial compensation, Defence Counsel should make it clear to them, in order to avoid unrealistic expectations. He/she should then ensure that witnesses receive what they have been told to expect.²⁶⁹
- Defence Counsel should ensure that witnesses are well prepared for the experience of testifying in court.²⁷⁰ This preparation process is particularly important in respect of child witnesses.²⁷¹
- Defence Counsel should give witnesses clear explanations of courtroom procedures and should tell them what is expected of them as witnesses. Witnesses' anxiety can be calmed by telling them 'you only have to say what you know'.²⁷²
- Defence Counsel should conduct a pre-trial visit of the courtroom with the witness in advance of his/her testimony.²⁷³ The visit should demonstrate how protective measures will be applied if they have been granted.²⁷⁴
- Defence Counsel should provide the witness with a copy of his/her statement before the testimony, where available, in order to refresh his/her memory.²⁷⁵

2005, at para 30 (<<http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>>, last accessed on 9 December 2011).

²⁶⁸ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 116-123 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁶⁹ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 15 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

²⁷⁰ The Witnesses and Victims Section of the Special Court for Sierra Leone found that the main reason for witnesses' anxiety was their lack of familiarity with the court and the trial chamber process. Therefore introducing witnesses to the criminal justice process is of the greatest importance, especially for the most vulnerable witnesses. *Idem* at 23-24.

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Studies of child witnesses have shown that children with a greater understanding of the court system provided more accurate answers to questions than children of the same age with less understanding of the court system.

²⁷² Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 13 & 23-24 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

²⁷³ *Idem* at 13.

²⁷⁴ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 116-123 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁷⁵ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 13 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

See also UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 116-123

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The UK Court of Appeal approved this practice (*R v Richardson* [1971] 2 QB 484): it recognised that requiring a witness to give evidence without the opportunity to refresh his/her memory would reduce his/her testimony to more of a test of memory than of truthfulness. However, the Court found that the defence should be informed if prosecution witnesses have refreshed their memory before giving evidence (*Worley v Bentley* [1976] 2 All ER

- Defence Counsel should prepare witnesses for cross-examination: he/she should explain the questioning process and explain to witnesses how to answer different types of questions.²⁷⁶ However Defence Counsel should refrain from 'training' the witnesses, i.e. discussing or rehearsing the witness' evidence or otherwise coaching the witness before his/her testimony.²⁷⁷
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- Defence Counsel should encourage, reassure and build the confidence of witnesses and make every effort to reduce the witness' anxiety before his/her testimony.²⁷⁹ Defence Counsel should therefore ensure that witnesses have an opportunity to discuss anything that concerns them in preparing for their testimony.²⁸⁰
- Defence Counsel should do his/her best to prevent feelings of distress from interfering with the witness' testimony. It is recommended that the most vulnerable witnesses (child witnesses, victims of sexual violence) be taught ways of reducing their anxiety and of managing any painful feelings during the testimony.²⁸¹
- When available, Defence Counsel should encourage the involvement of a support person at the pre-trial stage for vulnerable witnesses. The support person should preferably be a professional or a member of a civil society organisation, independent from the witness, not involved in the case, and with some experience of the criminal justice system. When this is not possible, a friend or a relative of the witness can act as a support person provided that he/she is not involved in the case and is not given the details of the case or the evidence of the witness.²⁸²
- Defence Counsel should advise the support person against discussing with the witness the details of the case or the evidence the witness will be giving.²⁸³
- The support person's role is to: provide emotional support, understand the witness' views, wishes, concerns and vulnerabilities and convey them to the relevant stakeholders, familiarise the witness with the court and its procedure

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²⁷⁶ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 18 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

²⁷⁷ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 100 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁷⁸ *The Prosecutor v Lubanga Dyilo* (Transcript 'Ruling'), ICC-01/04-01/06-T-110, 28 January 2009 (<<http://www.icc-cpi.int/iccdocs/doc/doc976333.pdf>>, last accessed on 9 December 2011).

²⁷⁹ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 13 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

²⁸⁰ International Criminal Tribunal for the former Yugoslavia and United Nations Interregional Crime and Justice Research Institute, 'ICTY Manual on Developed Practices', 2009 at 198 (<http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf>, last accessed on 9 December 2011).

²⁸¹ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 17 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

²⁸² UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 105-116 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁸³ *Idem* at 105-116.

and accompany the witness during the pre-trial visit to court and while he/she gives evidence in court.²⁸⁴

- Defence Counsel should inform the Judge of any special need or requirements a witness may have prior to the trial and of the presence of a support person during the witness testimony.²⁸⁵

Trial Stage

- When available, Defence Counsel should encourage the presence of a support person in the courtroom during the testimony of vulnerable witnesses. The support person should preferably be the one who became involved at the pre-trial stage.²⁸⁶ He/she will wait with the witness and accompany him/her to court. The support person will sit behind the witness in the courtroom and provide emotional support while remaining neutral. He/she should be able to comfort a distressed witness and to alert the Judge in cases of problems during the testimony. For instance the support person should be able to alert the court to the witness' need for a break in proceedings.²⁸⁷
- When an order for the anonymity of a witness has been granted, Defence Counsel should refrain from asking any questions related to the identity of the witness.
- Defence Counsel should tailor the language of the questions to each witness and make sure that the witness is able to understand the questions. Defence Counsel should keep questions as short and simple as possible, with only one point per question.²⁸⁸ Defence Counsel should try to use the same words that the witness used and should avoid using legal terminology. When a witness does not understand a question, Defence Counsel should reword it instead of repeating it.²⁸⁹
- Defence Counsel should question child witnesses in a caring and sensitive manner and in a language that is simple and comprehensible to a child.²⁹⁰

²⁸⁴ The witness support person should not accompany the witness when he/she reviews his/her statement prior to the trial. Otherwise this witness support person should not accompany the witness when giving evidence in court. *Idem* at 104.

²⁸⁵ *Idem* at 105-116 and 135.

²⁸⁶ The support person should preferably be a professional or a member of a civil society organisation, independent from the witness, not involved in the case, and with some experience of the criminal justice system. When this is not possible, a friend or a relative of the witness can act as a support person provided that he/she is not involved in the case and is not given the details of the case or the evidence of the witness. *Idem* at 105-116.

²⁸⁷ *Idem* at 116-123.

²⁸⁸ At the SCSL there is a great concern about witnesses' ability to understand questions which address multiple points as they are confusing and can lead witnesses to provide inaccurate answers.

²⁸⁹ It has been observed that witnesses who do not understand the question tend to answer with 'yes', as they feel embarrassed to admit that they did not understand. UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 79

(<<http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁹⁰ It is important to remember that many concepts that are taken for granted in adult conversation (such as dates, time, length and frequency of events, weight, height, age estimates) are only gradually acquired as children develop. Therefore questions should take into account the stage of development of the child. *Idem* at 82-84. See also United Nations Economic and Social Council, 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', Resolution 2005/20, 22 July 2005, at para 31 (<<http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>>, last accessed on 9 December 2011); United Nations Office on Drugs and Crime and UNICEF, 'Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary', 2009, Article 12(1) (<http://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf>, last accessed on 9 December 2011).

- Defence Counsel should ask the court for breaks during the testimony of child witnesses when the testimony is too long for the child's ability to concentrate.²⁹¹
- Defence Counsel should keep in mind the needs of vulnerable witnesses who are giving evidence for the defence. For instance, if the prosecution seeks an adjournment, Defence Counsel should inform the Judge of any effect that this might have on the witness.²⁹²

Post-Trial Stage

- Defence Counsel should communicate clearly to witnesses what they can and cannot expect following their testimony. For instance, when it is unlikely that witnesses will receive any financial compensation, Defence Counsel should make it clear to them, in order to avoid unrealistic expectations. He/she should then ensure that witnesses receive what they have been told to expect.²⁹³
- Defence Counsel should encourage witnesses to seek the assistance of the local police station if they fear for their security.²⁹⁴
- Defence Counsel should provide details of the outcome of the case to witnesses after the conclusion of proceedings.²⁹⁵

²⁹¹ This is also a best practice in respect of vulnerable adult witnesses who have a limited span of concentration or who are giving distressing evidence. UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 124-128 and 134

(<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

See also United Nations Economic and Social Council, 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', Resolution 2005/20, 22 July 2005, at para 30 (<<http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>>, last accessed on 9 December 2011).

