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978-1-107-02914-9 - The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law

Edited by Charles Chernor Jalloh

Excerpt

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Introduction

Assessing the Legacy of the Special Court for Sierra Leone

Charles Chernor Jalloh

I. THE CONTEXT

Since the end of the Cold War, various types of ad hoc criminal tribunals have been established in different parts of the world with varying degrees of success. Although the UN Security Council–created International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) were the modern pioneers, and are therefore better known, the Special Court for Sierra Leone (SCSL) followed not long afterward and quickly began to carve out its own place in the edifice of modern international criminal law.

The SCSL, which was created through a bilateral treaty between the United Nations and the government of Sierra Leone in January 2002, was designed to address the perceived shortcomings of the ICTY and ICTR, in particular, their apparently costly nature; the slow pace of their proceedings; their geographic and emotional distance from the local populations in whose names they were asked to render justice; and their seemingly unfocused prosecutions that sometimes included lower-ranking suspects that some deemed more appropriate for trial within national courts rather than before an international penal tribunal.¹ The coercive Chapter VII legal basis of the twin UN tribunals and the consensual² treaty-based character of the SCSL therefore differ markedly, reflecting the particular historical and political circumstances of their establishment.

Today, as the ICTY, ICTR, and the SCSL approach the completion of their respective mandates, academics are increasingly turning toward efforts aimed at evaluating the potential impact, and limitations, of these ad hoc courts, using doctrinal, semi-empirical and empirical approaches in an attempt to discern their legacy. Of course, the idea that academic lawyers would be interested in conducting normative and doctrinal assessments of the legacy of the international criminal courts that states have created to prosecute crimes in specific situations is not new. Indeed, the notion of legacy has some historical pedigree

¹ See Independent Expert, *Report on the Special Court for Sierra Leone* ¶ 29 (Dec. 12, 2006) (Antonio Cassese).

² Admittedly, one should not stretch the consent argument. It seems obvious that even UN member states would have consented to be bound by UN Security Council decisions addressing threats to international peace and security by fiat of their prior consent to the Charter of the United Nations. So, the decisions of the Council to create the twin ad hoc tribunals (which became binding because of their Chapter VII nature and Article 25 of the UN Charter) are to some extent a reflection of indirect consent. For this argument in relation to the distinctive legal basis of the SCSL vis-à-vis the ICTY and ICTR, see Charles C. Jalloh, *The Contribution of the Special Court for Sierra Leone to the Development of International Law*, 15 AFR. J. INT'L. & COMP. L. 165, 207, 187 (2007).

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dating at least as far back as the conclusion of the first international trials at the Nuremberg International Military Tribunal (IMT) in 1946.

Although it does not appear that the term “legacy” was in vogue then as much as it is now, no less than Justice Robert Jackson, the chief American prosecutor at Nuremberg, argued only months after the delivery of the final judgment that the success of the IMT could be assessed against whether it had achieved what it set out to do.³ Even though he conceded that it would otherwise be premature to reflect upon the long-range impact of that tribunal, just months after the completion of the judicial process, Justice Jackson could readily identify at least six legal accomplishments attributable to the trials of the Nazi leadership.⁴ To him, although the Allies’ conclusion of the London Agreement, which established the IMT and the historic trial that was subsequently carried out would not imply the end of aggressive war or the persecution of minorities or the commission of international crimes, what we would in today’s parlance call the Nuremberg Legacy had established new standards of conduct for humanity. He expected that those standards would in the future serve as bulwarks of peace and tolerance by holding individuals accountable for international crimes at the international level. In his characteristic eloquence, he then concluded that this had thus put “International Law squarely on the side of peace as against aggressive warfare, and on the side of humanity as against persecution.”⁵

Even though often mentioned in contemporary international criminal law discourse, but not always defined, the term “legacy” as used here should be understood as a narrow and specific reference to the body of legal rules, innovative practices, and norms that the tribunal is expected to hand down to current and future generations of international, internationalized and national courts charged with the responsibility to prosecute the same or similar international crimes. This definition, although perhaps imperfect, is to be distinguished from the arguably overbroad conception of legacy offered by the United Nations in relation to hybrid courts as their “lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity.”⁶ My use of the term here does not contemplate the physical infrastructure such as the Court buildings that will be left behind in Freetown or the documents and archives and records of the Tribunal, matters that are more appropriately considered in discussions of the residual mechanism.

It follows that the sense in which I invoke the “L” word is more modest. It is closer to, but distinct from, the definition offered by Richard Steinberg in his equivalent work on the ICTY.⁷

³ ROBERT H. JACKSON, *THE NUENBERG CASE*, at xiv (1947).

⁴ See Jackson, *supra* note 3, at xiv to xvii. In addition, on December 11, 1946, just months after the completion of the Nuremberg Trials, the UN General Assembly unanimously adopted Resolution 1(95) in which it affirmed the strength of the “principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal.” At the General Assembly’s request, about four years later, the International Law Commission formulated the principles of international law recognized at Nuremberg, which were formally endorsed on December 12, 1950.

⁵ *Id.* at xvii.

⁶ Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-conflict States. Maximizing the Legacy of Hybrid Courts* (2008), available at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf> (last visited November 2012), at 4–5.

⁷ *ASSESSING THE LEGACY OF THE ICTY 5–6* (Richard H. Steinberg ed., 2011) (defining “legacy” as including the findings of that tribunal, its legal legacy, records, institutional, regional, and normative legacy).

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Legacy thus describes the *corpus juris* of rules, doctrines, and innovative tribunal precedents and institutional practices that the Court may be said to have developed and contributed to the advancement of the emerging body of substantive international criminal law and procedure. This focus seems particularly significant because, as is widely known, after the watershed post-World War II prosecutions at Nuremberg and Tokyo, international criminal law⁸ essentially languished in desuetude for several decades until it was at last resuscitated by the United Nations through the creation of the ad hoc Chapter VII tribunals in the early 1990s.

Be that as it may, today, with all but one of its nine trials complete (that involving the former Liberian president Charles Taylor, which is expected to conclude by December 2013), the SCSL will be the first of the modern ad hoc international criminal tribunals⁹ to complete all of its cases through to appeals and to symbolically close down its doors even as it transforms into a residual mechanism.¹⁰ Perhaps not surprisingly given that they were the first truly international criminal courts to be established, various scholarly efforts have already been undertaken to assess the legacy and impact of the ICTY,¹¹ and to a lesser extent, the ICTR.¹² Most of the attempts to evaluate the legacy of the twin

⁸ “International criminal law” has had a plethora of inconsistent definitions over the years. Here, I endorse the definition by a group of scholars who referred to it as “encompassing not only the law governing genocide, crimes against humanity, war crimes and aggression, but also the principles and procedures governing the international investigation and prosecution of these crimes”; see ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURT, *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 5 (2d ed. 2010).

⁹ The ICTR, which was established by the UN Security Council in 1994, recently symbolically completed its last of seventy-five substantive cases that were prosecuted all the way to trial judgment. On December 20, 2012, the ICTR Trial Chamber issued its judgment in which it unanimously found the former Rwandese Minister of Planning Augustine Ndirabatware guilty of genocide, and direct and public incitement to genocide and rape as a crime against humanity. He was sentenced to thirty-five years’ imprisonment. See the *Statement of the Chief Prosecutor of the Tribunal, Justice Hassan B. Jallow* (reflecting on the significance of that moment for the ICTR after eighteen years of work and succinctly summarizing that tribunal’s key case accomplishments) at <http://www.unicttr.org/tabid/155/Default.aspx?id=1336> (last visited December 22, 2012). The Security Council, by Resolution 1966 adopted on December 22, 2010, established the International Residual Mechanism for Criminal Tribunals to continue certain essential functions. The Arusha-based court’s component was operationalized on July 1, 2012, whereas the ICTY’s is currently scheduled for activation on July 1, 2013.