²⁹² UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 135 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁹³ Special Court for Sierra Leone, 'Best Practice Recommendations for the Protection and Support of Witnesses', 2008 at 18-19 (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqzcrMc%3d&tabid=176>>, last accessed on 9 December 2011).

²⁹⁴ *Idem* at 18-19.

²⁹⁵ According to the Witnesses and Victims Section of the Special Court for Sierra Leone, witnesses who receive no post-trial follow-up have reported feeling abandoned. *Idem* at 18-19.

See also UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 130 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

5. BEST PRACTICES REGARDING VICTIMS

Overview

The final group of actors addressed in the Best Practice Guide is victims. A victim is a person against whom a criminal offence has been committed. As endorsed by the Truth and Reconciliation Commission, 'a victim may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental or economic harm'.²⁹⁶ The status of victim is not related to whether the perpetrator of the criminal offence is identified, apprehended, prosecuted or convicted.²⁹⁷

Victims can be under threat and/or vulnerable, in the same way as witnesses. Vulnerable victims include children, victims who have a mental disorder, a physical disability, or are significantly impaired in relation to intelligence and social functioning, and victims who have been severely physically or mentally traumatised by the criminal offence.²⁹⁸

Whereas the previous Section of the Best Practice Guide looked at victims when they are called to testify, this Section focuses on the way in which victims should be viewed and treated by stakeholders at all stages of criminal proceedings.

Principle

All stakeholders should keep in mind the needs and interests of victims at all stages of criminal proceedings and should work towards minimising their inconvenience.

All stakeholders must treat victims with compassion and respect for their dignity.²⁹⁹ In addition, all stakeholders must pay special attention to vulnerable victims, including children, elderly persons, mentally and physically ill persons and victims of criminal offences involving sexual violence. Stakeholders should also be aware of the fact that some victims might suffer from post-traumatic stress disorder as a delayed reaction to the stress of the criminal offence. Moreover, secondary victimisation can happen through the experience of the victim within the criminal justice system.³⁰⁰ Therefore, it is important that stakeholders be attentive to the psychological state of mind of the victim and act with sensitivity.

²⁹⁶ Truth and Reconciliation Commission, Final Report, Volume 2, 2004 at 234, para 27 (<<http://www.sierra-leone.org/TRCDocuments.html>>, last accessed on 9 December 2011). The TRC used in its Final Report the definition of victim provided in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and International Humanitarian Law.

²⁹⁷ Article 17 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (<<http://www.un.org/documents/ga/res/40/a40r034.htm>>, last accessed on 9 December 2011).

²⁹⁸ UK Ministry of Justice, 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures', 2011 at 4 (<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf>>, last accessed on 9 December 2011).

²⁹⁹ Article 4 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (<<http://www.un.org/documents/ga/res/40/a40r034.htm>>, last accessed on 9 December 2011).

³⁰⁰ The term 'secondary victimisation' refers to the victimisation that occurs not as a direct result of the criminal offence, but through the response of institutions and individuals to the victim. This will for instance be the case if the victims' experience is not recognised as criminal victimisation or if stakeholders behave in an inappropriate manner. United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 7 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011).

All stakeholders should also remember that what to them may be one case out of many is often of major importance to victims.³⁰¹

Furthermore, all stakeholders should strive to protect the privacy of victims and when necessary, to ensure their safety and the safety of their family.³⁰² This can be achieved by granting victims protective measures, in accordance with the previous Section of this Best Practice Guide. This possibility has been acknowledged by the SCSL as Rules 69 and 75 of the Rules of Procedure and Evidence indicate that victims can be granted protective measures. Moreover, throughout its existence and as a result of the work of its Witnesses and Victims Section, the SCSL has shown great respect for the needs and interests of victims involved in criminal proceedings, and has therefore inspired the following best practices.

In addition, the TRC paid particular attention to victims in its Final Report.³⁰³ Therefore, by applying the following best practices and protecting the rights of victims, stakeholders will participate in implementing the following TRC recommendations:³⁰⁴

'The Commission seeks to promote the creation of a human rights culture in Sierra Leone. A rights culture is one in which there is knowledge and recognition of the basic rights to which all human beings are entitled. A rights culture demands that we respect each other's human rights, without exception';

'The Commission calls on the judiciary to take a pro-active approach to the protection of human rights';

'The Commission calls upon the Sierra Leone Bar Association to become the guardians of the protection of the Rule of Law and the human rights of Sierra Leoneans'.

³⁰¹ Idem at 35.

³⁰² Article 6(d) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (<<http://www.un.org/documents/ga/res/40/a40r034.htm>>, last accessed on 9 December 2011); Article 4 of the Service Charter for Victims of Crime in South Africa, 2007 (<<http://www.npa.gov.za/files/Victims%20charter.pdf>>, last accessed on 9 December 2011); Project Victims in Europe, 'Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union', 2009 at 60 (<http://www.apav.pt/portal_eng/pdf/Project_Victims_Europe_Final_Report.pdf>, last accessed on 9 December 2011).

³⁰³ Truth and Reconciliation Commission, Final Report, Volume 2, 2004 (<<http://www.sierra-leone.org/TRCDocuments.html>>, last accessed on 9 December 2011).

³⁰⁴ Idem at 125, para 45; 148, para 182; 147, para 174.

Best Practices for Judges

- In cases involving vulnerable victims, the Judge should aim towards giving the case priority.³⁰⁵
- The Judge should ensure that victims are treated with respect, courtesy and fairness.³⁰⁶
- The Judge should ensure that State Counsel keeps victims informed of the status of their cases.³⁰⁷ However, victims should not be informed if they have indicated that they would prefer not to be informed.³⁰⁸
- The Judge should ensure that victims sit in the courtroom away from the defendant's family or friends. Where possible, victims should have a separate waiting area.³⁰⁹
- The Judge should allow victims to be accompanied by support persons in the courtroom in proceedings which are not held in closed sessions. When the case involves vulnerable victims, State Counsel should also consider requesting that they be accompanied by support persons in the courtroom during closed sessions.³¹⁰
- The Judge should encourage the presentation of victim impact statements by State Counsel prior to sentencing. These statements aim at giving victims the opportunity to present their views and concerns, and to explain how the crime has affected them, whether physically, emotionally or financially. Therefore, they may include anything victims think might be helpful or relevant but should not include opinions as to how the court should punish the offender.³¹¹

³⁰⁵ United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 69 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011).

³⁰⁶ Idem at 69; Article 1 of the Service Charter for Victims of Crime in South Africa, 2007 (<<http://www.npa.gov.za/files/Victims%20charter.pdf>>, last accessed on 9 December 2011).

³⁰⁷ United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 70 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011).

³⁰⁸ Project Victims in Europe, 'Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union', 2009 at 60 (<http://www.apav.pt/portal_eng/pdf/Project_Victims_Europe_Final_Report.pdf>, last accessed on 9 December 2011).

³⁰⁹ UK Office for Criminal Justice Reform, 'The Code of Practice for Victims of Crime', 2005 at 14 (<http://www.cps.gov.uk/victims_witnesses/victims_code.pdf>, last accessed on 9 December 2011); Project Victims in Europe, 'Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union', 2009 at 60 (<http://www.apav.pt/portal_eng/pdf/Project_Victims_Europe_Final_Report.pdf>, last accessed on 9 December 2011).

³¹⁰ United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 71 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011).

³¹¹ Article 6(b) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (<<http://www.un.org/documents/ga/res/40/a40r034.htm>>, last accessed on 9 December 2011); United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 70 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011); Article 32(5) of the United Nations Convention against Corruption (<http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>, last accessed on 9 December 2011); UK Crown Prosecution Services, 'Legal Guidance on Victim Personal Statements', 2011, (<http://www.cps.gov.uk/legal/v_to_z/victim_personal_statements/>, last accessed on 7 December 2011).