¹⁰ On the other hand, although the agreement for the establishment of the Residual Special Court for Sierra Leone (RSCSL) was signed by the United Nations and the Sierra Leone government in August 2010, and ratified by Sierra Leone’s Parliament in December 2011, the RSCSL will not become operational until issuance of a final judgment in the Charles Taylor appeal. That is expected to take place by December 2013. Even though the SCSL issued its own last trial judgment in that case on April 26, 2012, followed by the sentencing judgment on May 30, 2012, because the case is now on appeal the Court arguably is not the first to technically complete its work. Yet, because it seems that the Ndirabatware case will go on appeal albeit before the Residual Mechanism in Arusha, a strong argument can be made that the SCSL was in fact the first from among those three UN ad hoc courts to complete its work.

¹¹ For some leading works on the subject, see DIANE F. ORENTLICHER, *SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA* (OSJI, May 2008), *THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (Bert Swart, Alexander Zahar & Göran Sluiter eds., 2011), *ASSESSING THE LEGACY OF THE ICTY* (Richard H. Steinberg ed., 2011).

¹² Although there have been several notable academic works on the legal contributions of the Rwanda tribunal to the development of international criminal law, there is to date no comprehensive book on its “legacy” as such. For examples of works comprehensively addressing the core legal issues during the process, see WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* (2006); LARISSA VAN DEN HERIK, *THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO*

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UN tribunals have focused on their pioneering additions to the Nuremberg Legacy and the normative advancement of the concept of individual criminal responsibility at the international level as well as on the elaboration of the substantive content of the various international crimes within their jurisdiction, in particular, genocide, crimes against humanity, and war crimes.

In stark contrast, since the SCSL was established in January 2002, fewer scholarly works have systematically studied that tribunal and its role in post-conflict Sierra Leone or its legacy to international criminal law and practice. Although there now appears to be an exponential growth in literature on the Court, until recently the bulk of the commentary focused on its apparent hybridity compared to the ICTY and ICTR and its possibilities of serving as a leaner and cheaper institutional model for bringing justice to diverse post-conflict situations. Even fewer studies have examined the law and *practice* of the SCSL between the time its first indictments were issued in March 2003 and the near completion of all its trials in 2012 to determine whether it has made, or failed to make, meaningful additions to the broader international criminal justice project.

Yet, because of the near unique fact pattern of the Sierra Leone conflict, the SCSL was often confronted with a range of novel legal issues in the course of its proceedings. This allowed it to develop some interesting jurisprudence on issues of wider significance to international criminal law and practice. The Court was therefore among the first to grapple with some of the more important and recurring legal dilemmas for many modern post-conflict situations. For example, among others, the SCSL was the first international criminal court to try and convict persons for the recruitment and enlistment of children for the purposes of using them in hostilities. It was also the first international tribunal to prosecute the war crime of attacks against UN peacekeepers, the first to recognize the new crime against humanity of forced marriage as an “other inhumane act,” and perhaps more notably, the first to indict, fully try, and then convict a former African president for planning and aiding and abetting the commission of international crimes in a neighboring state.

Finally, because of the SCSL's landmark jurisprudential precedents, future legal efforts to hold perpetrators to account may now benefit from greater clarity on, among others, questions such as whether sitting heads of third states in such a tribunal are immune from prosecution for serious international crimes before a bilateral treaty-based international court¹³; whether amnesties granted under domestic law barred the prosecution of universally condemned international crimes before an ad hoc international criminal court¹⁴; whether alternative accountability mechanisms such as special tribunals and truth commissions can

THE DEVELOPMENT OF INTERNATIONAL LAW (2005), and GEORGE MUGWANYA, THE CRIME OF GENOCIDE IN INTERNATIONAL LAW: APPRAISING THE CONTRIBUTION OF THE UN TRIBUNAL FOR RWANDA (2007). Key articles from those involved in the ICTR's work include Erik Møse, *Main Achievements of the ICTR*, 3 J. INT'L CRIM. J. 920–43 (2005) and Hassan B. Jalloh, *The Contribution of the United Nations International Criminal Tribunal for Rwanda to the Development of International Criminal Law*, in AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION, AND RECONCILIATION IN RWANDA AND BEYOND (Philip Clark & Zachary Kaufmann eds., 2009). There are various other studies in the transitional justice literature examining the impact of the ICTY/ICTR on reconciliation. See, e.g., MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY (Harvey M. Weinstein & Eric Stover eds., 2004).