- When deciding on a sentence, the Judge should take into account the impact of the crime on victims expressed through victim impact statements.³¹²
- Where possible, the Judge should order restitution by the offender to the victim, as a sanction in itself or as an additional penalty.³¹³ Such restitution could include:
 - the return of property;
 - payment for the harm or loss suffered;
 - reimbursement of expenses incurred as a result of victimisation;
 - the provision of services for the victim or the community.³¹⁴

Best Practices for State Counsel

- State Counsel should keep in mind that it is the victim who is directly harmed by the criminal offence, and that he/she has a valid interest in the prosecution of the case. Therefore, State Counsel should encourage victims' involvement at all stages of the proceedings.³¹⁵
- When State Counsel takes the decision that there is insufficient evidence to bring any proceedings or decides to alter or drop any charges, he/she should notify victims as soon as possible. When victims are vulnerable or intimidated, they should be notified particularly quickly.³¹⁶ However, victims should not be informed if they have indicated that they would prefer not to be informed.³¹⁷
- It is recommended that State Counsel meet victims to explain his/her decision not to bring proceedings, to alter or to drop the charges, when the case involves

³¹² United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 69 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011).

³¹³ Restitution should be understood as being wider than financial compensation. Research has shown that the effort of the offender to repair the damages brings a sense of justice to victims, who view restitution as a sign of acknowledgement and respect for the harm suffered. Project Victims in Europe, 'Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union', 2009 at 102 (<http://www.apav.pt/portal_eng/pdf/Project_Victims_Europe_Final_Report.pdf>, last accessed on 9 December 2011).

³¹⁴ Articles 8 and 9 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (<<http://www.un.org/documents/ga/res/40/a40r034.htm>>, last accessed on 9 December 2011); United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 47-48 and 70 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011).

³¹⁵ United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 67 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011).

³¹⁶ UK Office for Criminal Justice Reform, 'The Code of Practice for Victims of Crime', 2005 at 12 (<http://www.cps.gov.uk/victims_witnesses/victims_code.pdf>, last accessed on 9 December 2011).

³¹⁷ Council of Europe, Recommendation No. (85)11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure, 1985 at para 6 (<<http://www.coe.int/t/dghl/standardsetting/violence/Documents/Recommendation%20%2885%29%20position%20of%20victim.pdf>>, last accessed on 9 December 2011).

death, child abuse, sexual offences and any other offences of an equally serious nature, as applicable.³¹⁸

- State Counsel should inform victims of the scope, timing, and progress of the criminal proceedings and of the disposition of their cases, particularly when victims have indicated that they wish to be informed.³¹⁹ However, victims should not be informed if they have indicated that they would prefer not to be informed.³²⁰
- State Counsel should notify the victims if they are required to give evidence as soon as possible.³²¹
- State Counsel should inform victims of any relevant assistance available to them, including health and social services.³²²
- State Counsel should reassure victims and show compassion when interacting with them.³²³
- State Counsel, or other prosecution staff if unavailable, should introduce themselves to victims at court. He/she should answer any questions the victims may have about court procedure.³²⁴
- State Counsel should request that victims be accompanied by support persons in the courtroom in proceedings which are not held in closed sessions. When the case involves vulnerable victims, State Counsel should also consider requesting that they be accompanied by support persons in the courtroom during closed sessions.³²⁵
- State Counsel should encourage victims to give victim impact statements and if agreed, should record such statements. These statements give victims the opportunity to present their views and concerns, and to explain how the crime

³¹⁸ In the UK, racially and religiously aggravated offences and offences with a homophobic element are included within this category. UK Office for Criminal Justice Reform, 'The Code of Practice for Victims of Crime', 2005 at 12 (<http://www.cps.gov.uk/victims_witnesses/victims_code.pdf>, last accessed on 9 December 2011).

³¹⁹ Keeping victims informed and assisting them in understanding the situation may indeed help them regain a sense of control. Indeed research has shown that victims who were kept informed by authorities felt that their wishes were taken into consideration and that they had some degree of influence over the outcome of the case. United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 24 and 35 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011).

See also Article 6(a) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (<<http://www.un.org/documents/ga/res/40/a40r034.htm>>, last accessed on 9 December 2011);

Article 3 of the Service Charter for Victims of Crime in South Africa, 2007

(<<http://www.npa.gov.za/files/Victims%20charter.pdf>>, last accessed on 9 December 2011).

³²⁰ Project Victims in Europe, 'Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union', 2009 at 60 (<http://www.apav.pt/portal_eng/pdf/Project_Victims_Europe_Final_Report.pdf>, last accessed on 9 December 2011).

³²¹ UK Office for Criminal Justice Reform, 'The Code of Practice for Victims of Crime', 2005 at 12 (<http://www.cps.gov.uk/victims_witnesses/victims_code.pdf>, last accessed on 9 December 2011).

³²² Article 15 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (<<http://www.un.org/documents/ga/res/40/a40r034.htm>>, last accessed on 9 December 2011).

³²³ Common phrases can be used to reassure victims such as 'I am sorry this happened to you' or 'it is not your fault that it happened'. United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 24 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011).

³²⁴ UK Office for Criminal Justice Reform, 'The Code of Practice for Victims of Crime', 2005 at 12 (<http://www.cps.gov.uk/victims_witnesses/victims_code.pdf>, last accessed on 9 December 2011).

³²⁵ United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 71 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011).

has affected them, whether physically, emotionally or financially. They may include anything victims think might be helpful or relevant but should not include opinions as to how the court should punish the offender. State Counsel should not raise victims' expectations regarding the effect of victim impact statements and should warn victims that such statements are unlikely to affect the sentence.³²⁶

- If they are available, State Counsel should present victim impact statements to the court prior to sentencing.
- Where possible, State Counsel should request restitution by the offender to the victim, as a sanction in itself or as an additional penalty.³²⁷ Such restitution could include:
 - the return of property;
 - payment for the harm or loss suffered;
 - reimbursement of expenses incurred as a result of victimisation;
 - the provision of services for the victim or the community.³²⁸
- Following the conviction, State Counsel should notify victims of proceedings and decisions at the appellate level, parole dates, and changes of status of an inmate, particularly in cases where there might be danger to the victims.³²⁹

³²⁶ Article 6(b) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (<<http://www.un.org/documents/ga/res/40/a40r034.htm>>, last accessed on 9 December 2011); United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 39 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011); Article 5 of the United Nations Convention against Corruption (<http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>, last accessed on 9 December 2011); UK Crown Prosecution Services, 'Legal Guidance on Victim Personal Statements', 2011, (<http://www.cps.gov.uk/legal/v_to_z/victim_personal_statements/>, last accessed on 7 December 2011). However, although victims have a right to be heard, they also should have the right not to participate if they find that participation too stressful. Project Victims in Europe, 'Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union', 2009 at 42 (<http://www.apav.pt/portal_eng/pdf/Project_Victims_Europe_Final_Report.pdf>, last accessed on 9 December 2011).

³²⁷ Restitution should be understood as being wider than financial compensation. Research has shown that the effort of the offender to repair the damages brings a sense of justice to victims, who view restitution as a sign of acknowledgement and respect for the harm suffered. Project Victims in Europe, 'Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union', 2009 at 102 (<http://www.apav.pt/portal_eng/pdf/Project_Victims_Europe_Final_Report.pdf>, last accessed on 9 December 2011).

³²⁸ Articles 8 and 9 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (<<http://www.un.org/documents/ga/res/40/a40r034.htm>>, last accessed on 9 December 2011); United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 47-48 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011).

³²⁹ United Nations Offices for Drug Control and Crime Prevention & Centre for International Crime Prevention, 'Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', 1999 at 67 (<<http://www.uncjin.org/Standards/9857854.pdf>>, last accessed on 9 December 2011); Project Victims in Europe, 'Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union', 2009 at 60 (<http://www.apav.pt/portal_eng/pdf/Project_Victims_Europe_Final_Report.pdf>, last accessed on 9 December 2011).

6. BEST PRACTICES FOR DISCLOSURE IN CRIMINAL CASES

Overview

The rules of evidence apply to all criminal cases. Evidence is essential in ultimately deciding whether an accused person is innocent or guilty.

It is important that Sierra Leonean courts admit evidence during criminal cases to determine what the issues are. It is at the Judge's discretion to weigh up the evidence, to decide whether or not the evidence can be admitted into court, and whether or not the evidence proves an issue which is relevant to the case.

Disclosure is the procedure in which important and relevant evidence for a case is passed between the prosecution and the defence, normally before the criminal trial begins.