¹³ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 59 (May 31, 2004).

¹⁴ Prosecutor v. Allieu Kondewa, Case No. SCSL-2004-14-AR72(E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord 128 (May 25, 2004).

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coexist and complement each other where used simultaneously¹⁵; and whether individual criminal responsibility accrued to recruiters of child soldiers at customary international law by November 30, 1996.¹⁶

This edited book considers the SCSL's legacy on all these issues as well as many others. It aims to help fill a part of the current gap in the emerging literature on the legacy of ad hoc international criminal courts by offering the first comprehensive doctrinal assessment of the legacy of the Sierra Leone Court. The focus is to analyze the “legal legacy” of the Tribunal, in particular, its judicial opinions, practices, and decisions as well as their possible contributions to the wider corpus of norms for substantive international criminal law and procedure.

To contextualize the Court and the subsequent chapters in this volume, the next part of this Introduction will provide a brief historical overview of the circumstances in Sierra Leone that led to the creation of the SCSL. In the second part, I will discuss key attributes of the SCSL's jurisdiction. As the Court completed only a handful of trials when compared to the twin UN tribunals, partly because of a lack of political will to bankroll another expensive international tribunal and its consequently limited mandate to prosecute only those bearing “greatest responsibility,” the third part of the chapter will offer a short summary of its nine cases and their final verdicts and sentences. Finally, in the fourth part, I will describe the contents and organization of the volume before offering concluding remarks. A separate Conclusion at the end of the book highlights the main preliminary lessons from the SCSL experience for the field of international criminal law.

II. A BRIEF OVERVIEW OF THE SIERRA LEONEAN CONFLICT

The Sierra Leone conflict, which started on March 21, 1991 and ended on January 18, 2002, gained notoriety around the world for its brutality and the perpetration of some of the worst atrocities against civilians ever witnessed in a modern conflict.¹⁷ The war, which is estimated to have resulted in the deaths of seventy thousand¹⁸ people, the displacement of about 2.6 of the country's population of 5 million, and the maiming of thousands of others, was characterized by widespread killings, mass amputations, abductions of women and children, recruitment and use of children as combatants, rape, sexual violence against mostly women and underage girls (including their taking as “bush wives”), arson, pillage, looting, burning, and wanton destruction of villages and towns.

¹⁵ Prosecutor v. Samuel Hinga Norman, Case No. SCSL-2003-08-PT, Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Sam Hinga Norman 101 (Oct. 29, 2003). See also Prosecutor v. Samuel Hinga Norman, Case No. SCSL-2003-08-PT, Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman JP against the Decision of His Lordship, Mr. Justice Bankole Thompson Delivered on the October 30, 2003 to Deny the TRC's Request to Hold a Public Hearing with Chief Samuel Hinga Norman JP, November 28, 2003, at 122.

¹⁶ Prosecutor v. Samuel Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion on Lack of Jurisdiction (Child Recruitment) 132 (May 31, 2004).

¹⁷ Several books offer useful accounts on the history of the Sierra Leone conflict. See, e.g., LANSANA GBERIE, *A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE* (2006), DAVID KEEN, *CONFLICT AND COLLUSION IN SIERRA LEONE* (2006), and PETER PENFOLD, *ATROCITIES, DIAMONDS AND DIPLOMACY* (2012). An official history, comprising several volumes, was produced by the Sierra Leone Truth and Reconciliation Commission in 2004. Most of the material in this introduction is drawn from the authoritative TRC Reports.

¹⁸ MARY KALDOR & JAMES VINCENT, UNITED NATIONS DEVELOPMENT PROGRAMME EVALUATION OFFICE CASE STUDY SIERRA LEONE 7 (2006). I have used this number, drawn from this UN Report, in the apparent absence of official statistics on the numbers of people killed during the war.