Disclosure is essential as it protects the fair trial rights of an accused person by firstly allowing him/her to prepare his/her case so that he/she can defend himself/herself.³³⁰ Secondly, the disclosure of evidence is important to ensure that an accused person is treated equally before the courts.³³¹ This includes the principle of equality of arms which means that all parties in a case are given the same procedural rights during a criminal case.³³²

During the preliminary needs assessment mission, it became evident that disclosure is currently a key issue amongst legal actors in Sierra Leone. It is a recognised procedure at the SCSL which provides for the disclosure process in its Rules of Procedure and Evidence.³³³ Disclosure should be treated with the same importance in both the magistrates courts and the superior courts,³³⁴ this is essential to the accused receiving a fair trial under Article 17 of the SCSL statute. At all times when the stakeholders are following their disclosure obligations, they must remember that cases against each accused person must be considered separately.³³⁵ Finally, once a criminal trial has started, if either State or Defence Counsel finds any extra evidence or material which

³³⁰ Per Section 23(4)(a)&(b) of the Constitution of Sierra Leone, Act No. 6 of 1991(<<http://www.sierra-leone.org/Laws/constitution1991.pdf>>, last accessed on 9 December 2011) & Article 17(5)(b) & (c) of the Statute of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011), which provide for the right to understand a charge in a language the accused understands and to have adequate time and facilities for the preparation of his defence.

³³¹ Per Section 8(2)(a) of the Constitution of Sierra Leone, Act No. 6 of 1991(<<http://www.sierra-leone.org/Laws/constitution1991.pdf>>, last accessed on 9 December 2011) which provides that every Sierra Leonean citizen is treated equally before the law & Article 17(1) of the Statute of the Special Court for Sierra Leone (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3d&tabid=176>>, last accessed on 9 December 2011).

³³² 'The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant'. Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007 at 3 para 13, (<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>, last accessed on 9 December 2011).

³³³ Rules 66-70 of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³³⁴ UK Crown Prosecution Services, 'Attorney General's Guidelines on Disclosure', 2011, (<http://www.cps.gov.uk/legal/a_to_c/attorney_generals_guidelines_on_disclosure/>, last accessed on 9 December 2011) at para 7.

³³⁵ 'UK Crown Prosecution Services, 'Disclosure Manual For investigations started on or after 4 April 2005', 2011 at 12.5 & 12.6, (<http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/>, last accessed on 9 December 2011).

should have been disclosed and which was not disclosed originally, the party in question should inform the other side and the court promptly.³³⁶

As disclosure has been an integral element of criminal cases at the SCSL and there are currently no binding rules on disclosure in place at the national level in Sierra Leone, the following are general guidelines which can be implemented in to the criminal justice system of Sierra Leone:

- At all times it is at the Judge’s discretion as to whether or not material should be disclosed.³³⁷
- Judges can organise status conferences if he/she feels it is necessary:
 - a) to organise between the parties when evidence will be disclosed; or
 - b) to review the status of the case; and
 - c) to provide the accused with an opportunity to put forward any issues he/she wishes to raise.³³⁸
- Disclosure is a positive, ongoing duty on prosecutors which starts to run from the beginning of criminal proceedings and continues until the end of the trial and even in to the post-trial phase including appeals.³³⁹ This ongoing duty also applies to State Counsel’s ongoing obligation to disclose exculpatory material.³⁴⁰
- It is State Counsel’s professional responsibility to always act fairly and impartially according to the interests of justice.³⁴¹
- Both parties must act in good faith at all times in respect of disclosure obligations.³⁴²

³³⁶ Rule 67(D) of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³³⁷ Rule 89 of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011). Furthermore, under Rule 95, the Trial Chamber at the SCSL can exclude evidence where its admission would bring the administration of justice in to disrepute when its probative value is manifestly outweighed by its prejudicial effect;

Prosecutor v Sesay, Kallon & Gbao (Decision on Sesay application for disclosure pursuant to Rules 89(B) and/or 66(A)(ii)), SCSL-04-15-T-936, 10 January 2008 at para 15.

Prosecutor v Sesay, Kallon & Gbao (Decision on Defence Motion to request the trial chamber to rule that the Prosecution Moulding of Evidence is Impermissible), SCSL-04-15-T, 1 August 2006 at para 12, (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=nCI7KSErOC8%3d&tabid=155>>, last accessed on 9 December 2011).

³³⁸ Rule 65bis of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³³⁹ ‘UK Crown Prosecution Services, ‘Disclosure Manual For investigations started on or after 4 April 2005’, 2011 at 2.10, (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁴⁰ Rule 68(B) of the Special Court for Sierra Leone, Rules of Procedure and Evidence places an ongoing obligation on the prosecution in respect of disclosure of exculpatory material, (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁴¹ Article 5 of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone: ‘Counsel shall act with: (i) competence, honesty, skill and professionalism in the presentation and conduct of the case; (ii) independence in the performance of his functions, and shall not accept nor seek instructions from a Government or any other source, nor engage in any activity which compromises his independence or which reasonably creates the appearance of such compromise; and (iii) integrity to ensure that his actions do not bring the administration of justice into disrepute’, (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=IbTonPmXLHk%3d&tabid=176>>, last accessed on 9 December 2011).

³⁴² *Prosecutor v Brima, Kamara & Kanu* (Decision on joint Defence motion on disclosure of all original witness statements, interview notes and investigators notes pursuant to Rules 66 and/or 68), SCSL-04-16-T-246, 4

- To conceal a witness' identity in material which is being disclosed:³⁴³
 - a) material can be redacted,³⁴⁴ i.e. parts of information can be blocked out to conceal the identity of a witness;
 - b) a fictitious name or a number can be used in documents, particularly witness statements to protect the identity of a witness.

This Section of the Best Practice Guide provides a framework for the disclosure process which can be applied in criminal cases in Sierra Leone.

6.1. Prosecution's Obligation to Disclose Materials

Principle

State Counsel has a duty to disclose to the defence all materials in his/her possession or custody which may be used at trial by the prosecution.

There are three aspects to State Counsel's disclosure obligations:

- i. The duty to provide the defence with all relevant materials;
- ii. The duty to provide the defence with a list of witnesses the prosecution intends to call at trial; and
- iii. Situations where disclosure can be restricted.

State Counsel has a duty to provide the defence with a list of all relevant materials and evidence that the prosecution may use at trial. State Counsel has a duty to grant the defence access to all material and evidence in his/her possession which the prosecution may use at trial.³⁴⁵ This material also includes exculpatory evidence.³⁴⁶

State Counsel must always inspect, view or listen to potentially disclosable material which could reasonably be considered capable of undermining the prosecution case

May 2005 at para 16, (<http://www.sc-sl.org/LinkClick.aspx?fileticket=0o71R63rtAA=&tabid=157>, last accessed on 9 December 2011).

³⁴³ This is to be considered if an order for protective measures is made.

³⁴⁴ Redactions have been allowed in the *AFRC*, *RUF*, *CDF* cases of the SCSL and in the current *Charles Taylor* trial.

³⁴⁵ Rule 66(A)(iii) of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁴⁶ Exculpatory evidence is evidence which may be relevant for the defence's case including evidence which could confirm the accused's innocence or guilt or which may affect the credibility of State Counsel's case. Rules 68(A)&(B) of the Special Court for Sierra Leone, Rules of Procedure and Evidence: 'The Prosecutor shall, within 14 days of receipt of the Defence Case Statement, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which may be relevant to issues raised in the Defence Case Statement.

The Prosecutor shall, within 30 days of the initial appearance of the accused, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material', (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

against the accused or of assisting the case for the accused.³⁴⁷ Defence Counsel should be open, alert and responsive to requests for disclosure.³⁴⁸

There are some materials which are not necessarily automatically passed from the prosecution to the defence as part of disclosure. Materials which are not subject to disclosure are known as the prosecution's work product. This applies to internal documents including reports and memos created by the prosecution in connection with the investigation or the preparation of a case. This is adhered to at the SCSL:³⁴⁹

'Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions'.

Furthermore, State Counsel is required to disclose to Defence Counsel a list of the names of witnesses being called for the prosecution's case, within a reasonable time period before the trial begins.³⁵⁰

If State Counsel decides to call a witness later, he/she should inform Defence Counsel as soon as possible. This applies to situations where:

- a) State Counsel was not aware of the witness when he/she originally handed the list to Defence Counsel; or
- b) he/she did not think he/she would be calling that particular witness when he/she handed over the list.

Finally, there are situations where disclosure can be restricted if it may cause a risk to the integrity of the evidence or could cause potential harm to a person, to public safety or national security. Restrictions on disclosure can include:

- a) the delay in disclosing evidence;
- b) the limitation of disclosure of evidence;
- c) the total restriction on access to a piece of evidence.³⁵¹

At the international tribunals, delayed disclosure is seen as being justified in situations where the witness or the witness' family would be placed in danger.³⁵²

³⁴⁷ UK Crown Prosecution Services, 'Attorney General's Guidelines on Disclosure', 2011 at 35, (<http://www.cps.gov.uk/legal/a_to_c/attorney_generals_guidelines_on_disclosure/>, last accessed on 9 December 2011).

³⁴⁸ UK Crown Prosecution Services, 'Disclosure Manual For investigations started on or after 4 April 2005', 2011 at 15.10, (<http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/>, last accessed on 9 December 2011).

³⁴⁹ Rule 70(A) of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁵⁰ Rule 73bis(B)(iv) of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011). At the SCSL this list includes the pseudonym of each witness.

³⁵¹ Rule 95 of the Special Court for Sierra Leone, Rules of Procedure and Evidence: 'No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute'. (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁵² *Prosecutor v Slobodan Milošević*, (First decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses), IT-02-54-T, 3 May 2002 at para 8 (<http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/020503.pdf>, last accessed on 9 December 2011).

The following best practices aim to provide practical guidance to stakeholders to ensure that the prosecution's obligation to disclose is adhered to.

Best Practices for Judges

- The Judge should consider accepting material in Krio or in English.
- The Judge should consider allowing State Counsel to provide the defence with a list of materials which the defence will then inspect, instead of copies of all the material in its custody or possession, if resources are limited.
- The Judge should consider allowing materials that are in Krio and those that are in English to be accepted without translation. These best practices will ensure that an accused understands the charges against him and to ensure that the formality of the court is adhered to.
- In cases where a person has provided confidential information and agrees to it being disclosed to Defence Counsel, the Judge in such cases may not order either of the parties to get more information from him/her. It is also suggested that in this situation, the information provider should not be called as a witness.³⁵³
- If in this situation, the provider of the confidential material is in fact called by State Counsel to be a witness, the Judge may not make this witness answer questions he would prefer not to on the grounds of confidentiality.³⁵⁴
- If the Judge discovers during a trial, that either the prosecution or defence have not followed their obligations to disclose material, the Judge can order the offending party to disclose the material.
- If either of the parties intentionally do not follow the court order to disclose material, the Judge can apply appropriate remedies. Remedies may vary from case to case.³⁵⁵ They include:
 - a) extension of time to the parties,³⁵⁶
 - b) exclusion of evidence.³⁵⁷

³⁵³ Rule 70(C) of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁵⁴ Rule 70(D) of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁵⁵ *Prosecutor v Brima, Kamara & Kanu* (Decision on joint Defence motion on disclosure of all original witness statements, interview notes and investigators notes pursuant to Rules 66 and/or 68), SCSL-04-16-T-246, 4 May 2005 at para 16, (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0o71R63rtAA=&tabid=157>>, last accessed on 9 December 2011).

³⁵⁶ *Prosecutor v Sesay, Kallon & Gbao* (Ruling on Disclosure regarding Witness TF1-195), SCSL-04-15-T, 4 February 2005 at para 7, (<<http://www.sierraleoneli.org/sl/judgment/special-court/2005/21>>, last accessed on 9 December 2011). The Chamber noted that [at the SCSL], the preferred remedy for breach of disclosure obligations is an extension of time to allow the defence to adequately prepare its case: 'The Chamber acknowledges that, as a general rule, the judicially preferred remedy for a breach of disclosure obligations by the Prosecution is an extension of time to enable the Defence to adequately prepare their case. It is not exclusion of the evidence. However, in the particular circumstances at hand, this Chamber finds that the Prosecution has failed to promptly exercise due diligence that is required in discharging its duty to disclose to the Defence all of the information in its possession in accordance with Rule 66 of the Rules, and given the gravity of the allegations, is satisfied that this is a proper case in which to apply the remedy of exclusion'.

- Extensions of time should not be given to either party as a matter of course. Judges should be provided with a detailed explanation as to why either of the parties require an extension.³⁵⁸
- It is the duty of the trial Judge to look at both the interests of justice in the case and the rights of the accused to decide whether or not the evidence to be disclosed is restricted. It is recommended that where there is a substantial risk of either of the following factors, the trial Judge can make an order that there is a restriction of disclosure:
 - a) risk to the integrity of physical evidence;
 - b) risk of physical harm to a person; or
 - c) risk to public safety or to national security.
- The Judge should expect no less than the prosecution adopting a transparent approach to its disclosure obligations.

Best Practices for State Counsel

- As soon as an accused has made his first appearance in court, a time period should begin to run in which State Counsel must disclose the evidence. This time period is automatically triggered by the accused's first appearance in court.³⁵⁹
- The time period which should be used as a guide is a 'reasonable period' of time. This reasonable period should be long enough for State Counsel to gather the material to disclose to the defence, but not so long that an accused's preparation of his/her defence is compromised. It must occur enough in advance of the trial to ensure that the defence can be properly prepared. Therefore, this means that State Counsel must provide the list of materials to the defence within a reasonable period of time before the trial starts.³⁶⁰
- State Counsel should consider providing a list of material to the defence if, due to resources it is easier than copying all the disclosable materials in his/her custody.

³⁵⁷ *Prosecutor v Sesay, Kallon & Gbao* (Ruling on Disclosure regarding Witness TF1-195), SCSL-04-15-T, 4 February 2005 at para 7, (<<http://www.sierraleoneli.org/sl/judgment/special-court/2005/21>>, last accessed on 9 December 2011);

Prosecutor v Brima, Kamara & Kanu (Decision on joint Defence motion on disclosure of all original witness statements, interview notes and investigators notes pursuant to Rules 66 and/or 68), SCSL-04-16-T-246, 4 May 2005 at para 16, (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=0o71R63rtAA=&tabid=157>>, last accessed on 9 December 2011);

Rule 67(A)(i) of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011);

Rule 95 of the Special Court for Sierra Leone, Rules of Procedure and Evidence should also be borne in mind by the Sierra Leonean Judges: 'No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute', (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁵⁸ Judiciary of England and Wales, 'Disclosure: A Protocol for the Control & Management of Unused Material in the Crown Court', 2011 at 28, (<http://www.judiciary.gov.uk/Resources/JCO/Documents/Protocols/crown_courts_disclosure.pdf>, last accessed on 9 December 2011).

³⁵⁹ This obligation is automatically triggered by the accused's appearance.

³⁶⁰ Rule 67 of the Special Court for Sierra Leone, Rules of Procedure and Evidence states only 'as early as reasonably practicable and in any event prior to the commencement of the trial', (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

- State Counsel must provide the material/ list of material and provide access to those materials as soon as evidence becomes available and without any unnecessary delay.³⁶¹
- It is recommended that State Counsel maintain a record of his/her disclosure duties including:
 - a) which material is disclosed to the defence;
 - b) which material is withheld from the defence;
 - c) the inspection of material; and
 - d) the recording of information into a suitable form.³⁶²
- State Counsel should take care to ensure that the defence does not have access to evidence which is not subject to disclosure, or other pieces of evidence such as those containing the details of the names of any anonymous witnesses.
- Information which has been provided to State Counsel on a purely confidential basis used solely for the purpose of generating new evidence is not subject to disclosure. This information can only be disclosed if the person who provided the initial information agrees to it being disclosed.³⁶³
- State Counsel must consider the balance between the need to protect information on a confidential basis versus the accused's right to a fair trial.³⁶⁴
- After any preliminary hearing and before the trial starts, State Counsel or Defence Counsel may file a preliminary motion for disclosure to make the other party meet its disclosure obligations.
- To restrict the disclosure of evidence, State Counsel must make a motion to the court.³⁶⁵
- During the trial, where the trial court learns that State or Defence Counsel has failed to comply with the disclosure obligations or an order of the trial court

³⁶¹ This material will include evidence which the defence believes is material to its preparation, or which the prosecution intends to lead with during the trial, or material which was obtained from or belongs to the accused. Examples of such material include books, documents, photographs and tangible objects. Rule 66(iii) of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁶² UK Crown Prosecution Services, 'Disclosure Manual For investigations started on or after 4 April 2005', 2011 at 11.14, (<http://www.cps.gov.uk/legal/d_to_q/disclosure_manual/>, last accessed on 9 December 2011).