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It was not always so. Indeed, the tragedy of the Sierra Leonean conflict and that country's relatively recent association with signature atrocities, "blood diamonds" and the prosecutions of international crimes through the SCSL, which is the subject of this book, is that it was previously considered a haven of political stability and a renowned center of higher learning in Africa. Sierra Leone, which along with Gambia, Ghana, and Nigeria were the four English colonies in West Africa, secured political independence from Britain on April 27, 1961. Self-government was followed by what seemed to be an auspicious start for democracy with the first peaceful transfer of power to an elected opposition party in an independent African State in 1967.¹⁹ However, the British political legacy, if indeed there was one, proved to have little longevity as the country quickly degenerated down the path of instability with a spate of military coups and countercoups.²⁰ Ultimately, the civilian All People's Congress (APC) party formed a stable government around 1970.

Unfortunately, the APC government, under the stewardship of then-president Siaka P. Stevens, stifled democracy by transforming itself into a despotic one-party regime and sustaining its stranglehold on the country through massive corruption, nepotism, plunder of public assets, and exacerbation of ethnic, regional, and rural–urban cleavages.²¹ In the decade between 1980 and early 1990, bad governance, economic decay, intolerance for dissent, and the shrinking of the democratic space, among other factors, had created sufficient malaise for the outbreak of conflict in the country.²²

In March 1991, a group of about forty to sixty armed men entered Bomaru Village in Kailahun District, eastern Sierra Leone near the Liberian border. The attack, in which thirteen people, only two of whom were combatants perished, turned out to be one of the first salvos of the murderous Revolutionary United Front (RUF) rebels. They were apparently led by one Foday Sankoh, a disgruntled former soldier in the Sierra Leone Army (SLA), whose apparent goal was to overthrow the then-government under President Joseph Saidu Momoh.

In a few weeks, the rebels, with human, material, logistical, and other support from Charles Taylor of the National Patriotic Front of Liberia (NPFL),²³ increased the intensity and frequency of their attacks. The ill-equipped and corrupt SLA, which had more experience putting down peaceful pro-democracy student demonstrations than fighting a war, proved unable to contain the unrelenting guerrilla attacks. In a few months, most of Kailahun District in the east and Pujehun District in the south, both not far from the Liberian border, had fallen under rebel control. Given the SLA's inability to combat the war, and the lack of leadership among the Freetown government elite, it was only a matter of time before the war would spread to other parts of the country – with devastating consequences for the local population.

¹⁹ JOHN R. CARTWRIGHT, *POLITICS IN SIERRA LEONE: 1947–1967*, at 4 (1970).

²⁰ Sierra Leone Truth and Reconciliation Commission, Report of the Commission "Executive Summary," Vol. 2, Ch. 1, available at <http://www.sierraleonecsrc.org> (last visited Dec. 22, 2012).

²¹ *Id.*

²² *Id.*

²³ Taylor started a guerrilla war in Liberia in 1989 similar to that led by Sankoh in Sierra Leone. He served as Liberia's president from 1997 to 2003. On the need for accountability for the wartime atrocities in that country, see Chernor Jalloh & Alhagi Marong, *Ending Impunity: The Case for War Crimes Trials in Liberia*, 2 *AFR. J. LEGAL STUD.* 53 (2005) (arguing for the expansion of the SCSL's jurisdiction to try those bearing greatest responsibility for serious international crimes committed during the Liberian conflict).

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President Momoh lacked a coherent strategy to deal with the nation's security even as his largely undisciplined and inexperienced army continued to suffer terrible losses from the ragtag RUF. The rebels, as they experienced initial military setbacks, resorted more to guerilla-style hit-and-run tactics, and engaged in barbaric acts aimed at instilling fear in their enemy as well as the local civilian population. Their strategy of terrorizing and then abducting civilians, drugging and enlisting children to fight, burning and looting villages, and raping young girls and women, developed in the early days of the war, were to later become the tragic images associated with the Sierra Leone conflict by those in other parts of the world.