³⁶³ Rule 70(B) of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁶⁴ In the *Lubanga* case, the prosecution was in possession of over 200 documents which it conceded contained exculpatory or material information but which it had agreed with the information providers not to disclose. Due to terms of confidentiality, information could not be shown to the court. The Trial Chamber held that the confidentiality agreement of the Rome Statute had been incorrectly used, using it 'routinely, in inappropriate circumstances, instead of resorting to it exceptionally'. *Prosecutor v Lubanga* (Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008), ICC-01/04-01/06-1401, 13 June 2008 at para 72, (<<http://www.icc-cpi.int/iccdocs/doc/doc511249.PDF>>, last accessed on 9 December 2011).

³⁶⁵ Rule 66(B) of the Special Court for Sierra Leone, Rules of Procedure and Evidence: 'Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to a Judge designated by the President sitting ex parte and in camera, but with notice to the Defence, to be relieved from the obligation to disclose pursuant to Sub-Rule (A). When making such an application the Prosecutor shall provide, only to such Judge, the information or materials that are sought to be kept confidential', (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

relating to disclosure, the trial court must order the prosecutor or the defence to disclose the relevant evidence.³⁶⁶

- Where State or Defence Counsel intentionally fails to comply with the court order to disclose, the court may impose a sanction for noncompliance with a court order.³⁶⁷
- Informal disclosure should be considered to avoid any unnecessary delays and to prevent the court's time from being wasted. State Counsel should consider asking Defence Counsel for information that he/she believes may be lacking instead of making a specific disclosure order.

Best Practices for Defence Counsel

- Informal disclosure should be considered to avoid any unnecessary delays and to prevent the court's time from being wasted. Defence Counsel should consider asking State Counsel for information that he/she believes may be lacking instead of making a specific disclosure order.
- It is recommended that due to limited resources, Defence Counsel when viewing material make a handwritten record of any material viewed.
- After any preliminary hearing and before the trial starts, State Counsel or Defence Counsel may file a preliminary motion for disclosure to make the other party meet its disclosure obligations if it has failed to do so, intentionally or otherwise.
- During the trial, where the trial court learns that State or Defence Counsel has failed to comply with the disclosure obligations or an order of the trial court relating to disclosure, the trial court must order State or Defence Counsel to disclose the relevant evidence.
- Where State or Defence Counsel intentionally fails to comply with the court order to disclose, the court may impose a sanction for noncompliance with a court order.
- If Defence Counsel is informed of a new witness the prosecution is calling, he/she may file a motion either before or during the trial to delay proceedings whilst he/she prepares the defence case accordingly.

³⁶⁶ Rule 77(A)(iii) of the SCSL Rules of Procedure & Evidence: 'The Special Court, in the exercise of its inherent power, may punish for contempt any person who knowingly and wilfully interferes with its administration of justice, including any person who: without just excuse fails to comply with an order to attend before or produce documents before a Chamber', (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁶⁷ Idem.

6.2. Defence's Obligation to Disclose Materials

Principle

Defence Counsel should disclose to the prosecution any alibi or special defences, and the list of the witnesses the defence intends to call at trial.

Defence Counsel is also subject to disclosure obligations. Defence disclosure is important because:

- a) it helps the management of the trial by identifying which issues are not agreed upon between the defence and the prosecution;
- b) it helps the prosecutor with finding any information which should be disclosed; and
- c) it provides lines of enquiry which will help in resolving the case.³⁶⁸

If the accused has an alibi³⁶⁹ for the offence with which he/she is charged, or would like to put forward to the court any grounds which aim to exclude his/her criminal responsibility (including special defences such as diminished or lack of mental responsibility),³⁷⁰ then Defence Counsel must tell State Counsel. Defence Counsel must inform State Counsel of these intentions within a reasonable period of time. A reasonable period of time means as early as is reasonably practicable for the defence and before the trial of the accused begins.³⁷¹ However, if the accused does not raise an alibi or any special defences before trial, this will not limit his/her right to raise it at trial.³⁷²

At the SCSL, the defence submits a document known as a defence case statement which contains:

- a) the nature of the accused's defence in general terms;
- b) any matters on which the accused does not agree with the prosecution; and
- c) the reasons why the accused does not agree with the prosecution.³⁷³

³⁶⁸ UK Crown Prosecution Services, 'Disclosure Manual For investigations started on or after 4 April 2005', 2011 at 15.5, (<http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/>, last accessed on 9 December 2011); UK Crown Prosecution Services, 'Attorney General's Guidelines on Disclosure', 2011 at 15,(<http://www.cps.gov.uk/legal/a_to_c/attorney_generals_guidelines_on_disclosure/>, last accessed on 9 December 2011).

³⁶⁹ An alibi is a defence which states that the accused was not at the scene of the crime but was elsewhere when it happened.

³⁷⁰ Rule 67A(ii)(a)&(b) of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁷¹ Rule 67 of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁷² Rule 67(B) of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁷³ Rule 67(C) of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

As there is currently no obligation on the defence to disclose material in Sierra Leone, this practice of defence case statements from the SCSL should be implemented. Defence case statements should include any details of an alibi or grounds excluding criminal responsibility in addition to any special defences.

Defence Counsel should also disclose to State Counsel a list of the name of witnesses being called for the defence's case within a reasonable period of time.³⁷⁴ This is consistent with an accused being able to examine witnesses as part of his/her right to the adequate time and facilities for the preparation of his/her defence.³⁷⁵

The following best practices detail the way in which stakeholders can ensure that the defence is consistent in its disclosure obligations.

Best Practices for Judges

- The Judge should carefully look at the defence case statements given in each case to make sure that correct procedure is followed. Therefore Judges should be aware that they can ask either State Counsel or Defence Counsel questions if the defence case statement does not meet the standards it should, and be prepared to hear either parties' reasons before making a decision on what next steps should be taken.

Best Practices for State Counsel

- If State Counsel believes that the defence case statement does not contain enough specific information, he/she should inform Defence Counsel or the Judge so that the situation can be resolved as soon as possible.³⁷⁶
- State Counsel should be proactive in identifying inadequate defence case statements to ensure that disclosure is applied equally between the parties.³⁷⁷
- State Counsel should keep in mind that if there is more than one accused in a case, the defence case statement of one accused may be disclosable to the co-accused.³⁷⁸
- If an alibi is disclosed by Defence Counsel, State Counsel should be aware that he/she can tell Defence Counsel of any witnesses the prosecution will be calling in rebuttal.³⁷⁹

³⁷⁴ There is no specific obligation on Defence Counsel at the SCSL to disclose a list of the name of defence witnesses to be called at trial. However, Rule 73ter of the Special Court for Sierra Leone, Rules of Procedure and Evidence provides for a pre-defence conference in which the Judge may order a list of defence witnesses to be provided, after the close of the prosecution but before the opening of the defence, (<<http://www.scs-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁷⁵ Amnesty International, 'Fair Trials Manual', 1998 at 130: 'The right of the accused to adequate time and facilities to prepare a defence include the right to prepare the examination of prosecution witnesses. There is therefore an implied obligation on the prosecution to give the defense adequate advance notification of the witnesses that the prosecution intends to call at trial', (<<http://www.amnesty.org/en/library/asset/POL30/002/1998/en/81bf7626-d9b1-11dd-af2b-b1f6023af0c5/pol300021998en.pdf>>, last accessed on 9 December 2011).

³⁷⁶ UK Crown Prosecution Services, 'Attorney General's Guidelines on Disclosure', 2011 at 18, (<http://www.cps.gov.uk/legal/a_to_c/attorney_generals_guidelines_on_disclosure/>, last accessed on 9 December 2011).

³⁷⁷ UK Crown Prosecution Services, 'Disclosure Manual For investigations started on or after 4 April 2005', 2011 at 15.11, (<http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/>, last accessed on 9 December 2011).

³⁷⁸ UK Crown Prosecution Services, 'Disclosure Manual For investigations started on or after 4 April 2005', 2011 at 15.29, (<http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/>, last accessed on 9 December 2011).

- If State Counsel is informed of a new witness the defence is calling, he/she may file a motion either before or during the trial to delay proceedings whilst he/she prepares the defence case accordingly.

Best Practices for Defence Counsel

- The details of the alibi must include:
 - a) the place the accused person claims to have been at the time the offence took place;
 - b) the names of witnesses who are supporting the alibi; and
 - c) any other evidence which supports the alibi.³⁸⁰
- The grounds for excluding criminal responsibility must include:
 - a) names of witnesses supporting these grounds;
 - b) names of any expert witnesses; and
 - c) any other evidence which supports these grounds.³⁸¹
- When Defence Counsel gives the details of the alibi or the grounds for excluding criminal responsibility, this statement should include to the best of the accused's knowledge:
 - a) as many details as possible of the witnesses;
 - b) any information which may help with finding the witnesses.
- Defence Counsel should keep in mind that if there is more than one accused in a case, the defence case statement of one accused may be disclosable to the co-accused.³⁸²
- If an alibi is disclosed by Defence Counsel, State Counsel should be aware that he/she can tell Defence Counsel of any witnesses the prosecution will be calling in rebuttal.³⁸³

³⁷⁹ Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011).

³⁸⁰ Rule 67(A)(ii)(a) of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011); UK Crown Prosecution Services, 'Disclosure Manual For investigations started on or after 4 April 2005', 2011 at 15.7, (<http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/>, last accessed on 9 December 2011).

³⁸¹ UK Crown Prosecution Services, 'Disclosure Manual For investigations started on or after 4 April 2005', 2011 at 15.6, (<http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/>, last accessed on 9 December 2011). Other evidence would include:

- a) Where the defence case is different from the facts of the prosecution case and the reasons for the difference in facts;
- b) Any points on the admissibility of evidence;
- c) Whether the defence believes there has been an abuse of process; and
- d) Any special defences the accused wishes to rely upon.

³⁸² UK Crown Prosecution Services, 'Disclosure Manual For investigations started on or after 4 April 2005', 2011 at 15.29, (<http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/>, last accessed on 9 December 2011).

³⁸³ Rule 67(A)(i) of the Special Court for Sierra Leone, Rules of Procedure and Evidence

- Defence Counsel must tell State Counsel as soon as possible if Defence Counsel decides to call a witness later:
 - a) which he/she was not aware of when he/she originally handed the list to Defence Counsel; or
 - b) he/she did not think he/she would be calling that particular witness when he/she handed over the list.
- If Defence Counsel informs State Counsel of a new witness he/she is calling, he/she may file a motion either before or during the trial to delay proceedings whilst he/she prepares the defence case accordingly.

7. BEST PRACTICES FOR CASE MANAGEMENT

Finally, the Best Practice Guide will examine delays in the Sierra Leonean criminal justice system and will suggest best practices to enhance the efficacy of criminal proceedings.

Overview

The Needs Assessment Report highlighted the fact that delays are common within the Sierra Leonean criminal justice system. These delays are caused predominantly by infrastructural obstacles including budgetary constraints, limited personnel, inadequate facilities and transportation problems, which in turn impede upon the swift administration of criminal justice.

In its final report, the TRC referred to the delays in the Sierra Leonean criminal justice system:³⁸⁴

'Delays in the delivery of both criminal and civil justice threaten to cripple the administration of justice in Sierra Leone. The use of judicial time must be maximised. Those factors that create the idle use of time should be eliminated. The creation of an efficient case flow management system, the proper scheduling of cases and an increase in judicial sitting hours will enable the judiciary to work at greater capacity'

For example, in 2007, when the last comprehensive data was released, the Supreme Court had a total of 18 active cases: three were completed by the conclusion of the year, six were pending and nine were brought forward to the Court. Although no information exists to determine the annual clearance rate or target for the Supreme Court, using the 2007 data it appears that the Supreme Court has capacity for three cases per year, while it receives approximately nine cases, meaning an annual accrual of six. This means each case will be delayed by between one and two years from committal to the beginning of proceedings. At the lower levels, the backlog is more severe: as of 2007, the High Court's caseload stood at 75, whereas the Magistrates Court had a national backlog in excess of 4,000.³⁸⁵

As a result of the delays, cases are lengthy and protracted. More specifically, a review conducted recently by the UK Crown Prosecution Service with the Justice Sector Development Programme of more than 650 Sierra Leonean cases ascertained that a case takes an estimated 2.8 years to move from initial registration in the Magistrates' to its end in the High Court and committal from the Magistrates to the High Court took around 574 days.³⁸⁶

This Section of the Best Practice Guide does not seek to make recommendations to the way in which the Sierra Leonean government can reduce delays in the criminal justice system based on financial allocations. Instead, it aims to introduce practical best practices which can be implemented at the national level on a day-to-day basis to reduce delays.

³⁸⁴ Truth and Reconciliation Commission, Final Report, Volume 2, 2004 at 148, para 183, (<<http://www.sierra-leone.org/TRCDocuments.html>>, last accessed on 9 December 2011).

³⁸⁵ University of Nottingham Human Rights Law Centre, 'Assessment of Needs and Gaps in the Sierra Leonean Criminal Justice System' at Section 5.1.

³⁸⁶ Idem at Section 7.1.

The most effective way in which this can be achieved is through an effective case flow management system as per the TRC report. It is equally important that Judges themselves actively approach case management to ensure that criminal cases proceed in a fair and timely manner.³⁸⁷ This is also consistent with the approach adopted by the TRC:³⁸⁸

'In the adversarial system, judges have played a passive role in the control of proceedings, unless moved at the instance of one of the parties. There is a growing awareness that, if cases are to move faster, courts must become more involved in the speeding up of the process. They should monitor case development, require parties to report progress and set down time scales'.

In addition to Judges monitoring the development of cases and parties' progress in court throughout a criminal trial, it is essential that all stakeholders are open to the concept of case management conferences to minimise delays.

Furthermore, at the SCSL, case management has been followed in status conferences to:³⁸⁹

- i. *'organize exchanges between the parties so as to ensure expeditious trial proceedings;*
- ii. *review the status of his case and to allow the accused the opportunity to raise issues in relation thereto'*

Active case management as undertaken at the SCSL, should therefore be encouraged in Sierra Leone as it is pivotal to reducing delays in the criminal justice system.

Principle

All stakeholders must be committed to working as efficiently as possible to minimise delays during a criminal trial and to ensure that all criminal cases are dealt with justly.

This is consistent with the rights of the accused being adhered to in order that he/she has a fair trial. The following are best practices which should be followed to minimise delays during criminal cases in Sierra Leone.

³⁸⁷ Judges 'should have a pro-active role in case management in order to guarantee fair and timeliness case processing, accordingly to timeframes.' European Commission for the Efficiency of Justice, 'Compendium of "best practices" on time management of judicial proceedings', 2006 at 4.4, (<http://euromed-justice.eu/files/repository/20090706165605_Coe.CompendiumofBstpracticesontimemanagementofjudicialproceeding.doc.pdf>, last accessed on 9 December 2011).

³⁸⁸ Truth and Reconciliation Commission, Final Report, Volume 2, 2004 at 148, para 185, (<<http://www.sierra-leone.org/TRCDocuments.html>>, last accessed on 9 December 2011).

³⁸⁹ Rule 65bis of the Special Court for Sierra Leone, Rules of Procedure and Evidence (<<http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176>>, last accessed on 9 December 2011). Furthermore, a pre-trial conference with the prosecution can be called at the SCSL before a trial begins and a pre-defence conference can be organised with the defence before the defence opens under Rules 73bis&ter of the Special Court for Sierra Leone, Rules of Procedure and Evidence.