With the army having lost confidence in their commander-in-chief, Momoh was ousted from power in April 1992 by a group of mutinying soldiers led by a twenty-seven-year-old Captain Valentine Strasser, an army paymaster with no political experience. They took over the reins of state in a coup and formed a junta regime styling itself the National Provisional Ruling Council (NPRC). Although very popular at the beginning, especially among the urban youth and students, the NPRC suspended the national constitution, and thereafter, ruled the country by decree. But the inexperienced Strasser, as well as his former deputy (Julius M. Bio)²⁴ who later overthrew him in a palace coup in January 1996, failed to decisively end the conflict. Partly because of deep mistrust of the army, who locals aptly labeled "sobels" (a coinage from the words *soldier* and *rebels* used to describe the phenomena of soldiers by day and rebels by night), the government turned to hiring mercenaries, first from Nepal and afterward South Africa, to help fight the war in return for generous diamond concessions. The presence of foreign fighters initially offered some respite to the government forces. However, it proved to be only a Band-Aid instead of a permanent solution, temporarily enabling the regime to continue its sovereign control of the mineral-rich mining areas in the east and south of the country.

Under pressure mostly from war-weary Sierra Leoneans clamoring to participate in their country's governance through the ballot box, the junta eventually restored constitutional rule. Long-anticipated democratic elections were finally conducted in 1996. The Sierra Leone People's Party (SLPP) candidate Ahmad Tejan Kabbah, a former UN bureaucrat who had returned home to enter the contest, won the elections. President Kabbah immediately entered into negotiations with the RUF and concluded a peace accord in Ivory Coast in 1996 aimed at ending the conflict. The Abidjan Accord²⁵ contained, among others, provisions calling for termination of the hostilities, removal of the Executive Outcomes foreign mercenaries from the country within three to six months, and an amnesty under which no judicial action would be taken against the RUF for the crimes perpetrated by them up to the date of signature of the agreement.²⁶

Nevertheless, as there did not appear to be good faith on the rebel side to transform itself into a political movement with the rights, privileges, and duties recognized under Sierra

²⁴ Interestingly, in the most recent presidential contest in Sierra Leone on November 17, 2012, Bio, who had long resigned from the army, was the lead opposition Sierra Leone People's Party candidate. He ran against incumbent president Ernest Bai Koroma. Koroma won a second term with 58.7 percent while Bio secured up to 37.4 percent of the vote. See *National Electoral Commission, Statement from the NEC Chairperson on the Conduct and Result of the Presidential Elections*, (Dec. 4, 2012), available at <http://www.nec-sierraleone.org/>.

²⁵ See *Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone signed at Abidjan, Ivory Coast* (Nov. 30, 1996), available at http://www.usip.org/files/file/resources/collections/peace_agreements/sierra_leone_11301996.pdf

²⁶ See *id.* at Articles 1, 2, 12, 14.

Leonean law, the Abidjan Accord failed; hostilities resumed; and yet another military coup took place on May 25, 1997, this time by a group known as the Armed Forces Revolutionary Council (AFRC). President Kabbah fled to neighboring Guinea where he essentially set up a government-in-exile in Conakry. The AFRC coupists, who released Major Johnny Paul Koroma who was in jail at the time, installed themselves as the new regime, declared martial law, and invited Sankoh and the RUF leadership to share power.

But the uneasy AFRC–RUF coalition failed to gain international recognition. A massive and unprecedented campaign of civil disobedience from Sierra Leoneans simply fed up with the war effectively shut down the country for periods at a time. As the army was no longer loyal, the desperate Kabbah government designated a civilian militia, the Civil Defense Forces led by Sam Hinga Norman, Kabbah's deputy defense minister, to help fight the rebels. With strong international backing, especially from the regional Economic Community of West African States (ECOWAS), which was committed to restoring the democratically elected government, Kabbah was reinstated to power after ten months on March 10, 1998. In July 1999, the militarily weakened Kabbah government buckled under international pressure and negotiated the comprehensive Lomé Peace Agreement with the RUF in the hope of ending the conflict once and for all.²⁷ The Lomé package, reflecting the weaknesses of a government teetering on the brink of collapse, tried to placate the rebels through power oversharing, including offering four deputy minister positions, four key minister positions, and even the vice-presidency of the state to the RUF.²⁸

In perhaps the worst strategic blunder that could have been made by a Sierra Leonean government dependent on minerals for core revenue, President Kabbah agreed to create a commission that would be solely responsible for the exploitation of the country's immense gold, diamond, and other strategic mineral resource wealth.²⁹ He ceded the chairmanship of that board to Sankoh, the RUF rebel leader, who could now lawfully take what he previously had to plunder. The parties also agreed to disarmament, rehabilitation, and reintegration of the former combatants into society.³⁰ The United Nations and ECOWAS undertook to serve as the "moral guarantors" of the peace through the subsequent deployment of peacekeepers to monitor the parties' compliance with the agreement.

Significantly, to avoid any type of criminal accountability for the despicable crimes committed during the conflict, the parties provided for the establishment of a Truth and Reconciliation Commission to purportedly "address impunity, break the cycle of violence, provide a forum for both victims and the perpetrators of human rights violations to tell their story" about the war and to promote national healing.³¹ In a controversial move, especially within Sierra Leone, President Kabbah capitulated to the RUF demands and expanded the amnesty concession first included in Article 14 of the Abidjan Accord. However, even the blanket amnesty granting Sankoh personally and all other combatants and collaborators "absolute and free pardon and reprieve"³² in respect of all their depraved actions between

²⁷ See Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front signed at Lomé, Togo (July 7, 1999), available at <http://www.sierra-leone.org/lomeaccord.html> (last visited Dec. 2012).

²⁸ See *id.* Article V.

²⁹ See *id.* Article VII.

³⁰ See *id.* Article XVI.

³¹ See *id.* Articles VI(2) and XXVI.

³² See *id.* Article IX.

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the start of the war and the conclusion of the Lomé Peace Agreement proved insufficient to restore peace to Sierra Leone.

Around this time, even though the Sierra Leonean conflict had largely been ignored by most Western media up to that point, the sensational stories of human savagery to fellow humans going on in the small West African nation started generating external interest. The publicity efforts were led by local and international civil society advocacy groups, with Sierra Leonean women's groups, fed up with the war, taking the lead in several mass public protests in Freetown. Human Rights Watch and Amnesty International, for their part, led the international naming and shaming efforts with a series of widely disseminated and shocking reports.³³ The demobilization, reintegration, and rehabilitation programs for the combatants soon began to run into difficulties, and it became evident that some factions of the RUF were bent on undermining the peace. They were not sufficiently invested in winning the peace as much as they were in the continuation of war so as to voluntarily lay down their weapons.

The government, which had cowered in a corner and refused to seriously consider the criminal accountability option, appeared to undergo a significant change of heart when, in May 2000, over five hundred UN peacekeepers were disarmed and held hostage by renegade rebel commanders. Sankoh, it was now evident, had only limited influence and authority over his key battlefield commanders. He was arrested following civilian demonstrations and a shootout at his home in the West End of Freetown. He was thereafter detained at an undisclosed location. The following month, in June 2000, President Kabbah formally declared that his government could no longer tolerate further RUF violations of the key terms in the Lomé Peace Agreement. Consequently, under renewed pressure from the local and international civil society to repudiate the blanket amnesty and to establish some type of criminal accountability mechanism to prosecute the worst offenders, the Kabbah government turned to the United Nations seeking assistance to create a credible court to try the worst offenders, especially the RUF leadership.