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Best Practices for Judges

- The Judge should set a timetable for the case as soon as possible.³⁹⁰
- The Judge should organise case management conferences before and during trials as necessary to monitor the progress of the case and the parties.
- The Judge should discourage delay, dealing with as many aspects of the case as possible on the same occasion and to avoid any unnecessary hearings.³⁹¹
- The Judge should encourage both parties to co-operate in the progression of the case.³⁹² This includes the encouragement of both parties to follow their disclosure obligations efficiently and in conjunction with the court timetable as much as possible.
- At an accused's first hearing, the Judge should ask him/her if he/she pleads guilty. If he/she pleads guilty, the Judge should proceed to sentencing immediately or at the least on the same day.³⁹³
- At an accused's first hearing, if he/she pleads not guilty, the Judge should:
 - a) immediately set a date for the trial,³⁹⁴
 - b) give the accused the details of the date and location for the trial;³⁹⁵
 - c) give details of a timetable for the case, taking into consideration an estimate of how long each witness will take to give his/her evidence.³⁹⁶
- If the Judge has to decide on any motion put forward by either State or Defence Counsel, he/she should not take longer than is absolutely necessary to render a decision.³⁹⁷

³⁹⁰ Part 3 of the Criminal Procedure Rules, 2011 (UK) (<<http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/criminal/rulesmenu.htm>>, last accessed on 9 December 2011).

³⁹¹ Idem.

³⁹² Idem.

³⁹³ Senior Presiding Judge for England and Wales, 'Essential Case Management: Applying the Criminal Procedure Rules', 2009, (<<http://www.judiciary.gov.uk/Resources/JCO/Documents/Protocols/applying-crim-procedure-rules-dec-2009.pdf>>, last accessed on 9 December 2011); Justice Sector Development Programme, 'Criminal Case Management: Best Practice Handbook', 2006 at 20, (<http://www.britishcouncil.org/criminal_case_management_handbook.pdf>, last accessed on 9 December 2011).

³⁹⁴ 'The Court should ensure that its time is managed as best as possible by ensuring the following: The Court should immediately fix a trial date'. Justice Sector Development Programme, 'Criminal Case Management: Best Practice Handbook', 2006 at 20, (<http://www.britishcouncil.org/criminal_case_management_handbook.pdf>, last accessed on 9 December 2011).

³⁹⁵ 'The Court should ensure that its time is managed as best as possible by ensuring the following: The Court should ensure the date, place and time of the next hearing is given to the Accused on a reminder card'. Idem at 20.

³⁹⁶ 'The court's directions must include a timetable for the progress of the case (which can include a timetable for the trial itself). The time estimate for the trial should be made by considering, individually, how long each 'live' witness will take having regard to the relevant disputed issue(s)'. Senior Presiding Judge for England and Wales, 'Essential Case Management: Applying the Criminal Procedure Rules', 2009, (<<http://www.judiciary.gov.uk/Resources/JCO/Documents/Protocols/applying-crim-procedure-rules-dec-2009.pdf>>, last accessed on 9 December 2011);

'The Court must ensure that time estimates are set for each case after representations by the Prosecution and Defence', Justice Sector Development Programme, 'Criminal Case Management: Best Practice Handbook', 2006 at 20, (<http://www.britishcouncil.org/criminal_case_management_handbook.pdf>, last accessed on 9 December 2011).

- When the Judge is granting adjournments, he/she should ensure that a date for the next court hearing has been established.³⁹⁸ Adjournments must be balanced with the need to ensure that the accused has a fair trial. If there are many adjournments in a case, it can encourage lawyers who are not prepared for their cases to repeatedly ask for new adjournments.³⁹⁹
- The Judge should encourage both parties to co-operate in the progression of the case.⁴⁰⁰
- The Judge should ensure that the accused person and witnesses are informed of the courtroom procedure.⁴⁰¹
- The Judge should keep any trial breaks to a minimum period of time.

Best Practices for State Counsel

- Before a case comes to court, State Counsel should be fully prepared and know:
 - a) the facts of the case;
 - b) the issues involved in the case; and
 - c) the history of the case.
- State Counsel should co-operate with the court and the other side in the progression of the case.⁴⁰² This includes following disclosure obligations closely.
- State Counsel should communicate effectively and in a timely manner with Defence Counsel and the court.⁴⁰³
- State Counsel should inform the court promptly if the date or the duration of the trial may be affected.⁴⁰⁴

³⁹⁷ 'During the trial phase, numerous written motions have been decided in an efficient manner. However, the pace of rendering decisions has reportedly slowed in recent months, and significant delays have been found to exist in certain instances. Some delays by the trial and appeals chambers in issuing decisions are unavoidable. However, extended lags can raise concern, especially where they implicate fair trial issues'. Human Rights Watch, 'Justice in Motion. The Trial Phase of the Special Court for Sierra Leone', 2005 at 10, (<<http://www.hrw.org/reports/2005/11/01/justice-motion-0>>, last accessed on 9 December 2011).

³⁹⁸ 'Adjournments have to be allowed only if clearly justified, and if a date for the next event has been established'. European Commission for the Efficiency of Justice, 'Compendium of "best practices" on time management of judicial proceedings', 2006 at 4.5, (<http://euromed-justice.eu/files/repository/20090706165605_Coe.CompendiumofBstpracticesontimemanagementofjudicialproceeding.doc.pdf>, last accessed on 9 December 2011).

³⁹⁹ 'If a court allows many adjournments, it encourages lawyers, not prepared for their cases, to ask for a new adjournment. In this way the judge's hearing time will be underused'. Idem at 4.5.

⁴⁰⁰ Part 3 of the Criminal Procedure Rules, 2011 (UK) (<<http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/criminal/rulesmenu.htm>>, last accessed on 9 December 2011).

⁴⁰¹ European Commission for the Efficiency of Justice, 'Compendium of "best practices" on time management of judicial proceedings', 2006 at 2.1, (<http://euromed-justice.eu/files/repository/20090706165605_Coe.CompendiumofBstpracticesontimemanagementofjudicialproceeding.doc.pdf>, last accessed on 9 December 2011).

⁴⁰² Part 3 of the Criminal Procedure Rules, 2011 (UK) (<<http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/criminal/rulesmenu.htm>>, last accessed on 9 December 2011).

⁴⁰³ Idem.

- State Counsel should check that he/she has enough copies of documents that he/she will need to provide to the defence, any witnesses and the Judges.⁴⁰⁵
- State Counsel should check with the prosecution witnesses that they are aware of the trial date and location and that they can attend.
- State Counsel should ensure that evidence is presented in the shortest and clearest way.

Best Practices for Defence Counsel

- Before a case comes to court, Defence Counsel should be fully prepared and know:
 - a) the facts of the case;
 - b) the issues involved in the case; and
 - c) the history of the case.
- Defence Counsel should co-operate with the court and the other side in the progression of the case.⁴⁰⁶ This includes following disclosure obligations closely.
- Once the date for a hearing or trial has been set, Defence Counsel should inform the accused of the date and the courthouse.⁴⁰⁷
- Defence Counsel should communicate effectively and in a timely manner with State Counsel and the court.
- Defence Counsel should check that he/she has enough copies of documents that he/she will need to provide to State Counsel, any witnesses and the Judges.
- Defence Counsel should check with the witnesses that they are aware of the trial date and location and that they can attend.
- Defence Counsel should ask the court for an interpreter as soon as possible if necessary so that the court has time before the trial to locate one.
- Defence Counsel should ensure that evidence is presented in the shortest and clearest way.

⁴⁰⁴ E.g. an application for adjournment. 'The prosecutor should promptly inform the court and other parties promptly of anything that may:- (a) affect the date or duration of the trial, including, in particular, any proposed application for an adjournment; (b) significantly affect the progress of the case in any other way'. Senior Presiding Judge for England and Wales, 'Essential Case Management: Applying the Criminal Procedure Rules', 2009, (<<http://www.judiciary.gov.uk/Resources/JCO/Documents/Protocols/applying-crim-procedure-rules-dec-2009.pdf>>, last accessed on 9 December 2011).

⁴⁰⁵ 'In addition, the prosecutor must have sufficient copies of documents e.g. maps or photographs for the defence, witnesses and the court'. Idem.

⁴⁰⁶ Part 3 of the Criminal Procedure Rules, 2011 (UK) (<<http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/criminal/rulesmenu.htm>>, last accessed on 9 December 2011).

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