III. BRIEF OVERVIEW OF THE ESTABLISHMENT AND JURISDICTION OF THE SPECIAL COURT FOR SIERRA LEONE

On January 16, 2002, representatives of the United Nations and the Sierra Leonean government met in Freetown, the Sierra Leonean capital, to sign the agreement establishing the SCSL.³⁴ This represented the culmination of the process that President Kabbah had begun when he sent his June 2000 letter to the United Nations Security Council through Secretary-General Kofi Annan requesting the international community's assistance in establishing an independent "special court" that, through prosecution of those leaders who had planned and directed a notoriously brutal conflict characterized by atrocity crimes and the taking of UN peacekeepers as hostages, would help bring justice

³³ See, e.g., Human Rights Watch, *Sierra Leone: Getting Away with Murder, Mutilation, Rape* (July 1999, Vol. 11, No. 3A), <http://www.hrw.org/reports/1999/sierra/> (documenting, inter alia, shocking victim testimony of RUF atrocities, and calling for the international community to oppose the blanket amnesty for all combatants and accountability for crimes under Sierra Leonean and international law).

³⁴ See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2178 U.N.T.S. 137 (Jan. 16, 2002).

Cambridge University Press

978-1-107-02914-9 - The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law

Edited by Charles Chernor Jalloh

Excerpt

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and ensure a lasting peace.³⁵ President Kabbah maintained that, but for international support, Sierra Leone would not have the legal, logistical, human, and other resources necessary to prosecute those responsible for the atrocities.³⁶

In Resolution 1315, adopted on August 14, 2000, the Security Council formally endorsed President Kabbah's request.³⁷ Thus it directed Secretary-General Annan to negotiate an agreement with the government of Sierra Leone to establish an independent special tribunal with jurisdiction to prosecute those bearing "greatest responsibility," focusing in particular on those who had threatened the establishment and implementation of the peace process.³⁸ The subject matter jurisdiction was to include war crimes, crimes against humanity, and other serious violations of international humanitarian law, as well as various offenses under national law.³⁹ The temporal jurisdiction would cover the crimes committed after November 30, 1996, over the express objections of the Sierra Leonean government that ultimately wanted international support to prosecute crimes that dated back to the beginning of the conflict in March 1991. The geographic jurisdiction was confined to the offenses that actually took place on Sierra Leonean territory. This latter maybe contrasted with the ICTR, which had jurisdiction over certain crimes associated with the 1994 genocide, but that took place on the territory of neighboring states. This could have been done in the Sierra Leone situation, given the intimate connections between the Sierra Leonean and Liberian conflicts.

The Statute of the SCSL, which entered into force on April 12, 2002 after each of the parties had complied with their respective formalities for its implementation, contained many novel features that were intended, among other things, to reflect the specificities of the Sierra Leone war. It was an attempt to create a cheaper and inexpensive institution compared to other tribunals and that was expected to conclude its work in about three years. For these reasons, as well as others more prosaic, the Court scored a series of firsts. It was (1) the first international penal tribunal to be given a narrowly framed personal jurisdiction to prosecute only those deemed to bear the greatest responsibility for the various international and national crimes within its jurisdiction; (2) the first international tribunal since Nuremberg and Tokyo to sit in the *locus commisi delicti* – that is, the place where the crimes were committed; (3) the first to provide scope for the affected state (Sierra Leone) to appoint some of its principal officials, such as a minority of the judges in each of the trial and appeal's chambers and the deputy prosecutor; (4) the first to be funded entirely through donations by UN member states; (5) the first to be overseen by an independent management committee comprised of nonparty states to give it assistance and oversee its operational aspects; and finally, (6) the first court anywhere in the world to operate alongside a truth and reconciliation commission in a post-conflict situation.⁴⁰

³⁵ President of the Republic of Sierra Leone, Annex to the Letter dated Aug. 9, 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 10, 2000).

³⁶ *Id.* See also Charles C. Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT'L L. 395, 398–99 (2011).

³⁷ S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

³⁸ S.C. Res. 1315, *id.* at para. 3.

³⁹ Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 145, arts. 2 (crimes against humanity), 3 (war crimes), and 4 (other serious violations of international humanitarian law). Article 5 listed the offenses prosecutable using Sierra Leonean law.

⁴⁰ The TRC, as discussed later by several authors in this book, was established pursuant to the government's undertaking in the Lomé Peace Agreement. See, for example, the chapters by Leila Sadat and Alpha Sesay.